

CHARLES DUNOYER AND FRENCH CLASSICAL LIBERALISM

LEONARD P. LIGGIO

Department of American Studies, State University of New York, Old Westbury

(Barthelemy) Charles (Pierre Joseph) Dunoyer (1786–1862) was born on May 20, 1786 at Carennac in ancient Turenne (Quercy, Cahorsin), the present-day Lot. His father, Jean-Jacques-Philippe Dunoyer, was seigneur de Segonzac. Destined at an early age for the order of St. Jean de Malte, he began his education in the order's near-by house at Martel. With the confiscation of the order's houses in 1792, his aunt, formerly of the Visitation order, and, then, the former Benedictine prior of Carennac, continued his education at home. His secondary education was completed at Cahors in the *école centrale*, one of the newly established schools under the Directory in which the ideas of the 18th century philosophes, and especially, the Ideologues, predominated. In 1803, Dunoyer went to Paris to study law at the newly founded Université de Jurisprudence.

Dunoyer arrived in Paris as a major intellectual and political era was ending and a new one — the Empire — was beginning. Dunoyer's education at the *école centrale* had introduced him to the major thinkers of the Enlightenment and their followers during the Revolution and Directory. Beginning in 1800 a strong campaign against the Enlightenment was initiated in Paris, but was countered with lessening impact by the major organ of the philosophe tradition, *La Décade Philosophique*, of which the principal editor had been Jean-Baptiste Say (1767–1832). Say was general editor of the *Décade* from its founding (An II, April 29, 1794) until his entry into the Tribunat in 1800.^[1] The education with which Dunoyer came to Paris was the product of the work of a number of men who contributed to the *Décade*.

Pierre Claude François Daunou (1761–1840), who was to be closely associated with Charles Dunoyer during the Restoration, was the major

force in the development of the *écoles centrales* as he had been for the creation of the *Institut de France*. During 1791–1792 Talleyrand had proposed a secondary education based on languages, literature, history and ethics; and Condorcet had countered with an emphasis on mathematics, sciences, and the political and moral sciences. In 1795, after a proposal by Lakanal for a more scientific program, a less scientific one of Daunou was adopted. Earlier, Daunou, along with Lakanal and Sieyès, desired that education be freed to be supplied by private initiative. Daunou emphasized that liberty was a necessary condition for scientific progress. This concept formed an important part of the educational and economic thought of Destutt de Tracy, who was active in educational policy under the Directory as well as a leading Ideologue. François Guillaume Andrieux, president of the Tribunat and contributor to the *Décade*, said that if it was better "to leave action to individual interest", then private market education should be the norm: "There would then be competition, emulation, as Smith, Mirabeau, etc., have not hesitated to embrace this last policy". Jean-Baptiste Say advocated the market approach to education in his *Traité d'économie politique* (1803), for which he was not renewed in the Tribunat.^[2]

The *Décade* was particularly significant in the history of economic thought. It contributed strongly to the development of Say's thinking, and Say was the most important economist in France during the Restoration. What would become even more accentuated in Say's *Traité*, the *Décade* was a major means of introducing the economic ideas of Adam Smith in a France where the concepts of the Physiocrats had been dominant. While Condorcet represented the

beginning of a transition from the exclusive agrarianism of the Physiocrats, his initiatives toward industrialism remained limited. But, the impact of the industrial revolution in France (it had reached the point of inaugurating the standardization of manufactured elements by 1785) upon Condorcet, had more far-reaching repercussions on the thinking of Say and Destutt de Tracy. However, the frame of reference of the Physiocrats remained significant. For them, natural society existed before the state. Natural society was absolute, necessary and permanent; the state was relative, accidental and provisional. The Physiocrats' anarchism looked forward to the disappearance of the State. Condorcet strongly articulated this individualism, and his thought was accorded more attention than anyone else's in the *Décade*.^[3]

For Say, industrialism and anarchism found their model in the United States, just as Chinese agrarian despotism was the model for most Physiocrats. The Physiocrats' preference for a "refined", communal, agricultural, old, tired, bureaucratic society had been opposed by Jean-Jacques Rousseau's "common", individualist, non-agricultural craftsman, young, fresh, non-bureaucratic society. "In passing simply from the refinement of an old society tightly formed around agriculture to the industrial activity of a new society, we again go forward from the Physiocrats to Rousseau. It is always the romanticism of the noble savage under a different form". Say held that only man in a state of advanced personal well-being could achieve the natural perfection of which Rousseau spoke. Only where the society is natural can natural and social perfection be achieved; economic society for Say is natural, but political society is not natural and thus inhibits man's perfection. "J.-B. Say is in agreement with Rousseau in proclaiming that political society is assuredly not natural".^[4]

Dunoyer's interest in the United States in his own writings and in articles (especially about Franklin) in his periodicals, reflected a similar interest on the part of the Ideologues and especially Say in the *Décade*. Say was critical of the Federalists and of the speculators in government business and securities who might introduce materialism and large fortunes

destructive of capitalism in America. For Say, as for many French radicals, Rousseau was associated with Franklin (and Jefferson). The second part of Franklin's *Autobiography* was first printed by the *Décade* in 1798 under Say's editorship; he also printed various letters and essays of Franklin. Robert Fulton represented an ideal American in Paris with his book on improvement of canal navigation, which Say reviewed, and his successful steamship sailing on the Seine. Say, in 1803, sent Jefferson a copy of his *Traité* accompanied by a letter:

It is likewise your task to demonstrate to the friends of liberty throughout Europe how great an extent of personal liberty is compatible with the maintenance of the social body. It will then no longer be possible to defile by excesses the noblest of causes; and it will perhaps finally be perceived that civil liberty is the true goal of social organization, and that we must consider political liberty only as a means of attaining this end. The United States are the children of Europe; but the children are greater than the parents. We are old parents raised in foolish prejudices, chained by a mass of ancient fetters, and bound by a quantity of puerile considerations. You will show us the true ways to free ourselves from them. For you have done more than win your liberty; you have established it.^[5]

For Say, America was the model of the young, fresh, active, unrefined society whose industrialism and anarchism would contribute to human perfection. He said in the *Traité*:

Here we indicate the point of contact between political economy and pure politics. Everyone is convinced that the sacrifices that the state of society imposes on us are especially the least where the government is best . . . In which country is one best governed, that is to say least governed at the cheapest cost than in the United States?^[6]

Say's optimism and naturalism was fundamental to the economic thought which he introduced. These premises were basic to many of the Physiocrats as well as to Rousseau. The Physiocrats placed the age of gold in the future, in contrast to Rousseau; they posited an individual naturalism *a posteriori* to Rousseau's individual naturalism *a priori*. The influence of Rousseau's individualism along with that of Adam Smith caused Say to negate the political means which many Physiocrats had favored. The individualism of Say's thought led his economic naturalism to obviate the political system. With reference to Rousseau,

The economic utilitarianism is extended to the individual. Individual naturalism is extended to the economy. It is from this conjunction that the new

naturalism is born. And here is how, while for Rousseau social utilitarianism was the means of individual naturalism, Say, after having strictly separated in his heart political society and economy, posited simply that political utilitarianism is the superfluous and temporary means of a naturalism not only individual but economic, of that natural coincidence of individual utilitarianism and economic utilitarianism.

If one goes to the foundation of things one would conclude finally that Say continues Rousseau much more than he contradicts him.^[7]

Adam Smith differed from the Physiocrats in putting aside their acceptance of a political system which they hoped to rationalize. His contribution was rooted in a utilitarian naturalism in which economic and social relations flourished in the absence of political action, however rational the intention. Say derived his basic concepts directly and indirectly from Smith. It was upon Smith's optimism and naturalism that much of the controversial literature was based among the English radicals following the French Revolution. Just as Say and the French school of economists were favorable to the French Revolution and the Industrial Revolution in line with Smith's followers, Malthus and the English school opposed them or saw them as evils however necessary.

To a major degree, the English radicals moved from the Rousseauan Declaration of Rights, which they recognized as an insufficient guarantee of natural rights, to the necessity of abolition of the political system.

Amongst these democrats, who were opposed to Burke, Mackintosh, Paine, Godwin submitted so strongly to the influence of Smith that they ended by showing themselves the insufficiency of the Declaration of Rights. Nothing catches this more than to see Mackintosh subordinate natural rights to utility, Paine simply juxtaposed the two doctrines, and Godwin, finally, sensing the necessity of choosing, perfected the ideas of Paine in disassociating government and society, in showing that, far from relaxing the social bond, the abolition of government binds it tighter . . . Godwin in accord with the tradition of utilitarian naturalism of Smith, had sacrificed politics to economics. It was economics that the artificial utilitarianism of Bentham sacrificed to politics.

Is that to say that it is Godwin who founded political economy? No! For it is perhaps more against him than against Bentham that Malthus and Ricardo established theirs . . . Godwin developed optimistic utilitarian naturalism, Malthus pessimistic utilitarian naturalism. It is in this way that one is able to say to the *Essay on the Principle of Population* that it is a rejoinder against the *Wealth of Nations* . . . According to Malthus, evil will not be able to be destroyed either by political

action, contrary to what Bentham thought, nor by the abolition of government, contrary to what Godwin thought. If government can achieve nothing against economic reality, it becomes an integral part of that reality.

. . . , is it not Adam Smith's optimistic utilitarianism that J.-B. Say begins anew? In such a manner that definitely will his political economy be founded actually less against Godwin than against Bentham, and less against the utilitarian rationalism of Bentham than against the pessimistic utilitarian naturalism of Malthus and Ricardo?^[8]

The pessimistic utilitarianism of Malthus and Ricardo in opposition to Godwin and his Smithian optimism was rooted in the crises of overproduction occurring during the period of the wars of the French Revolution and Napoleon. The crises of overproduction confronted economists with a profound challenge to the conception of economic science. Say demonstrated against Malthus the economic impossibility of overproduction. In his analysis of the extra-economic, the anti-economic or political, causes of overproduction, against Malthus' incorporation of government into economic reality, Say affirmed his renowned Law of Markets.

The division between optimism and pessimism had important roots in the respective attitudes toward industrialization. Just as Malthus' work was a response to Smith through Godwin. Say's *industrialisme* was a reaffirmation of Smith and Godwin. Smith's positive economic attitude toward industry distinguished him from the Physiocrats. "If from the *Wealth of Nations*, the *Traité* of Say derived in one part only his germs of industrialism, he derived in another part only the single optimistic branch of his utilitarian naturalism; and he made this double part coincide. If he industrialized nature, he naturalized industry".^[9] The application of industrialization in absolute freedom would result in general well-being. The *Décade* perceived an indefinitely increasing prosperity due to economic freedom or capitalism, and to the use of machinery applying new technology and scientific discoveries. For Say, the facility of amassing capital was one of the causes of indefinite human perfectibility.

For the *Décade*, one of the great advantages of the system of laissez-faire is that it prevents excessive enrichment due to monopolies and tariffs of a small number of privileged families, and that it diffuses

very widely the profits of industry . . . But these measures of general utility (the liberalism of Smith and Say, for example) would they have a noticeable effect on the poor? The *Décade* believed it would, at least in what concerned economic freedom. The liberation of work by the abolition of feudal rights and of corporations seemed to it already an immense social progress. Its hopes for future progress of the people was founded on the anticipated effects of the system of laissez-faire joined to the mechanization of industry: national prosperity without precedent, work for all, lower prices due to competition, and to standardized manufacturing production. It is an industrial revolution similar to the manufacturing movement in England that Jean-Baptiste Say emphasized.^[10]

Say credited his friend the abbé Henri Grégoire, the founder of the Conservatoire des Arts et Métiers, with recognizing the human progress which machinery was providing. The *Décade* called for concentration on production of articles of wide use, and "occupied itself constantly in inventions and new technology".

La Décade insisted on the importance of machinery and kept its readers current with the most recent developments in this field. It presented regular accounts of the sessions of the Lycée des Arts (the society founded in 1792 for the propagation of useful discoveries) and occupied itself with the industrial expositions which took place in Paris every year from 1797 of the Society for the Encouragement of National Industry (founded in 1801) and of the Conservatoire des Arts et Métiers (decreed in 1794).^[11]

Industrialization had an important practical effect on capital, leading to one of Say's major contributions to economics. The revolution had reduced the importance of the privileged "capital" of the old regime, and had freed men to acquire capital outside the role of the state and thus to improve the general interest. The industrial revolution represented the great increase of this capital and the reduction of privileged "capital". Income on capital represented a reward to the capitalist for saving and for foregoing the use of savings rather than merely an insurance for risk. The rise in the price of capital in industrial society no longer reflected the scarcity of capital, but the increase in productive use of capital. This contrasts with the conception of Malthus and Ricardo and placed Say in radical opposition to the pessimistic English school.^[12]

The development of the industrial revolution had held the attention of Say less on the already old phenomenon of the division of labor than on the entirely new phenomenon of mechanization which had caused the *industrialisme* of Say, passing beyond Smith, to return to naturalism.^[13]

From its birth, this harmonious conception was destined to be broken; and, if the progress which the economics of J.-B. Say realized was more distinct in relation to his contemporaries than in relation to his predecessors, it was perhaps still more distinct in relation to his immediate successors . . . the industrialist idea passed in turn to the *Censeur* and to its editors: Charles Comte, Dunoyer and Augustin Thierry, in order to reach in the end to Saint-Simon and to Karl Marx . . .

"Political Economy", said the *Censeur Européen* at the end of a review of Say's *Traité*, "in making seen how peoples prosper and decline, has posed the true foundations of political thought". Even as there was no longer economic science strictly speaking, there ought no longer to be a pure political science. There is political economy.

. . . And the progressive effacement that they marked of the warrior spirit before the industrial spirit was a veritable theory of historical materialism. As remarkable as their internal political conception was their international relations. The system of European equilibrium was only "an old used machine", a perpetual menace of war. The *Censeur* opposed to it the theory of markets and the real international entente that it engenders. There are no more than two great nations: the European nation of the producers, the industrials; as to the other, it is the old Europe battling against the new. But, if the relationship of the economic liberalism of J.-B. Say and the political liberalism of the *Censeur* is tight, it does not cover one difference. The sole criticism that Dunoyer addressed to his master is of not having seen that his doctrine was in itself a system of political thought and of having reduced the system of political thought to mere constitutional forms.^[14]

However, the flowering of Say's impact on Dunoyer was to occur only after a postponement of a dozen years. For when Dunoyer came to Paris in 1803 under the impact of the philosophical and literary views for which the *Décade* was the spokesman, the intellectual affinity was broken due to Say's leaving Paris in that year. The very publication of the *Traité* was the cause of Say's removal from Paris as a result of his elimination from the Tribunat. Refusing an offer from Napoleon of a position in the financial department, Say undertook to apply the recent developments in machinery to industrial production. He established a cotton spinnery which eventually employed almost 400 persons at Aulchy in Pas-de-Calais. When he sold his business a decade later and returned to the intellectual life of Paris as the Empire was coming to its conclusion, Say brought with him a complete knowledge of the role and the effects of industrialization on modern society.

J.-B. Say was intimately involved in the emergence

of large scale industry. He was, in effect, one of the most remarkable types of these manufacturers of the Consulate and of the Empire, of these first great entrepreneurs who sought to place in operation the new technological processes.^[15]

Equally important, during that decade Say was able to clarify the social thought which he had expressed in the *Traité* and to publish in 1814 the second edition which was to have a central importance on the development of the thought of Charles Dunoyer and Charles Comte and through them on many others. When Say had launched his *industrialisme* in 1803, he faced the strong opposition of the writers who were tied to the economic patterns and thought of the 18th century. By 1814 the industrial revolution on the continent, alongside that of England, clearly indicated that new ways of thinking about reality were necessary. The material conditions as well as the intellectual conditions were ready for *industrialisme* after 1814.

But since 1789 industry had tripled, the *Censeur Européen* and Saint-Simon triumphed. If Stendhal remained curiously hostile to industrialism, Benjamin Constant in 1818, and especially in 1829, allowed himself to approach it probably under the influence of the success of J.-B. Say.^[16]

Dunoyer's lively interest in philosophy and literature remained guarded after his arrival in Paris in 1803, under the chilling impact of the emerging imperial regime. Dunoyer pursued his law studies and translated the *Novelles* of the Emperor Leo III. In 1807 he met (François) Charles (Louis) Comte (1782–1837) who came from Sainte-Enimie, Lozère. Comte had arrived in Paris alone without entrée or fortune, but with a rude aspect and energetic character. Later, he would occupy a special place among the friends of Odilon Barrot (1791–1873), who was a compatriot from Villefort, Lozère, and who said of Comte: "His conversations and his examples fortified and purified in me the sentiment of liberalism of which my education and my origins had given me the germ."^[17] Charles Comte was working on a study of the jurisprudence of Sirey when he and Dunoyer became friends.

At his parents' insistence, the reluctant Dunoyer left his scholarly pursuits in Paris and entered government service under the Empire.

He became the secretary of a family friend, Baron Bertrand Bessières (1773–1855) of Prayssac (Lot), who was sent as intendant to northern Spain (1810–1811). Bessières, who had been a Napoleonic general de cavalerie and later defended Marechal Ney, was the younger brother of Marechal Jean Baptiste Bessières, duc d'Istria, who was the commander of French armies in northern Spain. Dunoyer's experience in Spain and his respect for the Spanish Liberals opposed by the traditionalists and the Anglophile constitutionalists, was to manifest itself in his discussion of Spanish events in his articles during the Restoration. Following his service in Spain, Dunoyer acted as the secretary to another family friend who was an official in the administration of Holland. There the police methods of the imperial government caused him to become completely opposed to the Empire and to return to Paris.

Dunoyer welcomed the actions of the Senate deposing Napoleon, appointing a provisional government and preparing a constitution, especially with the leadership of such liberal senators as Garat, Grégoire, Lanjuinais, Destutt de Tracy and Lambrechts. A new constitution was issued by the Senate on April 6, 1814, and the Comte de Provence was called to the throne of a constitutional monarchy. Dunoyer was one of the gentlemen of the National Guard cavalry formed as a guard of honor for the Comte d'Artois on his entry into Paris in April. But, Dunoyer withdrew from the guard of honor when the Senate's constitution was set aside by the new king, Louis XVIII, in his declaration of Saint-Ouen on May 2–3. Dunoyer published a pamphlet regarding the constitution: *Réponse à quelques pamphlets contre la constitution*. Dunoyer was critical of the *Charte* issued by the royal government on June 4, in response to the pressure of the Coalition Allies occupying Paris, following the treaty of Paris (May 30, 1814) which ended the war.

Dunoyer was then invited by Charles Comte to join him in the publication of a weekly journal, *Le Censeur*. The first volume (June 12–September 30, 1814) was published as a weekly until a strong censorship law was established. The *Censeur* declared in an advertisement:

Strangers to all the governments which have succeeded

each other in France during the space of twenty years, we have, in writing, only the interest which ought to animate all Frenchmen, that of seeing our fellow citizens obey the law, respect public morals and resist oppression. What men of such and such a party, or such and such a sect, should not look for, then, in this work, is what will feed their passions, for they will find here nothing which will be able to please them.^[18]

Despite their disappointments regarding the *Charte*, Dunoyer and Comte believed it capable of forming the basis for increased freedom and thus ending the successive revolutions which the French had experienced, but which had not in turn increased freedom. Dunoyer and Comte hoped that the royalists would be satisfied to find the Bourbons on the throne, and accept limited monarchy and cabinet government. They believed that constitutionalists would see the *Charte* as a major accomplishment in which most of their principles were clearly established. While the Bonapartists, as the most recent government, were least easily reconciled, they were seekers of office and power, and could become important if the government were to fail. Republicans were advised that the forms were less important than the content and that, with the *Charte*, France like England was a true republic in all but name. England was a contradiction to Dunoyer and Comte. In the midst of liberal and radical French opinion for which England represented an ideal, the *Censeur* became increasingly skeptical and finally abandoned its mild anglophilia for anglophobia. Since this evolution accompanied their increasing discouragement with the failures of the Restoration government and its violations of the *Charte*, it is possible that opened eyes saw wider than France and gained a depth of insight regarding England as well. With regard to *Le Mythe Anglais*, "the influence of the *Censeur* was not negligible"; "it was the most important of the secondary reviews".^[19]

Dunoyer felt that France had only a pale reflection of the English constitution because English society had strong foundations for liberty. Like other French radicals, he saw the defeat of Napoleon as a vindication of their ideas. The *Censeur* (September, 1914) wrote:

"the English have presented themselves mainly as liberators". Yet, Dunoyer's memories of the role of the English and their allies in Spain, a theme of his writings over these years, as well as England's war against the United States, raised doubts as to England's disinterested diplomacy. Despite its belief that England's intention was hegemony, the *Censeur* could prefer an alliance with England over one with Russia. The *Censeur's* Anglophobia was much deeper and analytic than the conceptions of "Perfidious Albion" of an Etienne de Jouy or of the "Noble England" of a Mme. de Stael. The depth of Dunoyer's analyses of England is evidenced in the impact that the *Censeur* had on Benjamin Constant's thinking. In this as in other areas the *Censeur* was part of the dialogue of attraction and criticism which they carried on to the end of Constant's life. Constant's conception of a free England was modified increasingly to a criticism of England. "Without doubt, in his portrayal of the economic and social evolution of England, Constant was inspired by the brochures and articles of J.-B. Say as by the *Censeur*, taking account of the sentiments of his public and of the disquiet which had provoked the social and political troubles of Great Britain".^[20] This development of ideas regarding England occurred throughout the Left in France with the *Censeur* in the forefront.

On the Left, one discovers with a certain astonishment that the banner of liberty covers henceforth an aristocratic merchandise. They begin to envisage that England may cease being the forerunner of civilization. Have not its ministers made themselves the recognized protectors of continental reaction? Moreover, one would wish to be a *patriote*! Many former officers of the *Grande Armée* still resented the humiliation of the defeat; many former prisoners or former soldiers recalled the essential themes of revolutionary and imperial propaganda. The *Left* had hardly more unity than the *Right*: less still perhaps. Some hated, some admired, others exploited, some desired to imitate. C. A. Scheffer and, in a lesser measure, the staff of the *Censeur* began to criticize the very idea of country.^[21]

This development did not include all those associated with the *Censeur*. Henri de Saint-Simon and his secretary Augustin Thierry expressed a deep Anglophilism in the *Censeur*,

especially on the English parliamentary system. (Saint-Simon's "De Réorganisation de la Société Européenne", *Le Censeur*, III): "In his articles in the *Censeur*, he gave the same England as an example to the French: she had known how to resolve the problem of relations between the ministers and the opposition".^[22] Furthermore, the shift to an anti-English position resulted from the increasingly central importance for Comte and Dunoyer of economic thought. "For the readers of the *Censeur* . . . political economy eclipsed philosophy. In a certain measure, it replaced it".^[23] It was ironic that at first this economic thought was English; Charles Comte had an acquaintance with Jeremy Bentham's writings. Dunoyer and Comte were interested in the less traditional writing which was being published in England and found that writing to be congenial to the cosmopolitan attitudes they inherited from the philosophes, the Ideologues and the *Décade*.^[24]

Thus, the first volume of the *Censeur* was launched in June, 1814 with certain significant political attitudes and concepts but with sufficient open-endedness to encourage and experience growth. This was in addition to the spirit of independence and criticism for which the *Censeur* was particularly famous. Eugène Hatin, in his discussion of the press under the Restoration, has noted:

The only truly independent journal of the epoch was *Le Censeur*. *Le Censeur* had been created by two of those young men for whom the imperial despotism contradicted all their ideas, revolted all their sentiments, and who despite their patriotism, had seen in the day of March 31 the signal of universal deliverance. Admitted to the intimacy of the most distinguished members of the liberal minority of the Senate and of the philosophic party, the Tracys, the Lanjuinais', the Lenoir-Laroche's, the Lambrechts', the Volneys, and the Cabanis', Comte and Dunoyer had imbibed a horror of tyranny, and it was to prevent its return that they had taken their stand . . . the ideas which, in its first numbers, *Le Censeur* expressed and developed in a firm and grave tone, contrasted singularly with most of the writings currently published. In sum, it was a support rather than a danger to the constitutional government of June 4, if that government would march directly along its path; but it would encounter in the new paper an inflexible censor everytime that it deviated.^[25]

But, the ministry did deviate rather quickly

from the principles which Dunoyer believed were consecrated in the *Charte*. This was especially true concerning freedom of the press, which to Comte and Dunoyer was the basis of all other freedoms. Respect for freedom of the press had been accepted in the royal declaration of Saint-Ouen on May 2, 1814. The *Charte* of June 4 provided in article eight: "The French have the right to publish and to print their opinions, in conformity to the laws which ought to punish abuses of this freedom". An alternative interpretation of this article was supplied by the ministry almost immediately. The concept of punishment following the commission of an act was accepted by Dunoyer all his life as the basis of law; the concept of prevention by the government was rejected by Dunoyer to the end of his career. The minister of the interior, the abbé de Montesquiou, declared that "punish" and "prevent" were synonymous, and presented to the chamber of deputies on July 5, 1814 a proposed law interpreting punish as the same as prevent. The proposed law was the work of Royer-Collard, *directeur de la librairie*, and Guizot, secretary general of the ministry of interior, who were the leading figures in the Restoration party known as the Doctrinaires. That law was ultimately passed by the legislature, and became effective on October 21, 1814. According to Hatin: "The press did not remain mute. A newly founded journal, which had come to enjoy a major role and to exercise a decisive influence in these years of crisis, *Le Censeur*, of which we will speak below, burst forth above all with a great force and great hardiness against that law, 'as despotic in its base as it was liberal in its form'. . . It was not only that unique liberal journal of the epoch which attacked the proposed law".^[26] Moderate royalist journals such as the *Journal de Paris* and *Journal des Débats*, attacked the law, but the brunt of the counter-attack by the ultra-royalists was aimed at the *Censeur*. The *Quotidienne* "described the liberals as Jacobins on half-pay, and compared *le Censeur* to Marat's paper", *L'Ami du Peuple*.

Politics during the succeeding months of the first Restoration did not give Dunoyer and Comte confidence in the way that the ministry would apply the new law on journalistic writings. The new censorship applied to publications of less than 320 pages; the second through the seventh volumes of the *Censeur* (November 10, 1814–September 6, 1815) were therefore published in the form of books. As Benjamin Constant touchingly described the situation in his *De M. Dunoyer et de Quelques-uns de ses ouvrages*:

. . . Nevertheless, the laws on writings, however absurd they are, have this advantage, that in order to study, one will try to elude them. The law on the press submitted to the censorship works of less than twenty printed sheets. Thus books of twenty and a half printed sheets were publishable: and writers who, having only one truth to develop, would express it in four pages, would look for others who together would form a volume.

Such was the origin of the *Censeur européen*, to which the authors, MM. Comte and Dunoyer, devoted themselves with good faith and with courage, to the study, which one could call experimental, of the solidity of the guarantees which the new pact promised to the nation. The laws contrary to these guarantees having been proposed by a timid and crafty ministry, and voted by the ignorant and docile Chambers, M. Dunoyer combatted them. Having raised persecutions against himself, this audacious patriot showed himself, in his defense, more occupied with the public interest than with his own.

At his risk and peril, he seized that occasion to expose the vices of our legislation, the insufficiency of the protection that citizens may expect, and the arbitrariness of authority made possible by the administrative and judicial disposition bequeathed by the empire to the monarchy.

He conquered in that way, for us and our heirs, a part of our liberties. For, although he did not come to obtain for them the institutions which render them inviolable, his example and his writings had popularized the notions which, while not consecrated in theory, became victorious in practice, when the general assent encompassed them. . . . The germs deposited, in 1814, in the *Censeur européen*, have developed and born fruit.^[27]

Thus, the *Censeur* was published as a volume of more than 320 pages without any announced date. Publication dates in the future were arbitrarily chosen once each volume was printed, in order to avoid being considered a regular periodical. Volume II was dated November 15, 1814; volume III, December 20, 1814; volume IV, March 1, 1815; volume V, April 18, 1815; volume VI, June 1, 1815; and

volume VII, September 6, 1815, but most of the copies were seized by the ministry of police of the second Restoration on September 4, 1815. As a pattern, the *Censeur*'s second volume was issued at an interval of a month and a half. The more than two months elapsing between the third volume, December 20, 1814 and the fourth volume, March 1, 1815, is explained by Charles Comte's involvement as the lawyer for General René Joseph Excelmans (1775–1852). General Excelmans took a leading role in the defense of France during the Allied invasion of 1814. He was prosecuted by the Restoration government's minister of war, Marshall Soult, in 1814. Comte prepared Excelmans' case in December, 1814, and appeared before the council of war at Lille, on January 23, 1815, where Excelmans was acquitted. The delay between the publication of volume six and volume seven 3 months later occurred during the transition from the Hundred Days to the second Restoration.

During the Hundred Days, Dunoyer and Comte had refused to leave Paris, for which they were condemned by royalists, and refused to support the new imperial regime, for which they were criticized by Bonapartists. Their strong criticisms of the Hundred Days brought a brief delay in volume five's distribution due to a temporary confiscation. Constant and Carnot intervened in the matter, and Baron Legoux, *procureur général*, suspended any action to prosecute the *Censeur*. The role of Fouché in initiating the action was suspected, as Dunoyer and Comte rejected his requests that they work with him in his interest. Hatin has commented:

Le Censeur was heard every hour to reprimand so vigorously the newspapers on their pusillanimity, and without doubt proved to them how far one was able to be bold. It is said that Fouché, wishing to attach to himself the editors of that paper, had offered to them the editorship of the *Moniteur*; then, on their refusal, had given them the choice of places which would be agreeable to them. But Comte and Dunoyer had rebuffed these offers, and they had remained inflexible in their opposition to the imperial government, an opposition which, it is very necessary to say, was not under the circumstances, very intelligent or very patriotic.^[28]

Hatin, among others, has attacked the liberal opposition under the Hundred Days as non-patriots; he objected to the *Censeur*'s criticism

of the imperial regime while French troops moved to the frontier to meet the Allied armies before Waterloo. The *Censeur* made quips about “*De l’influence de la moustache sur le raisonnement, et de la nécessité du sabre dans l’administration*”. However, the Hundred Days made a deep intellectual impact upon Dunoyer and Comte. The beginning of the major philosophic change leading to the important contributions to political, economic and social thought for which they become renowned can be dated from then. That impact went far beyond the quips about military men in government or the legitimacy of the imperial regime, although Hatin notes the importance of their attitude on that question during the Hundred Days.

April 20, one month after the return from Elbe, *Le Censeur* said: “The government is only a *provisional* government. It is of little importance that Napoleon has been proclaimed emperor by the army and by the inhabitants of the country through which he passed; of little importance that the coalition powers had or had not held to the conventions that they had made with him. France does not belong to the soldiers, nor to the inhabitants found on the route from Cannes to Paris.”^[29]

In the intense atmosphere of repression at the beginning of the second Restoration, Dunoyer and Comte encountered hostility from the ultraroyalists. But the seizure of the seventh volume of the *Censeur* occurred while Fouché was still minister of police, and appeared to be on his instigation. Dunoyer and Comte did not continue the periodical while the seizure of the seventh volume was in the courts, and they pursued the matter through the courts for over a year. They hoped that the decision of the courts would be in their favor, and when they planned to renew publication following September 5, 1816, which they considered the beginning of a third Restoration, they wished to reissue the seventh volume of the *Censeur* as the first volume of the *Censeur européen*, their new periodical. After further delay, they recognized that their appeals would be denied, and launched the *Censeur européen* without the seventh volume.

Concerning the suspension of the *Censeur* after the seizure of the seventh volume in September, 1815, Dunoyer and Comte later declared:

The chamber of deputies of 1815 was convoked and the

majority of members showed so much violence that all discussion became impossible. Not able to place itself in a party which, in its resolutions, seemed to take for its guide only furors, and not wishing to support a ministry which showed itself much too weak when it would defend justice, and much too strong when it attacked constitutional principles, men who did not hold to any faction and did not aspire to any favor could only condemn themselves to silence. This was the part which the authors of the *Censeur* took.^[30]

However, Dunoyer and Comte put their enforced leisure to good advantage. It was during 1815–1816 that they thought deeply about the ideas and concepts that had been raised for them during the Hundred Days by the actual political events and debates, and by the insights that these events gave to the social and economic thought which they were reading at that time. From that reading, beginning in the spring of 1815, came the new direction of their thinking, *industrialisme*, which first received expression in the periodical which they launched in the autumn of 1816, the *Censeur européen*, and which had both an immediate and long-lasting impact on the social thought of the 19th century.

Contemporary Restoration commentators indicate the high regard in which Dunoyer’s and Comte’s journalism was held. Restoration writers were ranked according to conscience and talents by Lebrun-Tossa, in his *Consciences littéraires d’à présent, avec un tableau de leurs valeurs comparées, indiquent de plus, les degrés de talent et d’esprit par un jury de vrais libéraux*.^[31]

	conscience	talent
Chateaubriand	0	10
Constant	10	10
Dunoyer & Comte	10	8
A. Thierry	10	4
Saint-Simon	10	3
Arnold Scheffer	10	2
Royer-Collard	7	4
Guizot	0	3
Fiévée	0	7

The accession of the Decazes ministry had encouraged Dunoyer and Comte to launch the *Censeur européen* late in 1816 (it was published in twelve volumes until April 17, 1819). But, in June, 1817, the third volume was seized in a complicated case secretly pressed by important government officials and carried through under

the charge against Dunoyer and Comte of Bonapartism. Comte fled arrest and went into hiding; Dunoyer was apprehended; and the editorship of the *Censeur européen* was placed in the hands of their principal assistant, Augustin Thierry, who took the occasion to place in the *Censeur européen* over 300 pages of his *Vue des révolutions d'Angleterre*. Dunoyer was held for a month in the Force prison, and then transferred to Rennes, where the government's case had been initiated. The liberal notables supported Dunoyer as sureties and organized a society to support the legal costs of this and other press trials. Dunoyer, defended at Rennes by Mérilhou, was convicted; but the case contributed to the development of liberal consciousness in France, and particularly in western France. The *Journal général* was suspended because it described one of the serenades presented to Dunoyer in front of the prison by the youth of Rennes. Appeals reduced the severity of the sentences but not the conviction.

This process against the *Censeur* caused for the first time to appear major manifestos of political doctrine signed by the most considerable members of the legal profession. M. Mérilhou, defender of MM. Comte and Dunoyer, produced in support of his plea a consultation of twenty-one lawyers among which one notes MM. Dupin, Persil, Parquin, Hennequin, Mauguin, Berryer fils, and some other names which ought to find celebrity in these press battles. This consultation bore principally on principles. The publisher, M. Dupin, established the famous distinction "Between the attacks which are directed against the *person* or constitutional authority of the king, and the criticisms directly only against his *ministers* or the *acts* of his governments".^[32]

With the increasingly liberal press laws, Dunoyer and Comte decided to publish the *Censeur européen* as a daily newspaper. It was issued in two volumes from June 15, 1819 to June 23, 1820. It was suspended as a separate publication amidst the reaction to the assassination of the duc de Berry in February, 1820; the *Censeur européen* was merged with the *Courrier français*. However, Hatin has indicated the origin of the reaction in the moves by Decages against the *Société des amis de liberté de la presse*, which had been established by liberal notables in 1817 in defense of Dunoyer and continued to defend the *Censeur européen* and other periodicals in press cases. The Society was the center for radical political activity leading to

the Left's electoral victories in 1817, 1818, and 1819. The Society's leaders were condemned and it was dissolved. The Society had had a *comité directeur* drawn from its most resolute members such as members of the *Union Libérale* of Paris. The *Union Libérale* appears to have been a vague, loose revolutionary coalition involving Paris notables, Paris youth, and provincial people, centering around Lafayette's salon in Paris and his château at Lagrange. Members were said to include legislators such as Lafayette, Voyer d'Argenson, Dupont de l'Eure, De Corcelles pere, General J.-J. Tarayre, General M.-J. Demarchy, journalists such as Dunoyer, Comte, Chatelain of the *Courrier français*, and Desloges of the *Journal du Commerce*, lawyers such as Joseph Mérilhou and Odilon Barrot, and a younger group including Paul Dubois, Théodore Jouffroy, Victor Cousin, Francois de Corcelle fils, Felix Barthe, Augustin Thierry, and the Scheffer brothers, Ary, Henri and Arnold who was Lafayette's secretary. J.-B. Say, whose daughter, Adrienne, married Charles Comte in 1818, has been mentioned as a participant.^[33]

Say's role, like that of Dunoyer and Comte, in revolutionary political activity in 1820, while unexpected is not unnatural. Teilhac has said:

If we see then in J.-B. Say the man of the French political revolution and of the Anglo-French industrial revolution, the man of political Ideology and of economic Utilitarianism, he joined not only formal classical rationalism to a fundamental economic naturalism but to this economic naturalism a political rationalism.^[34]

John Stuart Mill visited Say in Paris in 1820 and observed: "He belonged to the last generation of men of the French Revolution; he was the ideal type of true French republican". Similarly, Auguste Blanqui recalled: "I had had in my youth the honor of knowing the most eminent of French economists: J.-B. Say . . . J.-B. Say had very revolutionary ideas for the times. He detested at the same time the Bourbons and Bonaparte, an apparent contradiction which filled me with astonishment".^[35] In 1824, Frederic Jean Witt was interrogated by Bavarian police on revolutionary activities. Witt had been in Paris in 1818 and 1820, where he declared himself to have been in political contact with Lafayette, Comte and Dunoyer, and made him-

self their means of communication with radical elements in Germany.^[36]

The reaction of 1820 introduced a press law of March 31 which required submission of all periodicals to censorship before publication, and granted to the government the power to suspend any publication accused of infraction of the law even before a judicial decision. Lafayette in March, 1820, said of the press law that it was a violation of the *Charte*: "to violate it is to annul it, to dissolve the mutual guarantees of the nation and the throne, to restore us to ourselves in all the primitive independence of our rights and our duties". General Tarayer, in June, declared to the deputies: "the *Charte* is violated, and there remains to France no legal and regular means of defense against an ill-intentioned government". The ministry altered the electoral system, presenting in May, 1820 a law of the double vote, weighing the electoral system in favor of wealthy landholders. Liberals withdrew from the chamber of deputies for the remainder of the session, and the Right accused the Left of preparing to turn to illegal actions. There were protests in Paris leading to a riot on June 5. It was in this atmosphere that the *Censeur européen*'s publication was suspended on June 23, 1820. There followed an attempt at a military conspiracy in which Lafayette's circle, especially Arnold Scheffer, were implicated: the plot of August 19, 1819. Charles Comte went into exile in Switzerland; Dunoyer remained in Paris where he was involved in the government's prosecutions against the *Censeur européen*.^[37]

Charles Comte settled in the Vaud which, in 1821, named him professor of natural law at the University of Lausanne. Either in Switzerland or Paris, Witt introduced him to Karl Follen, who had been a political refugee from the Prussian University of Jena, following the assassination of Kotzebue in March, 1819; Follen was forced to move from France to Switzerland in 1820. Follen became professor of law at the University of Basel. Following Witt's revelations to the Bavarian police in April, 1824, the Prussian government demanded the surrender of Follen, who was given refuge in the United States and appointed to the faculty of Harvard University (1825-1835) where he became a leading abolitionist. Comte similarly was forced to leave Switzer-

land on May 15, 1824 when, on the basis of Witt's statements, the French government intervened against Comte with the government of Vaud. Comte and his wife spent eighteen months in England in the company of James and John Stuart Mill and other philosophical radicals.^[38]

Comte returned to France following his five years' exile,^[39] and became a contributor to the *Revue Americaine*, which Lafayette had founded on his return from America in October, 1825. Other editors were Voyer d'Argenson, Arnold Scheffer, and Armand Carrel, with Augustin Thierry as secretary. Comte wrote an important treatise on property, and published on similar topics. He was active in the opposition which led to the July Revolution of 1830. While Barrot became the prefect of the Seine, Comte was appointed a *procureur du roi*. But he resigned in 1831 and was elected a deputy by Mamers (Sarthe) and was reelected in 1834. During 1832 Comte and Barrot were active in defending newspapers against increasing prosecutions by the government. In 1832, Comte was appointed perpetual secretary of the newly reestablished Academy of Moral and Political Sciences. Charles Comte died on April 13, 1837.^[40]

The suspension of the *Censeur européen* in June, 1820 found Dunoyer with the highest reputation as a political publicist, a reputation which was to be long-lasting. Hatin has said:

We have seen what reproaches had been made against the authors of *Le Censeur*, and which as to basics and which as to form; but they have the incontestable merit of having dared first, since the Restoration, to profess with freedom the constitutional principles in all their integrity, and of having constantly sustained them, without ever making any concession to the military spirit or to bonapartism; they have yet the rare merit of having devoted themselves to proving by experience the vices of the legislation which then regulated the press.

Among the collaborators of MM. Comte and Dunoyer, we will name Scheffer, J.-B. Say and Daunou, of which the articles *sur les garanties* were very remarkable. Paul-Louis Courier published there, between April 1819 and July 1820, the letters where one finds the ideal of his politics, and where he begins to design the original form of his style . . . *Le Censeur*, said M. Nettement, was the banner of the stoic school, which wished the complete and immediate application of the principle of political prefectibility, of nearly absolute liberty, without taking enough account of the political difficulties that the Restoration encountered. It was, to tell the truth, a renaissance of the movement of 1789, with that theoretical optimism which took its

source in the best intentions, but which did not create in the least any grave perils.^[41]

During the remaining decade of the Restoration, Dunoyer remained active in the political opposition associated with the Lafayettes, de Broglies and de Staels. In 1822, Dunoyer wrote a pamphlet, *Lettre à un électeur de département*, and another in 1824, *Du droit de pétition à l'occasion des élections*. Dunoyer and Comte became members (February, 1826) of the forerunner of the "Adie-toi et le Ciel t'aidera" (which was instrumental in the July Revolution); this was "La Société des Sciences morales et politiques", which was under the aegis of Benjamin Constant and included Barrot, Mérilhou, Mauguin, duc de Broglie, Auguste de Stael and Guizot.^[42] Dunoyer's public contribution to the July Days was an open letter in *Le National* (July 26, 1830) declaring his refusal to pay taxes until the ordinances of Charles X were revoked.

Dunoyer's political role during the Restoration can best be described as that of ideological leadership and of strategist and adviser, rather than political leadership *per se*, despite the prominence he achieved from his several political trials in the courts and his well-publicized political imprisonments. Guillaume de Bertier de Sauvigny has well recognized the uniqueness of the political role occupied by Dunoyer:

Le Censeur, despite its powerful interest for the history of ideas, represented a relatively isolated voice; its editors, Comte and Dunoyer, were too concerned to raise themselves above the partisan passions of their epoch, too oriented toward the future of the nascent industrial society, to consider them representatives of a notable section of opinion.^[43]

Dunoyer's political role of ideologist and councillor was indistinguishable from the intellectual importance which Bertier de Sauvigny justly attributed to him. This activity continued to be manifest in the periodical press of the later Restoration, in the *Revue encyclopedique*, in the *Journal de débats*, and in the *Revue française*. But, the center of Dunoyer's intellectual contribution was the continuity and organization of the ideas, especially *industrialisme*, which had been conceived and developed in the *Censeur* and the *Censeur européen*. On the suspension of the *Censeur européen*,

Dunoyer embarked upon a course of lectures at the Athénée Saint-Germain, at which J.-B. Say had been presenting his lectures on economics for several years and Benjamin Constant had initiated his course on political thought. These lectures of Dunoyer formed the basis of his book, published in 1825, *L'industrie et la morale considérées dans leur rapport avec liberté*. A revised version was published in 1830, *Nouveau traité d'économie sociale, ou simple exposition des causes sous l'influence des quelles les hommes parviennent à uses de leur forces avec le plus de liberté, c'est-à-dire avec le plus de facilité et de puissance* (the bulk of this publication was destroyed by fire before distribution in 1830).^[44]

Dunoyer has been viewed as part of the broad society of intellectuals considered as the later Ideologues or the disciples of the Ideologues. Dunoyer was intermediate between Ideologue economists, Destutt de Tracy and Say, historians, C. F. Volney and P. C. F. Daunou, and the younger disciples such as Augustin Thierry and Victor Jacquemont, whose friends, in addition to Dunoyer, encompassed Fauriel, Mérimée, Monzoni and Stendhal.^[45] However, in contrast to the generally literary approach of the later Ideologues, Dunoyer carried the precision of the scientific attitudes of de Tracy and Say to their logical conclusions. The radical optimism of their naturalist philosophy was such that, according to Roger Soltau, "Jean-Baptiste Say proclaims his belief in 'the natural march of things', Dunoyer 'anticipated Spencer' (according to Taine) in his championship of the absolute 'freedom of labour', Garnier even denied the right of the State to issue currency, Bastiat [Soltau quoting Guido de Ruggiero] is an echo of eighteenth-century optimism with its identification of private and public interests, and the hostility towards the State which marks the earlier Liberalism".^[46]

Dunoyer opposed legislation as attempts to prevent voluntary relations by words or actions between individuals. If at all, there should be only the application of judicial decision when a crime is committed; for example, it should be immoral to establish any regulation of the practice of medicine. Anyone undertaking its practice would accept the risk of judicial

punishment should an injury be criminal. Relations would be defined by processes of contract, sureties and insurance. The production of security and justice would be a result of market functions and transactions. As Albert Schatz notes with reference to Dunoyer's ideas:

So understood, the governmental function needs a small number of agents, the mass of workers remaining available to increase the sum of social utilities other than security. It is proper then to diminish the number of public offices and officers, and to employ to this end the single efficacious means, which is to reduce the rewards or salaries. It is of little importance, moreover, whether the signboard of the company charged with ordinary security be monarchy or republic, provided that it cost little and disturb no one at all, that it realize progressively this ideal in a society so perfectly developed that government disappears, leaving to the inhabitants the full enjoyment of their time, their wealth and their liberty.^[47]

Dunoyer's precision of thought, following de Tracy and Say, and derived from scientific attitudes, contributed to the impact and the close relations which he had with Auguste Comte. Henri Michel has called Dunoyer the "positivist before positivism".^[48] Dunoyer became acquainted with Auguste Comte when he became Saint-Simon's secretary in mid-1817 following Augustin Thierry's break with Saint-Simon and his full association with Dunoyer on the *Censeur européen*. After Comte's resignation in a couple of years as Saint-Simon's secretary, he, too, wrote for the *Censeur européen* and remained in intellectual contact (even when all other contact was excluded) with Dunoyer throughout his life. (Comte died in 1857.) Henri Gouhier in *La Jeunesse d'Auguste Comte et la formation du positivisme*, tome III, *Auguste Comte et Saint-Simon*, emphasizes the role of Dunoyer in Comte's life. In *Appendice I, Le Censeur européen*, Gouhier says:

The liberal and antifeudal thought expressed discreetly in the constitutional journals, the *Journal de Paris* and the *Journal général*, was expressed more freely in *Le Censeur* of Charles Comte and Charles Dunoyer, "of which each edition was an event" (Houssaye, 1815, *La première Restauration* . . . p. 67).

This publication enjoyed a certain role in the formation of positivism . . . Auguste Comte became part of the staff during 1819 . . . Finally, around this review there was an intellectual and political milieu: "l'école positive de MM. Comte et Dunoyer", wrote Saint-Beuve (*Causeries du lundi*, t. II, 6e edition, Garnier, M. de Broglie, p. 381). These youth had a spirit which must be acknowledged. The founder of sociology has never forgotten it; in 1857, he called *Le Censeur* "the

only periodical publication which posterity will honor in French journalism: (*System*, t. IV, Preface de l'appendice général, p. 11). Comte's personal relations with Dunoyer have always been clear; the economist sent him his works and Comte never ceased to feel for him a profound esteem; in 1845, at the time when his reading was reduced practically to a few inquiries, he permitted himself "one special exception to his severe *hygiène cérébrale*" (A Mill 28 février, 1845, p. 410) in opening *La liberté du travail*. "In sum", he said to John Stuart Mill, "M. Dunoyer whom I have known more than twenty-five years, has always seemed to me one of my immediate predecessors who merits the entirety of my sympathies" (A Mill, p. 409). On diverse occasions, Comte noted what he owed to his work. It is Dunoyer and not J.-B. Say who figured as the associate of Adam Smith in the positivist calendar.^[49]

It is in the emergence of the concept of social science that Auguste Comte found common ground with Dunoyer. The *Censeur européen*, which spoke of a "laïc breviary for liberals" in strongly recommending Daunou's *Essai historique sur la puissance temporelle des papes* (4th ed., 1818; 1st ed., 1810) was a far cry from Joseph de Maistre's *Du Pape* (1821) which Comte claimed was the source of more of his ideas than any other book. Dunoyer's anarchism, individualism and tolerance was in opposition to Comte's concern for the decay of traditional morals and hostility to intellectual divergences.^[50] The infallibility and dominance of society posited by de Maistre was totally appealing to Comte in the early 1820s. The programs of the rulers were acceptable in contrast to the radical criticism of the opposition.

Dunoyer's criticism of the concept of indefinite perfectibility, however, while praised by Comte, would involve him in a major debate with Benjamin Constant, but the immediate consequence was a temporary break between Dunoyer and Stendhal. Fernand Rude, in "La Querelle des Industriels (1825)", *Stendhal et La Pensée sociale de Son Temps*, describes the circumstances, beginning with the publication of Dunoyer's book.^[51]

In a letter to the *London Magazine*, dated October 11, 1825, he [Stendhal] announced that Charles Barthelemy Dunoyer, who in collaboration with Charles Comte, had published *Le Censeur européen* and who is "one of the most powerful intellectuals of France", is on the point of publishing "a profound treatise" entitled "la morale et l'industrie considérées dans leurs rapports avec liberté". Except for the inversion of *industrie* and *morale* it is in fact the exact title. "This book of

Dunoyer is too true to be sermonized . . . His work is a faithful table of the state of our society during the last thirty-five years. And in a word, his work is a very good supplement to Mignet's *Histoire de la Revolution*".

In another letter of November 18, 1825, the "small nephew of Grimm" characterized this work as "admirable" and felicitated him on his success which, said he, "to my great surprise . . . goes to a crescendo". All the gentlemen who wish to think read M. Dunoyer. Six years ago, no one had understood him.

Dunoyer had presented a course in the winter of 1825 at the Athenée which constituted a veritable plea for *industrialisme*. It was in fact the rough draft of his major book . . . The epigraph of this work gives the resumé of it: "We become free only in becoming industrious and moral . . ." Here is what Dunoyer wished to demonstrate. And for this, said he, it is necessary to consider, not the governments but the masses; the state of their industry and of their morals. Throughout that book, this author never separates in effect the progress of industry from the progress of morals and of liberty . . . "Under the name of administration, I know not what monstrous, immense corpus, extending to all its innumerable hands, putting its shackles on everything, levying enormous taxes, bending by fraud, corruption, violence, all the political powers to its designs, exhaling chiefly the spirit of ambition which produced it, and the spirit of servility which conserves it". More even than of Saint-Simon, this indictment makes us think of Proudhon . . . [the *industriel* people are] . . . "those where it is no longer the passion for power that reigns, but the passion to work". . . . "In the beginning, the dominating classes are all, and the laboring classes nothing; in the end, the dominating classes will be nothing, at least so far as dominating, and the laboring classes will be all; society will be constituted for work".^[52]

For Dunoyer, *industrialisme* was the exact opposite of theft. Any action which was not the result of a freely chosen choice was a theft. That is why he admired the American state constitutions of the Revolution, especially that of Pennsylvania; that was a model because the government appeared to have the character of an industrial enterprise in which everyone was a voluntary associate. Similarly, he admired America's decentralism which he believed was the result of America's *industrialisme*. *Industrialisme* would dissolve states as the universality of mankind was rooted in free labor.

It is the spirit of domination which has formed these monstrous aggregations or which has rendered them necessary; it is the spirit of industry which will dissolve them: one of its ends, one of its greatest and most salutary effects must be to municipalize the world.

. . . The centers of action will be multiplied; and finally the vastest countries will end by presenting only a single people, composed of an infinite number of uniform aggregates, aggregates between which will be established without confusion and without violence,

the most complex and at the same time the most easy, the most peaceful and the most profitable relations.^[53]

Rude notes that in his letter of November 18, 1825, Stendhal singles out a noteworthy aspect of Dunoyer's book.

There is a passage which had particularly struck Stendhal. "M. Dunoyer, equally intrepid to blame the people of France, as to attack its tyrants, in place of flattering them basely in the fashion of the *Constitutionnel*, tells them courageously the truth. . . M. Dunoyer is the sole liberal writer who does not flatter the nation and is bold to tell them: 'You make yourselves slaves, that is why you have tyrants. Each people has never more liberty than it forces its sovereign to accord to them'".^[54]

The contacts between Dunoyer and Stendhal were based upon more than common friends, such as the young Victor Jacquemont or the elderly Destutt de Tracy. For two decades Stendhal had been a student of economics; he considered himself a disciple of Smith, Say and de Tracy.^[55] Since Dunoyer was the major writer and lecturer continuing Say's contributions, it was natural that Stendhal would know Dunoyer, as well as take a direct interest in the development of *industrialisme*. Along with Condorcet's *Equisse* and Volney's *Ruines*, the young Stendhal had been strongly influenced by the writings of William Godwin, and was praising Godwin's work in the early 1820s. Godwin's heroes, who were "at open war with their oppressors", were one of the inspirations for Stendhal's *The Red and the Black* (1830).^[56] *The Red and the Black* was inspired by a number of sources during the 1820s and included material which Stendhal took from the manuscripts of his late fellow citizen of Grenoble, Barnave.^[57] Barnave's then unpublished *Introduction to the French Revolution* presented one of the earliest statements of elements of the analysis characterized as *industrialisme*. Stendhal is a potential source for Dunoyer's being informed of Barnave's thought before the publication of Barnave's works in 1843 by Alphonse Marie Béranger de la Drôme (1785–1855). Rude writes:

We know the veneration which from his most youthful years Stendhal had for Barnave, "that great spirit". He speaks of him repeatedly in his *Mémoires d'un touriste* and he notes even: "If I had the space, I would cite a curious manuscript of his". In effect Stendhal knew the sister of Barnave, Mme. Saint Germain, as

well as Béranger de la Drôme, who in 1843 published the *Oeuvres de Barnave*.^[58]

Dunoyer's disagreement with Stendhal arose from the printing in late November 1825 of Stendhal's booklet, *D'un nouveau complot contre les industriels*, issued by their common publisher, Sautelet. Dunoyer was unhappy over the publication of an attack on *industrialisme* since his book was the principal and most widely known treatise on the subject. Stendhal had been prompted to write his pamphlet by Saint-Simon's *Catéchisme des industriels* (issued in four *cahiers* between December, 1823 and June, 1824). Rude believes that the *nouveau complot* was written in early 1825 but that the publication was postponed by Saint-Simon's death on May 19, 1825, and resumed by Stendhal with the launching by Saint-Simon's disciples of the magazine *Le Producteur* at the time of a speculative coup by Saint-Simonian bankers.^[59]

In the *Catéchisme*, Saint-Simon had attacked the "bourgeois", the lawyers, military officers and government bondholders (to which group Stendhal felt an affinity) and described banking as a new, higher form of industry which would lead to the reign of the bankers. Saint-Simon called for a union of the center-left with the center-right, the industrialists and the royalist ministerials, against the liberals. Saint-Simon expressed pleasure at the liberal party's destruction at the hands of the royalist ministry and wished the industrialists to repudiate liberalism because its critical and anti-organizational attitudes were revolutionary. Stendhal saw this project for a union of the bankers with the government as the *complot* against the liberals and the industrialists. Stendhal declared his faith in economics and in industrialization. Industry was one of the "great strengths of civilization", and he looked forward to its progress as it would lead the French to "put into practice the *Charte*". As a supporter of the producing majority against the governors, Stendhal opposed the substitution of "the most important industrials" as governors in place of the existing governors. Stendhal feared that Saint-Simonianism was a diversion from the struggle for liberty, was a weapon against liberalism, and was aimed at enshrining the rule of Baron de

Rothschild and the other half dozen major bankers.^[60]

Le Producteur, which was published by Saint-Simon's disciples with the support of a number of bankers headed by Jacques Laffitte, appeared on October 1, 1825; Cerclet was editor and Enfantin and Bazard were the publishers. In the early issues was a reprint of a chapter from Dunoyer's new book, a review by Say and articles by Auguste Comte, in which he declared that out of the scientific class, the engineers were forming a separate corporate class to act as intermediaries between the industrialists and the scientists (Comte also emphasized spiritual power as the new approach which Saint-Simon was initiating before his death). Stendhal wrote an article for the *London Magazine* (October 11, 1825) which was mostly favorable but which for the first time publicly linked the editors of *Le Producteur* with Saint-Simon. For they had attempted to present the whole spectrum of *industrialiste* authors rather than the narrow Saint-Simonian publication it would become. Indeed, there was a clear presentation of the diversity of *industrialiste* analyses. Say, in a review of McCulloch's *Political Economy* (*Le Producteur*, No. 5, October 29, 1825), attacked the Ricardian theory of value based solely on the quantity of labor in the product. Prosper Enfantin (No. 6, November 5, 1825) supported Ricardo and McCulloch against Say's economic analysis. Enfantin's article carried Ricardian classical economics, long before Marx, to the logical conclusion that Marx was to reach. In addition, there were articles on positivist literature against which Stendhal rebelled.^[61]

However, the matter which triggered Stendhal's booklet was a speculative coup which received the support of *Le Producteur*. Its first issue had proposed a company of the bankers of Europe with Laffitte at its head to become a Holy Alliance of the Bankers. French bankers had made loans to King Ferdinand VII at the same time as the martyrdom of the Spanish liberal Riégo; Laffitte in July 1824 had aided the Villèle ministry in its financial difficulty with the government debt. Finally, the bankers associated with the Saint-Simonians had been engaged in

making loans to the Pasha of Egypt to purchase ships and arms to fight against the Greek revolution. The last straw for Stendhal was a loan to Haiti to be negotiated by Ternaux which was much discussed in the early issues of *Le Producteur*. On November 3, 1825 two sets of equal bids were submitted by Pillet-Will, and by André Delessert and Casimir Périer. The next day the loan was granted to Laffitte and the Rothschild brothers.^[62]

Stendhal expressed his earliest criticism of the position of *Le Producteur* in conjunction with his distress over the Haitian loan (November 10) and added that issue to the manuscript he had written on Saint-Simon's *Catéchisme* and the earlier activities of the bankers. Stendhal's *D'un nouveau complot contre les industriels* viewed the conspiracy of the bankers and the government against the liberals and industrialists as a major aspect of the Saint-Simonian doctrine. Instead of the Rothschilds, Laffitte *et al.*, Stendhal proposed as disinterested heroes, Lafayette, Washington, Carnot, Dupont de l'Eure, Daunou and general Bertrand.^[63]

Cerclet wrote a letter of criticism to Stendhal. The *Journal du Commerce* responded (December 3, 1825) that Stendhal examined only a narrow segment of *industrialisme*, and neglected the major stream of *industrialisme* which centered on the ending of exploitation of man by man through privileges, and on society administering itself without an external agency. "Man will then work upon nature, live from things and leave his fellow men in peace". Armand Carrel reviewed Stendhal's booklet in *Le Producteur* (December 3, 1825). Stendhal in *Le Globe* (December 6, 1825) criticized the lack of clear writing and growth of charlatanism, of which an example was "a new polish for the boots, a new system of *industrialisme*, of a new *vegetable rouge*". *Le Globe* (December 17) reprinted long extracts from Stendhal's booklet.^[64]

Meanwhile, Leon Halévy, one of the leading Saint-Simonians, had written an article in *L'Opinion* (December 5) on Benjamin Constant's lecture on December 3; Halévy's article "Athénée Royal de Paris, Séance d'ouverture. Discours de M. Benjamin Constant", sought to answer Constant's criticism of Saint-Simonianism and

recalled the friendship between Constant and Saint-Simon. Constant responded with a letter to *L'Opinion* (December 6), which was reprinted in the *Journal du Commerce* (December 7). He emphasized the need of constitutional guarantees against the pursuit of purely material interest. He was especially fearful of Saint-Simonian intolerance and he supported freedom of conscience against the implicit despotism of the Saint-Simonians. Constant's interpretation regarding intolerance was confirmed in a reply to Constant's letter by Cerclet's article in *Le Producteur* (December 10), which followed an earlier response by Saint-Amand Bazard in the issue of December 3 but obviously published several days later.^[65]

The *Revue encyclopédique*, for which Say and Dunoyer wrote, contained a review (December, 1825) of Stendhal's booklet by Comte Paul-Eugène Lanjuinais, son of the liberal peer. He emphasized Stendhal's criticism of the Saint-Simonian banker's loans to the Turks and agreed with Constant's lecture that industry was very important but that it is necessary to develop the moral faculties as well. Victor Jacquemont, who was a friend of Dunoyer's, was favorable to *industrialisme* and was acquainted with the Saint-Simonians, had found Stendhal's booklet worthwhile. Jacquemont wrote Stendhal on December 22, 1825: "Barthélemy Dunoyer is furious against you. He said that you understand nothing on that question". So for Stendhal, "lourd" Dunoyer became "that most ignorant of liberal writers", because "it is too much to contemplate that they could believe that of me, who was of their party". However, Dunoyer and Say could not long maintain their fragile association with the editors of a *Le Producteur* which continued to espouse Ricardian economics. Against the absolute opposition of Say and Dunoyer to paper money and the system of credit based upon it, Enfantin (January 1, 1826) praised Ricardo's preference for paper money, and emphasized the role of banks in creating credit for major undertakings such as transportation development. So also the split between Dunoyer and Stendhal was not continued; Rude writes:

Stendhal acknowledges always his [Dunoyer's] science

in political economy. And I believe we recognize him in the M.D. that the *touriste* encountered at Chalon-sur-Saône and whom he presents as "one of the leading economists of France".^[66]

Dunoyer signaled his break with the Saint-Simonians in an article in the *Revue encyclopédique* (t. XXXIII, février, 1827). In this lengthy "Historical Notice on *Industrialisme*", Dunoyer presented an analysis and criticism of the writing of the Saint-Simonians in *Le Producteur*.

As disciples of M. Saint-Simon, the authors have undertaken the work with the intention of propagating his doctrines. They seem to adopt these doctrines without restriction. First, they claim for him the honor of having founded *industrialisme*; they attribute to him even the glory of having invented the word *industriel*. Hence, like him, from the fact that the theological and feudal powers are constantly declining, and that the arts, the sciences, and industry do not cease to acquire strength, they conclude that the direction of affairs must pass from the hands of ecclesiastical and lay lords into those of the savants, the artists and the industrialists. Following their master, they reproach these latter classes for only having worked to free themselves. Because they have long made war, of wishing to make war always; of rendering eternal what ought only to be transitory; of making an end of what was only a means; of wishing to replace the old system by criticism; . . . of reducing criticism to a system, of making an aim of criticism, without any other object than to criticize. They beseech those classes to abandon this *critical tendency*, which places, they say, very great obstacles to the progress of civilization, and to adopt the organic tendency, to proceed without loss of time to the organization of the industrial system. What they desire also, after the example of Saint-Simon, is a state composed solely of savants, artists and artisans, where the most distinguished savants and artists will form the spiritual power, and the most preponderant industrialists the temporal power of society; where the first will be charged with the formation of ideas, the second with the formation of sentiments, and the last with the administration of material interests. This system took no account of individuals; it only occupied itself with the *entire human species*. It assigned for the destiny of the species the *more and more perfect exploitation of the globe which we inhabit*. It proclaimed the *organizational principle of a productive association between all peoples*. The law of this association is not liberty. *Laissez faire et laissez passer* is an insufficient counsel.^[67]

Dunoyer strongly attacked the Saint-Simonian decision that human imperfection required man's social activities to be under the direction of other men. For the Saint-Simonians there is no reason for creative men to seek answers and desire to apply them, if there is no force compelling individuals who escape its

direction to return to its benefits and to show "continually to workers the route that they must follow and not permit anyone to escape from it". Dunoyer was appalled by the Saint-Simonian claim that the masses required a system of general directors and a negation of competition. For the Saint-Simonians, competition was a principal enemy and "order would result only from the exceptions made to the principle of competition". For Dunoyer, only competition can yield proper value and put in their correct place the means of order such as the police. The Saint-Simonians' desire to eliminate economic competition was shown by their wish to centralize the control of credit in the hands of bankers selected for this purpose. Dunoyer described this in terms taken from *Le Producteur*:

We seek constantly to combat this principle [competition] . . . It is necessary that in each branch of industry there be associations of capitalists who will make advances only to the entrepreneurs and to the enterprises which merit it . . . it is necessary to establish a credit center in each industrial class . . . There need to be disciplinary councils for lawyers, doctors, bakers, butchers, stockbrokers, notaries, etc. The disciplinary councils are no more an evil than particular directors in each branch of industry are an evil, than the general directors of society, than governments in general are an evil. Such councils must guide the science and the morality of all men examined by them . . . But they must be composed of evidently superior men. Such is that system. It is all directed against what the authors call the *critical tendency*, and towards what they call the *organic tendency*.^[68]

The Saint-Simonian system of organizing, directing and ordering society through government was in direct opposition to the contributions made by Say and Dunoyer. For the Saint-Simonians, an industrial society was one in which the leading industrialists exercised governmental power, in collaboration with the scientists and artists, over the rest of society. For Dunoyer, *industrialisme* was the negation of government of men by men, "a manner of life" where all social relations are characterized by free, competitive activities in absolute freedom.

The *industrial system*, the *industrial society*, is truly one where all men are producers of usefulness, where the men of all classes, forced finally to renounce all violence, are only able to live from useful things that they create by peaceful work, and from what they obtain by voluntary gift or regular exchanges; but there is not much use in speaking of the social

industrial state, when, by the word *industriel*, one only intends, as do M. Saint-Simon and the writers of his school, one of several classes of individuals or of professions . . . It is then the fault of these writers to wish to choose only from among the savants, the industrialists and the artists. But they fall into an error yet more serious, concerning the regime most convenient to the industrial system. Their complaints against what they call the *critical system*, that is to say, against a general and permanent state of examination, of debate, of competition, attacks society in its most active principle of life, in its most efficacious means of development. First, these writers mistake all the facts, when they accuse a critical philosophy of tending only to destroy and of proposing only a negative goal. In working to remove the obstacles which oppose the free and legitimate exercise of the human faculties, it tends, on the contrary, to a very positive goal, which is to place humanity in a situation where its faculties are able to grow easily. Hence, it demands the abolition of all privilege, of all monopoly, of all evil and violent restriction, and wishes that each be able to use his powers freely within the limits of justice and equity. . .

The disciples of the school which claims to be organic see the greatest inconveniences in leaving society to itself and in looking forward to its development by the free competition of individual efforts. This state of competition, they say, only leads to the anarchy of sentiments and ideas. However, by a singular contradiction, they admit, at the same time, that free discussion is necessary at certain epochs, when society tends to pass from one doctrine to another, from an imperfect state to a better state. But, if discussion often has the power to produce enlightenment, if it is able to really spirits to truth, if it is in the nature of things that common ideas emerge from a conflict of divergent opinions, what is the significance of the reproach made against freedom, and when does it begin to be anarchic? Is there, in the course of centuries, a single instant where society does not tend, in a multitude of ways, to modify its ideas, to change its manner of existence? To accuse liberty of what remains of confusion in moral and social doctrines, is to see evil in the remedy, and to complain precisely of what tends to make the confusion cease. The error of the organic school is the belief that liberty is only a provisional utility. A time will come, they say, where all the sciences will be positive; and we will no longer have need of liberty when all the sciences are positive: one cannot dispute demonstrated truths. One disputes no longer what is demonstrated, no doubt; but will it ever all be demonstrated? What appears to be demonstrated, will it always appear so? Will not the inductions which seem well established, in the experimental sciences, be modified some day by new experiences? In place of saying that our knowledge will become complete and certain, we are able to affirm strongly that they always will leave something to be discovered or to be rectified. It is then in the nature of things that liberty of examination will be perpetually necessary. Society which lives chiefly by action, acts, at each instant, according to the notions that it possesses, but, to act better and better, it needs to work constantly to perfect its knowledge, and it only is able to succeed by means of liberty: research, inquiry, examination,

discussion, controversy, such is its natural state, and such it will always be, even when its knowledge has acquired the greatest certainty and understanding.

This is not the advice of the organic school. It believes, on the contrary, that this state is only transitory, and that there will come a time when our knowledge will have attained such a degree of extension and of certitude, that there will be no matter for discussion. In consequence, and as if human knowledge had already arrived at that state of ideal perfection, it wishes to give from this moment official directors to society who will conduct its works in conformity with the infallible and complete knowledge that it is destined to acquire. It commences with a vain supposition in order to arrive at a disastrous conclusion. It is puerile to wish to decide in advance what will be in the future the progress of human knowledge; we do not have any means to know it; it will never become as perfect as one supposes; at least it is certain that it is yet far from being perfect, and it is insane to think as if it were perfect already. Finally, were it perfected, if we could know fully the aim of society and all the means we would ever have to attain it, were there nothing more to discover in the sciences; if we could know the best means to follow in the arts; if we could acquire the infallible means to discern, in all cases, the good and bad undertakings, it would yet be very pernicious to give to the best instructed men in all things the right to submit others to their direction. We do not hasten the progress of truth by constraints. The best means, on the contrary, to hinder it so that it does not spread, is to give to men who know it the power to impose it on those who are ignorant. Far from increasing its influence, one destroys it. . . No one understands why he must *a priori* submit his reason to that of another; no one consents to receive a truth imposed by force. It is surely desirable that society be guided by the knowledge of its most enlightened members, but it is more desirable that they possess power only by their knowledge. The true savants have not need to exercise any magistracy in order to be consulted. The natural disposition of whoever has need of a service is to address himself to whomever is best able to serve him. It is only coercive directors that people refuse to follow; and nothing will be less favorable to the progress of society, then to give to men of knowledge the power of constraint. Society wishes to be constrained only by whom it may select for the service; no more by savants than by priests; what its interest requires before anything, on the contrary, is that all unjust constraint should be repressed.^[69]

Dunoyer's "critical" approach toward any attempt to eliminate absolute freedom of choice was the basis of his conflict with the Saint-Simonians. The introduction of any compulsion or direction by one person over another, including intellectual direction, was precisely the fundamental disagreement which Dunoyer had had with Rousseau's concepts. The possibility that legislation could have any role in the education, development or improvement of any person was contrary to Dunoyer's conception

of law. All law was negative or destructive, except insofar as law expressed the exact relations which it sought to regulate, in which case it was at best superfluous. Dunoyer drew this attitude from the "very judicious reflections" of an "old, little-known work", *L'Homme et la Société* by J. B. Salaville, whom Rude notes had been influenced by the principles of William Godwin.^[70]

In conflict with Dunoyer's insistence that the voluntary acceptance of truth by each person was the sole means of gaining acceptance, in which case legislation was either evil or needless, the Saint-Simonians held that on the discovery of a truth, the compulsion to observe it had to be imposed on each person. For the Saint-Simonians the position advocated by Dunoyer was anarchism. In response to the "critical" approach and its rejection of his scientism, Saint-Simon had declared: "you, gentlemen, are nothing but anarchists". Dunoyer clearly identified himself with the anarchism of "critical" philosophy as well as the anarchism in politics which Saint-Simon and his disciples had felt to be the major opposition to his scientific despotism. As J. L. Talmon notes in his "Totalitarian Technocracy: Saint-Simon", of Saint-Simon's criticism of the radical liberalism of such contemporaries as Dunoyer:

Among themselves they would settle matters by way of contract, warranted by their own corporations and their laws and customs. Since the feudal-military-clerical State was in no position to render real assistance, but only to do harm, or worse — to extort ransom, the industrial classes developed almost a religion of non-interference by the State. Liberty became identified with the absence of government, individual freedom with isolationism. The experience of feudal-clerical rule was universalized into a philosophy teaching that government as such is a natural enemy, and not "chef de la société, destiné à unir en faisceau et à diriger vers un but commun toutes les activités individuelles".^[71]

Say and Dunoyer had been major spokesmen for the analysis which defined liberty in the terms which Saint-Simon and the Saint-Simonians condemned. This is of special interest in view of the criticism which Benjamin Constant made of this article by Dunoyer.

Constant's response, *De M. Dunoyer et de quelques-uns de ses ouvrages*,^[72] was included in the collection of essays, *Mélanges*, which

Constant had published in 1829 in preparation for his unsuccessful candidacy for the *Académie*. Pierre Deguise has commented on Constant's criticism of Dunoyer:^[73]

With *De M. Dunoyer et de quelques-uns de ses ouvrages*, Constant undertook to defend his ideas against those of others. In truth, Charles Dunoyer was not at all an enemy. A man of the liberal Left, as was himself, he had been motivated by an order to defend the freedom of the press equal to that of Constant. . . .

When he was obliged to renounce the publication of his review after the reaction which followed the assassination of the duc de Berry, he had turned more of his attention to political economy. He taught at the Athénée, where Constant had lectured on constitutional theory as well as on religion. . . .

Why then this criticism? Why, despite his eulogies on detail, this hostility of Constant who recognized in Dunoyer a companion in his battles? First he had been personally caught as one side in the work and he had to respond. Dunoyer saw in the industrial society the milieu most favorable to liberty. . . . He then reproached Constant, along with Rousseau, Chateaubriand and also some ultra-royalists, for their mistrust and even their contempt for the development of civilization which they accused of depraving mankind. He noted a passage of the first volume of *De la Religion* where Constant wrote: "Once before the human species seemed plunged into the abyss. Then also a long civilization had enervated it. Each time that mankind arrived at an excessive civilization, it appeared degraded for several generations" (Rel. I, 236). Constant was so much the more sensitive to this accusation, as he had felt himself placed in contradiction with himself. How is it possible to think that civilization is able to corrupt, when one believes with all one's strength in perfectibility?

Adroit in defending himself, he protests that he had never believed in intellectual degradation by material progress. It would only be a temporary retreat from perfecting when an excess of civilization is able to enervate spirits and soften energies. Degradation can only be transitory.

Nevertheless, why had he placed so much effort in this refutation . . . if Dunoyer had not hit the nail on the head? . . . Is it not strange that in this eternal conflict . . . which, in the midst of the eighteenth century, came to oppose Voltaire against Rousseau, a common nostalgia for simplicity, for patriarchal morals, is found among two writers, both from the shores of Lake Léman? . . . Constant felt for people furthest from the state of industrial wealth a sympathy nearly equal to that of Tacitus in another age for the Germans. Are these peoples not those who know best how to defend their freedom? The Russians and the Spanish against Napoleon, the Greeks against the Turks? Does one not divine behind these rude peasants, inheritors of ancient virtues, who rise up in arms to defend their independence, the shadow of William Tell?

. . . Dunoyer never goes as far as Bentham, but Constant is unable to accept a theory which does not make liberty and right a first given of human nature, as he had made it likewise for religious sentiment. And

then, fundamentally, the economist collides with the habits of political thought. "Politics as a science of government has been transcended", wrote Dunoyer; and he intended to substitute for it a study, according to him more scientific, which we call today "political economy". He did not seek the best form of government, but "the mode of existence most natural to our species, more favorable to its progress"; in place of presenting liberty "as a dogma", he studies it "as a result". It was insufficient to say as did the dogmatic publicists that "it is necessary that peoples should be free"; it is necessary to seek "how they will be free". In summation, from the point of view of political theorist and moralist who starts from principles, Dunoyer wished to substitute a purely experimental approach that he judged more scientific. The foundation of things appeared to him not political institutions, but the social mechanism . . . Constant is then very naturally brought to enter the campaign against the Saint-Simonians. He did it at the end of his essay in complimenting Dunoyer on distinguishing himself from a "new sect", the disciples of Saint-Simon whom he did not name. He took out with vigor against those who "preached servility to authority", wishing "to found a new industrial papism"; seeing "anarchy in all difference of opinion", and invoking a new spiritual power.^[74]

Constant expressed the highest praise for Dunoyer's writings in the *Censeur européen* as well as his conflicts with the government to vindicate civil liberties: "The germs deposited, in 1814, in the *Censeur européen*, have developed and fructified". While displeased by Dunoyer's criticism of him in *L'Industrie et la Morale*, on which his essay concentrated, Constant made reference to Dunoyer's article in the *Revue encyclopédique* on the origins of *industrialisme*. Before confronting the Saint-Simonians, Constant contributed his observations briefly on the originality of Dunoyer in the development of *industrialisme*. Constant's failure even to mention Saint-Simon and his deprecatory references to the Saint-Simonians stemmed from Constant's not taking Saint-Simon seriously as a thinker. Dunoyer he took seriously as a fellow radical theorist and philosophical opponent. As the precursor of Dunoyer's elaboration of *industrialisme*, Constant sought to mute and blur the differences by making his own ideas part of the general intellectual milieu. Dunoyer had stated the differences with clarity and in detail; Constant's vague reflections and his introduction of Sismondi, whose book was published too late to be relevant, obscured the particular issues.^[75]

Specifically, in his "Historical notice on

industrialisme", Dunoyer said of Constant:

I must say, to the glory of M. Benjamin Constant, that he is the first writer, at least to my knowledge, who had indicated the goal of the peoples of our time, and who also recognized the true object of politics. In his work on *l'esprit de conquête considéré dans ses rapports avec la civilisation européenne*, which had been published abroad in 1813 . . . Constant wrote: "While each people formerly formed an isolated family, a born enemy of other families, a mass of peoples now exists under different names and under various kinds of social organization, but homogeneous by its nature. It is sufficiently strong to have nothing to fear from the hordes that are still barbarian: it is sufficiently civilized that war will be a burden to it. The uniform tendency is towards peace . . . We have arrived at the epoch of commerce, the epoch which ought necessarily to replace what preceded . . . War was the savage impulse; commerce is the civilized calculation. It is clear that the more the commercial tendency dominates, the more the warrior tendency becomes weak. *The unique aim of modern nations is tranquility, with tranquility comfort, and, as the source of comfort, INDUSTRY.* War each day becomes a less efficacious means to attain this aim. It does not offer to individuals and to nations benefits which equal the results of peaceful work and regular exchange" (Chapter II). These statements are not absolutely irreproachable. M. Benjamin Constant, in saying that comfort is the unique aim of modern nations, seems to indicate that men have only physical needs to satisfy. The aim of modern nations is comfort; with comfort, dignity, consideration, glory, renown; and, as the source of all these goods, the moral and intellectual practice of all useful professions, or, as expressed by M. Benjamin Constant, *industry*, which embraces in effect all the useful professions of society. But, although the proposition of the able writer perhaps lacks exactitude in form, it was nonetheless very important as a foundation. It was the first time that anyone showed briefly the difference which exists between the ancients and the moderns; it was the first time that anyone indicated to the modern peoples that they direct their activity towards industry. This observation, which now seems trivial, was then entirely novel, and I believe that I remember that people were very much struck by it.^[76]

Dunoyer emphasized the undeveloped nature of Constant's attitudes on industry and the impact of its growth on civilization. Constant had not made any detailed analysis of the positive aspects of industrial progress, and Dunoyer had particularly noted Constant's belief that the improvement of material conditions would cause the retrogression of mankind and interfere with human perfectibility. Dunoyer discussed the failure of Constant to develop his attitudes on the role of industry into a philosophy such as *industrialisme*. Constant, like the two other authors whose works contributed to Dunoyer's and Comte's development of *industrialisme*,

Montlosier, the historian, and Say, the political economist, did not see the deeper implications of their ideas. According to Dunoyer,

No writing of M. Benjamin Constant following the *Esprit de conquête*, has shown that he appreciated the political consequences of his observation that the peoples of our day direct their activity towards industry; he had not occupied himself with industrial society; he has not investigated how that society lives, following by what laws it prospers and how it ought to be constituted in order to develop itself.^[77]

The *Esprit de conquête* was drawn, even to its exact words, from the studies written during the intellectually creative end of the eighteenth and beginning of the nineteenth century period in the life of Constant, which are contained in the notebooks known as the *Oeuvres Manuscrites de 1810*. These unpublished manuscripts, in seven volumes of three to four hundred pages each, were a source for some of Constant's later articles as well as abbreviated and more acceptable (less radical) versions of the original essays.^[78]

Constant's *De la Perfectibilité de l'Espèce humaine*, of which the *De M. Dunoyer et de quelques-uns de ses ouvrages* was a continuation, besides influencing other of his writings was partially reproduced in his *Mélanges*. The original essay had been composed about 1803–1804 as Constant's introduction to an extract from Herder's *Ideas on the Philosophy of History*. Perfectability had been treated in Mme. de Stael's *La Littérature considérée dans ses rapports avec les institutions sociales* (1800). Constant was a friend of a number of the Ideologues who were concerned with this topic. Georges Cabanis (1757–1808) had published a "lettre sur la Perfectibilité de l'esprit humain". Claude Charles Fauriel (1772–1844), who was a friend both of Constant and Dunoyer, had reviewed Mme. de Stael's book for *La Décade*, which led to his friendship with her and Constant. Fauriel was a close friend to Mme. de Condorcet (1764–1822), who with Cabanis, who was married to her sister, had published the complete works of Condorcet in 1801–1804. The Marquis de Condorcet (1743–1794), through his *Equisse d'un tableau historique des progrès de l'esprit humain*, had a major impact on the thinking of the Ideologues on this topic.^[79]

The immediate source for Constant and through him, for Dunoyer, was William Godwin. Constant had been in close contact with intellectual developments in England from the friendships he had made during his eighteen months at the University of Edinburgh in 1783–1784. One of his continuing friendships was with James Mackintosh (1765–1832), who wrote in 1791 the *Vindiciae Gallicae*, in reply to Burke's *Reflections on the French Revolution*; Mackintosh's 1799 Lincoln's Inn lectures on the law of nature and nations, and his defense in 1803 of a French political refugee tried at Bonaparte's insistence for libel of the First Consul, increased his fame. Godwin's *Inquiry concerning Political Justice, and its Influence on General Virtue and Happiness* (1793) was read widely by political theorists in France. Godwin had dispatched a copy to the Convention by the hand of John Fenwick in a letter of February 15, 1793, but the outbreak of war soon afterward may have contributed to the fact that there was no French translation of the work. There did not seem to be any reviews of *Political Justice* in France, although the many reviews and comments in English publications were read in France. There was a detailed review of Godwin's 1794 novel, *Caleb Williams* (Paris, 1796) in *La Décade* (January 30, 1796, volume 8, pp. 413–420), which emphasized Godwin's discussion of prisons and his principles of justice. In 1795, Constant's uncle, Samuel Constant, had published a French translation of *Caleb Williams* in Geneva. Constant corresponded with Godwin in 1795–1796 concerning the former's desire to translate *Political Justice*. Constant, in 1799, announced the forthcoming publication of his translation of Godwin's *Political Justice*, but political events then and in the future caused the indefinite postponement of its publication. But the impact of Godwin's ideas was evident in the writings of Constant in that period and in his speeches at the Tribune before his exclusion in 1802.^[80]

Constant himself had taken up the challenge to Burke's attacks on the French Revolution in *Des Réactions Politiques* (An V). In July, 1799 Constant published *Des suites de la contre-révolution de 1660 en Angleterre*, at the conclusion of which he announced his

translation of *Political Justice*, which would be accompanied by a "profound examination" of the principles "suitable to consolidate liberty". Constant wished to publish the translation of *Political Justice* to counter the dictatorial and arbitrary government of the post-Fructidor Directory as well as the similar measures of those looking to return to the Terror of 1793, because Godwin showed that the true liberty to which these men claim to be dedicated is based on absolute liberty — the absence of all violence. The *Oeuvres Manuscrites de 1810* contains three notebooks with 576 pages of translation of *Political Justice*. In addition, the seventh notebook contains Constant's "De Godwin, de ses principes et de son ouvrages sur la Justice politique", which was partially published as an essay in April 1817. Godwin's absolute reliance on the voluntary element in all relations, and his basing of the absolute autonomy of the individual on intellectual independence, was much admired by Constant and was their "kernel of anarchism". Constant's individualist anarchism led him to oppose Rousseau's *Social Contract* as a surrender of individual rights, since it opened the way to arbitrary actions by the nation against a single individual. Constant, like Godwin, was influenced by Adam Smith's concept of "natural order", and he sought the replacement of public, feudal property by private, commercial and industrial property, and the destruction of public institutions which he viewed as liberation.^[81]

Godwin avoided Turgot's concept of the "perfect man", since the idea of the ability to become perfect was in opposition to the idea of perfectibility, of continual improvement. Condorcet stressed progress based on the "improvement of instruments which increase the power and direct the exercise of these facilities". Condorcet's emphasis on the role in progress of education, invention and the applied arts and sciences, appears in his *Life of Voltaire* which Godwin used (*Political Justice* was published before the *Equisse*). A clear influence was the Ideologue historian, Constantin François Volney's *The Ruins, or Survey of the Revolutions of Empires* (1791) which was translated into English by James Marshal, Godwin's amanuensis. Volney (1757–1820) posited that

public happiness could be only the sum of individual happinesses, and he viewed natural rights as basic to mankind's progress. Godwin shared Volney's utilitarianism and viewed technological progress and the rise in living standards due to increase in knowledge as the progress of civilization. Godwin's favorable view of labor-saving machinery which increases comfort and material goods paralleled the views of Dunoyer and Herbert Spencer on the essence of the progress of civilization.^[82]

Unlike Rousseau, but like the Physiocrats earlier and Say and Dunoyer later, Godwin considered the golden age or stateless society to be in the future and not in the past of mankind. For Godwin, as man's knowledge increases and more complex relationships develop, the less need is there for the role of government, thereby requiring the "dissolution of government". Godwin advocated extreme decentralization, which like Dunoyer's, could be called Rousseauist or primitivist if they had viewed government as having any legitimate role. But, Godwin and Dunoyer saw the progress of society in inverse proportion to the powers of government. The dissolution of government is the perfection of the complex and developed society.^[83]

Albert Schatz's *L'Individualisme*, in introducing Dunoyer's definition of liberty, underlines the principle that the government and individuals in society progress in inverse proportion to each other; the dissolution of government is the necessary goal of morals and industry, of civilization.

Liberalism tends then to create between the State and the individual a radical antagonism which is not in the classical doctrine and which makes the State and the individual two forces inversely proportional to each other. In consequence, there is in liberalism a tendency rather potential than achieved, to retire the State from the totality of economic role: we will see this born in the fulfillment that Dunoyer supplied to the classical doctrine, ending finally in a form of anarchism more or less disguised.^[84]

Schatz notes that Dunoyer's thinking influenced the development of Proudhon's social theory. Dunoyer's analyses of liberty led him to an emphasis upon the roles of competition and voluntary association in the progress of civilized society. Dunoyer completed his analysis through applying these roles to the production of security

and to the development of the concept of competing voluntary associations providing for the production of security. Insurance societies and companies competing in the production of security for their members or subscribers was the culmination of this completion of the dissolution of government.^[85]

Schatz, in his chapter "De l'individualisme anti-étatiste à l'individualisme anarchiste",^[86] discussed the expression by Gustav de Molinari, Dunoyer's principal disciple, of civilized society's production of security:

that limited function, M. de Molinari removed from the government. In a study *De la production de la Sécurité* (*Journal des Économistes*, 15 février 1849, p. 277), he asked why this industry had made room only for a monopoly. Had one not seen in Spain the Sainte-Hermandad, in Flanders and Italy the societies of artisans or others charging for furnishing security? Do there not exist in England and America private constables and in the Far West lynchers without official mandate? Regression, one asks? Not at all. On the contrary, progress, and more in conformity to liberal orthodoxy.

. . . In the social state, the satisfaction of needs exists due to the division of labor and to exchange. The need of security, the effect of the insufficiency of justice, is one of those. From which there appear certain establishments destined to guarantee to each the peaceable possession of his person and of his goods, and that one calls "governments".

But, if all needs are satisfied better by free competition, would Dunoyer be able to set aside this need of security? *A priori*, such a derogation contrary to the liberal faith is to be considered evil. Also, if the industry of security has been organized as a monopoly, it is easy to discover the reason. Respondant to a need which is after that of food the most essential, it puts face to face weak consumers and strong producers, by very definition. The latter imposes the monopoly of security on the former. What are the results of that? One saw in England a governing company, a feudality having an hereditary council of administration, the House of Lords, fix as it was convenient to them, under the name of taxation, the price of security.^[87]

But Dunoyer's concern for the analysis of the absolutely free market was interrupted by the events of the July Days of the 1830 Revolution. With the establishment of the July Monarchy (1830–1848), Dunoyer embarked on his seven year tenure as prefect, first at Allier (1830), and then at Somme (1833–1837). On his retirement, which coincided with the death of Charles Comte, he became a *conseiller d'état en service ordinaire* in 1838. In 1835, he had published a *Mémoire à consulter sur quelques unes des principales questions que la Révolution de juillet*

à fait naître. In 1840 was published a study he had undertaken of the English railways with reference to railway construction in France: *Esprit et méthodes comparés de l'Angleterre et de la France dans les entreprises de travaux publics et en particulier de chemins de fer; conséquences pratiques tirées pour notre pays de ce rapprochement*.

Dunoyer was appointed *administrateur général* at the Bibliothèque Nationale (Bibliothèque royale, February–June, 1839) by the minister of public instruction in the Molé cabinet, the comte de Salvandy, who had been an associate of Decazes in 1819–1820. However, this was a period of cabinet crises due to the increasing conservatism of the government, which may have contributed to Dunoyer's retirement from active administration. Dunoyer's appointment to any position of ideological importance such as the Bibliothèque Nationale occasioned strong opposition from the conservatives; the mounting protests of his conservative subordinates forced Dunoyer to resign his office of *administrateur général* after a few months. He did publish *La bibliothèque du roi* (Paris, 1839). Thereafter, he returned to his analyses of the free market, and concentrated on social and economic theory. From the reestablishment of the Academy of Moral and Political Sciences Dunoyer was an active member, and in 1842 he was instrumental in the founding of the Société d'économie politique. He contributed to its *Journal des économistes*, as well as to the *Journal des débats*. In 1845 he published a completely revised and enlarged edition of his earlier major studies under the title: *De la liberté du travail, ou simple exposé des conditions dans lesquelles les forces humaines s'exercent avec le plus puissance*.

The Revolution of 1848 was a grave disappointment to Dunoyer. He strongly denounced the policies of Lamartine and published *La révolution du février, 1848* (Paris, 1849). But, he continued to sit on the *conseil d'état*, and took satisfaction from the free trade campaign that Frederic Bastiat conducted from his seat on the Left of the chamber of deputies. Bastiat in 1825 had written that he had studied only four works on economics: Smith, Say, Destutt de Tracy and the

Censeur. The coup d'état of December 2, 1851 caused Dunoyer to resign his position on the *conseil d'état* in protest. He continued to write for the *Journal des économistes* and to participate actively in the sessions of the *Académie des sciences morales et politiques*. There he engaged in debates, such as against Victor Cousin on the role of social economy and morals, in 1852.^[88] Finally, he wrote a two-volume work, *Le second empire et une nouvelle restauration* (London, 1864 and 1871) which was published posthumously by his son, Anatole, who was professor of political economy at Berne during the second empire, and who returned to France in 1873 to become a master of requests of the *conseil d'état*. Charles Dunoyer had died on December 4, 1862.

NOTES

1. The *Décade* was suspended in 1807.
2. Joanna Kitchin, *La Décade (1794-1807), Un Journal "Philosophique"* (Paris: Lettres Modernes, 1965) pp. 3-10, 179-184, 200. The success of the *école centrale* of the department of Lot, from the Ideologue point of view, was noted in an article on education in *La Décade* (October 22, 1801, p. 161) by one of its co-editors, Pierre-Louis Ginguené. Charles Hunter Van Duzer, *Contribution of the Ideologues to French Revolutionary Thought* (Baltimore: The Johns Hopkins Press, 1935) pp. 141-142.
3. Kitchin, *La Décade*, pp. 110-136, 198; Georges Gurvitch, *Industrialisation et Technocratie* (Paris: Librairie Armand Colin, 1949), p. 10; Gurvitch, *L'Idee du Droit Social, Notion et Système du Droit Social, Histoire de doctrine depuis le XVII^e siècle jusqu'à la fin du XIX^e siècle* (Paris: Librairie du Recueil, Sirey, 1931) pp. 236-260, 272.
4. Ernest Teilhac, *L'Oeuvre économique de Jean-Baptiste Say* (Paris: Librairie Felix Alcan, 1927), pp. 176, 164. Lester G. Crocker, *Nature and Culture, Ethical Thought in the French Enlightenment* (Baltimore: The Johns Hopkins Press, 1963), pp. 47, 444-448, 482-495, and 219-325 ("The Utilitarian Synthesis"); Crocker, *Rousseau's Social Contract: An Interpretative Essay* (Cleveland: Press of Case Western Reserve University, 1968), *passim*; Guy H. Dodge, "Introduction", *Jean-Jacques Rousseau: Authoritarian or Libertarian?* (Lexington, Mass.: D. C. Heath, 1971), pp. vii-xvii; Th. Ferneuil, "Socialisme et Individualisme", *Revue d'économie politique* (1889), III, 51; R. Fargher, "The Retreat from Voltairism, 1800-1815", *The French Mind, Studies in honour of Gustave Rudler* (Oxford: Clarendon Press, 1952), pp. 220-237; Mario Einaudi, *The Physiocratic Doctrine of Judicial Control* (Cambridge: Harvard University Press, 1938), *passim*.
5. Durnad Echeverria, *Mirage in the West, A history of the French Image of American Society to 1815* (Princeton, New Jersey: Princeton University Press, 1957), pp. 275, 216, 222-224, 232; Kitchin, *La Décade*, pp. 194-195.
6. Teilhac, *Say*, p. 176; *Say, Traité d'économie politique* (Paris, 1803), I, 393.
7. Teilhac, *Say*, pp. 176-177, 193, 68, 79.
8. *Ibid.*, 231-233.
9. *Ibid.*, 228.
10. Kitchin, *La Décade*, pp. 197-198, 146.
11. *Ibid.*, pp. 197, 145-146.
12. Teilhac, *Say*, pp. 112-120.
13. *Ibid.*, pp. 102, 137.
14. *Ibid.*, pp. 241, 243-244.
15. *Ibid.*, pp. 24-26; Charles Comte, "Notice historique sur la vie et les ouvrages de J.-B. Say", *Mélanges.... de J.-B. Say* (Paris: Chamerot, 1833), p. xi.
16. Teilhac, *Say*, p. 220.
17. Charles Almeras, *Odilon Barrot* (Paris: Éditions Xavier Mappus, 1950), pp. 22-24.
18. *Le Censeur*, volume I; the advertisement is bound at the beginning of the first volume.
19. Pierre Reboul, *Le Mythe Anglais dans la littérature française sous la Restauration* (Lille: Bibliothèque Universitaire, 1962), p. 377.
20. *Ibid.*, pp. 101, 14-20, 60-65, 77-102.
21. *Ibid.*, p. 115.
22. *Ibid.*, pp. 320-321.
23. *Ibid.*, p. 320.
24. *Ibid.*, p. 38; it is likely that Comte became acquainted with Bentham's works through the French translations by the Genevan, Pierre Etienne Dumont, who acted as Bentham's literary secretary. Dumont had made Bentham known to French-speaking readers by the translation and publication of the strictly laissez-faire *Manual of Political Economy* in the *Bibliothèque britannique* (Geneva, 1797-1798). Published in French through Dumont's editing were Bentham's *Traité de législation civile et penale* (1802) and *Théorie des peines et des récompenses* (1811), published in English only in 1825.
25. Eugène Hatin, *Histoire politique et littéraire de la presse en France. La presse moderne, 1789-1860. La presse sous la Restauration* (Genève: Slatkine Reprints, 1967, Paris, 1859-1861), VIII, 82-86.
26. *Ibid.*, pp. 41-46, 49-52, 71-75.
27. Benjamin Constant, *Mélanges* (Paris, 1829).
28. Hatin, *La Presse*, p. 127.
29. *Ibid.*, p. 127.
30. *Ibid.*, p. 281.
31. Éphraïm Harpaz, "Sur un Ecrit de Jeunesse d'Augustine Thierry", *Revue d'histoire littéraire de la France*, LIX, No. 3, p. 344. Also see *Des Journalistes et des journaux* (Paris, 1817), quoted in Hatin, *La Presse*, pp. 211-213.
32. *Ibid.*, pp. 287-289. Perhaps as a result of his prosecutions, Dunoyer became increasingly active in behind-the-scenes radical political activity such as the election campaign for deputy by Lafayette in the fall of 1818: "The successful candidate arrived in Paris at the beginning of November, 1818, accompanied by his friends Dunoyer and Victor de Broglie." Maurice de la Fuye and Emile Bameau, "The Phase of Abortive Conspiracies", *The Apostle of Liberty, a Life of La Fayette* (London: Thames & Hudson, 1956), pp. 243-245.
33. Hatin, *La Presse*, pp. 307-313; Alan B. Spitzer, *Old Hatreds and Young Hopes, The French Carbonari against the Bourbon Restoration* (Cambridge, Mass., Harvard University Press, 1971), pp. 33-35, 38, 212-

- 215, 242.
34. Teilhac, *Say*, p. 50.
 35. *Ibid.*, pp. 49–50.
 36. Spitzer, *Old Hatreds*, p. 203–204.
 37. *Ibid.*, pp. 37–50; members of a committee indicted before the *Cours d'Assises*, on June 29, 1820, included Lafayette, Comte, and Barrot. Lafayette and others were acquitted; but Comte was judged guilty and was condemned to five years in exile. Barrot visited Comte in exile both in Switzerland and England. Almeras, *Barrot*, pp. 23, 38.
 38. Spitzer, *Old Hatreds*, p. 205.
 39. Auguste Comte commented on Charles Comte's arrival in Paris: "Comte of the *Censeur* has returned a little while ago to Paris, where he will establish himself permanently. He has returned from his exile more prejudiced than ever in the bastard direction of political economy. He will undertake soon a book totally of the order of the day, to prove that all the theories which are not immediately applicable to industrial practice ought to be quickly abandoned and scorned. Here is a rational man to cause fear! It is he who had written in his time that if astronomy was truly useful, individuals would know well how to pay for it and hence that it is necessary to suppress the Observatory". This was written on November 24, 1825. Henri Gouhier, *La Jeunesse d'Auguste Comte et la formation du positivisme*; tome III, *Auguste Comte et Saint-Simon* (Paris: Librairie Philosophique J. Vrin, 1941), pp. 330–331.
 40. Harpaz, "Jeunesse d'Augustin Thierry", p. 349; Almeras, *Barrot*, p. 98. On November 6, 1830 Comte Charles de Lameth denounced abuses of freedom of the press; Comte, *procureur du roi*, on November 9 asked Lameth to make known such works to the courts as were open to any citizen. Lameth claimed that Comte was seeking judicial control over legislative statements. The chamber named a committee headed by Antoine Vatimesnil, who as a prosecutor during the Restoration had never supported parliamentary privileges, but had been a major force in the prosecution of Dunoyer and Comte. While declaring that Comte's action had threatened the rights of the chamber and approving Lameth's refusal to accept Comte's request, Comte was excused on the basis of the circumstances and the declarations he had made. In opposition to the committee's conclusions, Benjamin Constant made his last speech in the chamber on November 19, 1830. Constant held that Comte had the right to request Lameth to submit any facts; Lameth had the right to refuse according to his conscience; and the chamber had not any right to judge Comte because it was not a power of the legislature. Benjamin Constant, *Écrits et discours politiques*, commentary by O. Pozzo di Borgo (Paris: Chez Jean-Jacques Pauvert, 1964), II, 160–169.
 41. Hatin, *La Presse*, pp. 290–291.
 42. Almeras, *Barrot*, pp. 37–38.
 43. G. de Bertier de Sauvigny, "Preface", in Éphraïm Harpaz, *L'École Libérale sous la Restauration, Travaux à l'Ethico-Politique* (Genève: Librairie Droz, 1968), XVI, ix; M. Girard, "Les Libéraux des Gauche ou Independents de 1814 à 1824", *Le Libéralisme en France de 1814 à 1848: Doctrine et mouvement* (Paris: Centre de Documentation Universitaire, 1966), I, 148–168; II, 151–158.
 44. Albert Schatz, "Ch. Dunoyer et la Définition de la Liberté", *L'Individualisme économique et social* (Paris: Librairie Armand Colin, 1907), pp. 196–215; Gaston Richard, "Le philosophie et L'individualisme économique: l'école positiviste. Ses Origines", *La question sociale et le mouvement philosophique au XIX^e siècle* (Paris: Librairie Armand Colin, 1914), pp. 97–119; René Gonnard, "L'Industrialisme: J.-B. Say", and "Dunoyer", *Histoire des Doctrines Économiques* (Paris: Nouvelle Librairie Nationale, 1922), II, 252–264, 278–283.
 45. Fr. Picavet, *Les Ideologues* (Paris: Félix Alcan, 1891), pp. 334–409, 419–422, 479–489.
 46. Roger Henry Soltau, *French Political Thought in the 19th Century* (New York: Russell & Russell, 1959), p. 130; Guido de Ruggiero, *The History of European Liberalism* (trans. R. G. Collingwood) (Boston: Beacon Press, 1959), p. 187; on Dunoyer and *Censeur*, *ibid.*, pp. 172–173, 453.
 47. Schatz, *L'Individualisme*, pp. 210–211.
 48. Henri Michel, *L'Ideé de l'État, Essai critique sur l'histoire des théories sociales et politiques depuis la révolution* (Paris: Hachette, 1895), p. 345.
 49. Gouhier, *La Jeunesse*, pp. 408–409.
 50. Soltau, "The Authority of Science, I. Auguste Comte", *French Political Thought*, pp. 203–215.
 51. Fernand Rude, *Stendhal et La Pensée sociale de Son Temps* (Paris: Plon, 1967), pp. 101–180.
 52. *Ibid.*, pp. 105–109, 113–114.
 53. Charles-Barthélemy Dunoyer, *L'Industrie et La Morale* (Paris: Sautetlet, 1825), pp. 336–367. Cf. Odilon Barrot, *De la centralization et des ses Effets* (Paris: Dumineray, 1861).
 54. Rude, *Stendhal*, p. 113.
 55. Rude, "Les 'Apprentissages' de Stendhal, 2. L'économie politique", *ibid.*, pp. 57–98.
 56. Rude, "Les 'Apprentissages' de Stendhal, 1. L'Idéologie", *ibid.*, pp. 17–56.
 57. Emanuel Chill, "Introductory Essay", *Power, Property, and History, Barnave's Introduction to the French Revolution and Other Writings* (New York: Harper & Row, 1971), p. 70.
 58. Rude, *Stendhal*, p. 235; Fernand Rude, ed., *Barnave: Introduction à la Révolution Française* (Paris: Librairie Armand Colin, 1960).
 59. Rude, *Stendhal*, p. 40.
 60. Rude, *Stendhal*, pp. 131–137.
 61. *Ibid.*, pp. 115–124; Georges Weill, *L'École Saint-Simonienne* (Paris, 1899), pp. 9–10.
 62. Rude, *Stendhal*, pp. 97, 101, 124–127.
 63. *Ibid.*, p. 133.
 64. *Ibid.*, pp. 141–149, 153–155.
 65. *Ibid.*, pp. 148–152, 291.
 66. *Ibid.*, pp. 115, 155–164.
 67. *Revue encyclopédique*, pp. 190–191.
 68. *Ibid.*, pp. 192.
 69. *Ibid.*, pp. 194–198.
 70. Dunoyer, *L'Industrie et la morale*, pp. 430–431; J. B. Salaville, *L'Homme et la Société; ou nouvelle théorie de la nature humaine et de l'état social* (Paris: Carteret-Dentu, An VII, 1798), chapter XXXIV, pp. 355–372, 391–392; Rude, *Stendhal*, p. 114.
 71. J. L. Talmon, *Political Messianism, The Romantic Phase* (London: Secker & Warburg, 1960), pp. 35–124, esp., pp. 46 and 49–50; on 18th century advocates of the beneficial role of legislation, especially Rousseau, see Talmon, *The Origins of Totalitarian Democracy*

- (New York: Praeger, 1960), pp. 34–49.
72. Benjamin Constant, "De M. Dunoyer et de quelques-uns de ses ouvrages", in *De la Perfectibilité de l'Espèce humaine* (Lausanne: Éditions L'Age D'Homme, 1967), pp. 66–95; Benjamin Constant, *Mélanges de littérature et de politique* (Paris: Pichon et Didier, 1829), pp. 128–162.
 73. Pierre Deguise, "Introduction", Benjamin Constant, *De la Perfectibilité de l'Espèce humaine* (Lausanne: Éditions L'Age D'Homme, 1967), pp. 9–34.
 74. *Ibid.*, pp. 15–20.
 75. Constant, "De M. Dunoyer", *ibid.*, pp. 66–68, 90. Fourteen years before, Constant had published his *De L'Ésprit de Conquête*, in which he discussed the differences between the political freedom of the ancients and the individual freedom of the moderns. Constant repeated this in his brochure *De la liberté des Anciens comparée à celle des modernes* in 1819. Dunoyer's association in *L'Industrie et la morale*, pp. 93–94, of Constant with Rousseau and Chateaubriand as a critic of civilization and proponent of primitive levels of civilization, is highlighted by their diverse views of the meaning of the Greek struggle for independence from the Turks. For Constant, "it was in the barbarity of the Klephtes that Greece found a safeguard against the barbarity of the Turks", "De M. Dunoyer", *ibid.*, p. 75. The Klephtes were the Greek brigands, who from their refuge in the northern mountains, maintained the independence of Greek political movement and culture during the Turkish occupation, and who were active in the revolution. Dunoyer had been impressed that the Greeks were more industrious than the Turks, through their activity in commerce, crafts and especially seafaring, and thus, by the revolt of the Greek sailors who formed the vast majority of the Turks' navy, decisively shifted control in the Aegean to the Greek revolution. *L'Industrie et la morale*, pp. 101–102. Constant was also distressed by Dunoyer's emphasis that it was the fault of the people that they suffered the government's oppression; if people had a stronger sense of morality and self-interest they would not have experienced government's oppression or would long since have overthrown it. The *Revue encyclopédique* in January, 1825 had raised as a criticism of Dunoyer's lectures on *industrialisme* at the Athénée that industrial life makes ruling easier for the governors. Rude, *Stendhal*, p. 114. Constant disagreed with Dunoyer's view that governments were the reflection of the people's situation, and that governments will be overturned when the people achieve a sufficiently high state of development. Constant emphasized that governments were the result of conquest, of elements of the past, and of stagnation; and that the opposition between peoples and governments was the significant thing. Dunoyer's severity upon the people seemed to relieve the governments of criticism: "This new principle is necessary to examine: all which discredits peoples is avidly gathered by government, and against the intention of M. Dunoyer, the oppressive authorities will seize possession easily of that part of his system". "De M. Dunoyer", *ibid.*, p. 68.
 76. Dunoyer, "Historical notice on *industrialisme*", pp. 175–176.
 77. *Ibid.*, pp. 178–179.
 78. O. Pozzo di Borgo, in Constant, *Écrits*, I, 204–206. Constant's *Oeuvres Manuscrites de 1810* were acquired by the Bibliothèque nationale in 1961.
 79. Constant, *Mélanges*, pp. 387–415; Pierre Deguise, "Introduction", in Constant, *De la Perfectibilité*, pp. 11–14; O. Pozzo di Borgo, pp. 234–235; Picavet, *Les Idéologues, passim*; Kitchin, *La Décade*, pp. 127, 148–149. Dominique Bagge, *Les Idées politiques en France sous la Restauration* (Paris: Presses Universitaires de France, 1952), "Le courant de pensée Individualiste", pp. 25–92, especially p. 48.
 80. Burton R. Pollin, *Godwin Criticism: A Synoptic Bibliography* (Toronto: University of Toronto Press, 1967), pp. 54–55, numbers 360R–363R, including *La Décade* reviews of Godwin's *Fleetwood* and *St. Leon*, and p. 656, for editions of *Political Justice* (London, 1793, 1796, 1798; Dublin, 1793, 1796; Philadelphia, 1796; and Wurzburg, 1803); Pollin, "Godwin's 'Letters of Verax'", *Journal of the History of Ideas*, XXV, 1964, pp. 260–270.
 81. O. Pozzo di Borgo, I. 121–133, 234–235, 239–241; Pollin, *Godwin Criticism*, pp. 104–105, 199; Pollin, *Education and Enlightenment in the Works of William Godwin* (New York: Las Americas, 1962), pp. 1, 17–18. Harold Nicolson, *Benjamin Constant* (Garden City, New York: Doubleday & Co., 1949), pp. 285–289. The influence of Godwin on Constant has been noted by: Elizabeth W. Schermerhorn, *Benjamin Constant* (2nd printing, New York: Haskell House, 1970), pp. 179, 188; Georges de Lauris, *Benjamin Constant et les idées libérales* (Paris: Arthur Rousseau, 1903), p. 22. Charlotte T. Muret, *French Royalist Doctrines since the Revolution* (New York: Columbia University Press, 1933), p. 72, notes only the parallels between Godwin and Constant's individualist anarchism.
 82. Crocker, *Nature and Culture*, pp. 453; Pollin, *Education and Enlightenment*, pp. 4, 62–64, 95–98; C. F. Volney, *The Ruins* (Exeter: Joseph Mann, 1823), pp. 38–39, 93–104.
 83. Cf. above p. 5 for the Physiocrats' and Say's view of the golden age being in the future, and p. 31 for Dunoyer's extreme decentralism; Pollin, *Education and Enlightenment*, pp. 76–78, 83–89.
 84. Schatz, *L'Individualisme*, p. 197.
 85. *Ibid.*, pp. 490, 500.
 86. *Ibid.*, pp. 472–576.
 87. *Ibid.*, pp. 488–489. Dunoyer through de Molinari had an influence on American individualist anarchists; Schatz notes that Benjamin R. Tucker used some of their concepts. *Ibid.*, p. 514.
 88. Charles Turgeon, "Des prétendues richesses immatérielles", *Revue d'économie politique* (1889) III, pp. 230–231, and Turgeon, "La conception matérialiste de l'histoire d'après Marx et Engels", *ibid.*, (1911), XXV, pp. 307–310.

CLASSICAL LIBERAL EXPLOITATION THEORY: A COMMENT ON PROFESSOR LIGGIO'S PAPER*

RALPH RAICO

Department of History, State University College, Buffalo, N. Y.

In the popular academic mind, the doctrine of class-conflict seems to be inextricably linked to the particular Marxist version of the idea. Lip-service is often paid — especially by those eager to diminish the claims to originality of Marx and Engels — to the fact that these writers had precursors in this approach to social reality. Frequently a certain “French school,” preceding Marx and Engels and influencing their views, is alluded to, and the names Guizot, Thierry, Saint-Simon and a few others are sometimes mentioned in this connection. But what that earlier perspective consisted in, and how it might differ from the more familiar Marxist model, is rarely if ever broached. And yet this earlier view is not only more correct and faithful to socio-economic reality than the Marxist version (a point which must be assumed here, since there is no space to demonstrate it) but may well account for a discrepancy and contradiction within Marxism which has been noticed and commented upon but never explained.

When Marx says that the *bourgeoisie* is the main exploiting and parasitic class in modern society, “*bourgeoisie*” may be understood in two different ways. In England and the United States, it has tended to suggest the class of capitalists and entrepreneurs who make their living by buying and selling on the (more or less) free market. The mechanism of *this* exploitation would involve the classical Marxist conceptual apparatus of the labor theory of value, the appropriation of surplus value by the employer, and so on. On the Continent, however, the term “*bourgeoisie*” has no such necessary connection with the market: it can just as easily mean the class of “civil servants” and *rentiers* off the public debt as the class of businessmen involved in the process of social

production.^[1] That these former classes and their allies are engaged in the systematic exploitation of society was a commonplace of 19th century social thought, somehow mysteriously lost sight of as these same classes have risen to greater prominence in the English-speaking nations. Tocqueville, for instance, in his *Recollections*, states of “the middle-class,” which historians tell us came to power in 1830 under the “*bourgeois* monarchy” of Louis Philippe: “It entrenched itself in every vacant place, prodigiously augmented the number of places and accustomed itself to live almost as much upon the Treasury as upon its own industry.”^[2] Similar statements can be found in many later writers, such as Gustave Le Bon and Taine.

Now, the reader is invited to consider the following longish quotation (the description is of France in the third quarter of the 19th century):

This executive power, with its enormous bureaucracy and military organization, with its ingenious state machinery, embracing wide strata, with a host of officials numbering half a million, besides an army of another half million, this appalling parasitic body, which enmeshes the body of French society like a net and chokes all its pores, sprang up in the days of the absolute monarchy. The Legitimist monarchy and the July monarchy added nothing but a greater division of labor, growing in the same measure as the division of labor within bourgeois society created new groups of interests, and therefore new material for state administration. Every *common* interest was straightway severed from society, counterposed to it as a higher *general* interest, snatched from the activity of society's members themselves and made an object of government activity, from a bridge, a schoolhouse and the communal property of a village community to the railways, the national wealth and the national university of France.... All revolutions perfected this machine instead of smashing it. The parties that

* The original version of this paper was delivered at the Second Annual Libertarian Scholars' Conference, New York City, 26 October, 1974.

contended in turn for domination regarded the possession of this huge state edifice as the principal spoils of the victor...under the second Bonaparte [Napoleon III]...the state [seems] to have made itself completely independent. As against civil society, the state machine has consolidated its position...thoroughly.^[13]

This long quotation is from Marx's pamphlet, *The Eighteenth Brumaire of Louis Bonaparte*, dealing with Louis Napoleon's *coup d'état* of December, 1851. I think the contrast between the viewpoint presented here and the more customary Marxist view, of the state as a weapon to enforce extra-political, economic exploitation — of the state as merely "the executive committee of the ruling class" — is evident. And this statement by no means stands alone in the corpus of Marxism: in *The Civil War in France*, Marx touches on the same perspective, when he speaks, for instance, of the Paris Commune's aiming at restoring "to the social body all the forces hitherto absorbed by the State parasite feeding upon, and clogging the free movement of society."^[14] And Engels, in his 1891 preface to *The Civil War in France*, expresses himself in absolutely unambiguous terms:

Society had created its own organs to look after its common interests....But these organs, at whose head was the state power, had in the course of time, in pursuance of their own special interests, transformed themselves from the servants of society into the masters of society....Nowhere do "politicians" form a more separate and powerful section of the nation than precisely in North America (i.e. the United States). There, each of the two major parties which alternately succeed each other in power is itself in turn controlled by people who make a business of politics....It is in America that we see best how there takes place this process of the state power making itself independent in relation to society...we find two great gangs of political speculators, who alternately take possession of the state power and exploit it by the most corrupt means and for the most corrupt ends — the nation is powerless against these two great cartels of politicians who are ostensibly its servants, but in reality dominate and plunder it.^[15]

We may in passing take note of the beautiful irony of the fact that, unlike a libertarian analysis of the period of American history under discussion, Engels' analysis here completely ignores the massive use of state-power by segments of the capitalist class, and limits itself to the exploitative activities of those directly in control of the state apparatus. Why Engels should care to whitewash the capitalists

in this way, I really cannot say.

It seems, therefore, that there are two theories of the state (as well as, correspondingly, two theories of exploitation) within Marxism: there is the customarily discussed and very familiar one, of the state as the instrument of the ruling class (and the concomitant theory which locates exploitation within the production process); and there is the theory of the state which pits it against "society" and "nation" (two surprising and significant terms to find in this context in writers who were supremely conscious of the class divisions *within* society and the nation). Moreover, it would seem suggestive that it is the second theory that predominates in those writings of Marx which, because of their nuanced and sophisticated treatment of concrete and immediate political reality, many commentators have found to be the best expositions of the Marxist historical analysis.

Now, although it would be difficult to demonstrate, it appears highly probable that the second theory of the state (linking it with parasitism and exploitation), must surely have been influenced by the classical liberal writers. The view that exploitation of and parasitism upon society were attributes of the *non-market* classes, of the classes that stood outside of the production process, was a very widespread one in the early and middle 19th century. It is the basis of Saint-Simon's famous *Parable* (itself a residue from earlier liberal influences on that writer); it is the real meaning, it seems to me, of the celebrated typology of "military" vs "industrial" societies — a typology founded on the distinction between market and non-market forces. (This dichotomous typology was employed both by Auguste Comte and Herbert Spencer — often considered the founders of sociology — and in different terms, and earlier, by Benjamin Constant.^[16])

The degree to which one finds the concepts of classes and class-conflict used in this sense in 18th and 19th century liberalism, once one looks for it, is astonishing. To take two examples: this is clearly what Tom Paine is talking about in *The Rights of Man*, when he speaks of governments making war *in order to* increase expenditures; and what William Cobbett was getting at when

he terms gold the poor man's money, since inflation is a device utilized by certain knowledgeable and influential financial circles.

These concepts, in particular, permeate the writings of Richard Cobden and John Bright, who conceived of themselves as waging a struggle on behalf of the producing classes of Britain against the aristocracy which supported expensive government. Of the Anti-Corn Law agitation, Bright said: "I doubt that it can have any other character [than that of] . . . a war of classes. I believe this to be a movement of the commercial and industrial classes against the Lords and the great proprietors of the soil."¹⁷ The "tax-eating" vs the "tax-paying" class was a contrast which Bright especially was fond of using. Both men saw class-conflict everywhere in the Britain — and Ireland — of their time: in protectionism and monopolization of land, of course, but also in such policies as heavy taxes on newsprint, Church tithes and limitation of the franchise, and most particularly in expenditures for war-preparation and in a belligerent foreign policy and imperialism. As Bright put it:

The more you examine the matter the more you will come to the conclusion which I have arrived at, that this foreign policy, this regard for "the liberties of Europe," this care at one time for "the Protestant interests," this excessive love for the "balance of power," is neither more nor less than a gigantic system of out-door relief for the aristocracy of Great Britain.¹⁸

Later in the century, Bright identified other classes as the promoters of imperialism. In the case of the British occupation of Egypt in 1882, Bright (who resigned from the cabinet on account of it) believed that the City of London (i.e. financial interests) were at work, and, according to his biographer, "he did not think that we ought to involve ourselves in a series of wars to collect the debts of bondholders or find new lands for commercial exploitation."¹⁹ He agreed with his friend Goldwin Smith, the classical liberal historian and anti-imperialist, who wrote him that it was simply a "stock-jobbers' war."²⁰ This was long after Cobden had died, but the latter would doubtless have agreed. He once wrote: "We shall offer no excuses for so frequently resolving questions of state policy into matters of pecuniary calculation. *Nearly all the revolutions and great*

changes in the modern world have a financial origin."²¹ Reading passages such as these, one wonders how the contemporary social scientist — bereft of the libertarian theory of class-conflict — would have to interpret such views. The analysis would have to be that there are "unexpected Marxian elements" present even in the thought of leading liberals. Or, more probably, in view of the Manchesterites having looked askance at the influence of financial interest on government policy, there would be an analysis along the lines of "early petty-bourgeois proto-Fascism"!

In this connection we should consider the change-over of certain French liberals — such as Charles Dunoyer — from *Anglomania* to *Anglophobia*. This transformation, mentioned by Professor Liggio, is very interesting when counterposed to the Manchester school's perception of British society and British foreign policy and imperialism. Cobden and Bright were harping critics of the *status quo* in Britain and Ireland, constant naggers, especially of those who ran the foreign affairs of the country. (Bright has the great line: "What are we to say of a nation which lives under the perpetual delusion that it is about to be attacked?"²²)

Contemporary conservative *poseurs* would unquestionably agree with the founder of their breed, Benjamin Disraeli, that the men of Manchester were *simply not fun-people*. Rather, they were incessant complainers who found themselves unable just to sit back and enjoy the fantasies and tinsel-symbols of British world power (the ability to *enjoy* society as it is, a well-known American conservative publicist informs us, is a chief hallmark of the conservative mind). Cobden, Bright and their allies were on the contrary engaged in a deadly-serious, ongoing and deeply radical critique of British society and Britain's world-role. The following, for instance, is a typical example of Cobden's attitude toward that role:

The peace party...will never rouse the conscience of the people so long as they allow them to indulge the comforting delusion that they have been a peace-loving people. We have been the most combative and aggressive community that has existed since the days of the Roman dominion. Since the Revolution of 1688 we have expended more than 15 hundred millions of

money upon wars, not one of which has been upon our own shores, or in defense of our hearths and homes...^[13]

Cobden speaks of "our insatiable love of territorial aggrandizement," of the fact that "in the insolence of our might, and without waiting for the assaults of envious enemies, we have sallied forth in search of conquest or rapine, and carried bloodshed into every quarter of the globe."^[14] In a pamphlet with the really beautiful title, "How Wars Are Got Up in India," (as Paul Goodman said of Wilhelm Reich's *The Function of the Orgasm*, it is a classic even by virtue of its title alone), Cobden warns that England must make "timely atonement and reparation" and "put an end to the deeds of violence and injustice which have marked every step of our progress in India," or else face the inevitable providential "punishment for imperial crimes."^[15]

There would be those, one supposes, who would want to speak of a certain "masochism" and "self-flagellation" in these descriptions of the policies pursued by the ruling class of his own country; but that would be peculiarly out of place with such a vigorous and enormously vital personality as Richard Cobden.

(There is, incidentally, a direct line of analysis of the evils and the class-character of imperialism, running from Cobden and Bright through J. A. Hobson — who wrote an interesting exposition of Cobden's foreign policy views, *Richard Cobden: International Man* — to Lenin, who, as is well known, was heavily influenced by Hobson; and this genealogy of ideas certainly merits being closely examined by some libertarian scholar.)

Now, Hayek says somewhere that a writer's attitude towards England can be taken as highly indicative of his liberalism: if he was pro-English, it's likely that he was friendly to liberalism and the open society; if anti-English, then the reverse. But in light of the "anti-English" attitude of the Manchesterites, one would have to qualify this in an important respect: i.e. there would be a basis for "Anglophobia," grounded, not in opposition to the relative liberalism of England, but to its persisting aristocratic and imperialistic government throughout the 19th century.

Thus, I think that Professor Liggio has

performed a very valuable service in directing attention to a formative place and period of the classical liberal exploitation-theory: France during the Restoration and the July Monarchy, and particularly to the thought of Charles Comte and Dunoyer. (Of Charles Comte, a writer as knowledgeable in the history of sociology as Stanislaw Andreski has said that he is "one of the great founders of sociology, unjustly overshadowed by his namesake Auguste."^[16]) The period was one of great richness of political and sociological speculation, well reflected in the paper we have just heard. The three great currents of modern political thought — the primary colors from which virtually every political position thereafter may be composed — are already clearly delineated: conservatism and the various schools of socialism, with their frequently overlapping critiques of the emerging capitalist order, and individualist liberalism, equidistant from both of the first two. (The influence of theocratic conservatives like de Maistre on the thinking of Saint-Simon, and of the Saint-Simonians and Auguste Comte, is well known.) A number of Professor Liggio's points regarding the interconnections among these three currents are very illuminating and stimulating: in regard, for instance, to the *inner, political meaning* of Say's Law of Markets, and the significance of the facts that the Saint-Simonian "pope," Enfantin, supported Ricardo as against Say on this subject; or Dunoyer's attack on Saint-Simon's intellectual authoritarianism on grounds that are usually associated with Mill's *On Liberty*, which, of course, came substantially later. A few remarks are in order concerning another topic, viz., Dunoyer's argument with Benjamin Constant on the "enervating" effects of a developing and increasingly sophisticated civilization.

What is involved here in Constant's thought is a confrontation among the ideas of liberalism, romanticism and utilitarianism. Briefly, Constant's view (not exclusively, but most of the time) is this: the predominance of the commercial or industrial spirit over the military spirit or the spirit of conquest implies a relatively prosperous state of society, that is to say, a state where pleasure and creature

comforts will be augmented and more widely distributed than ever before. In fact, this is presumably the utilitarian ideal. Now, such a state will in the long run tend to militate against the free society, because the defense of freedom will frequently require sacrifices on the part of the individual, sometimes even the risk of losing one's life against an armed tyrant. But the willingness to sacrifice one's pleasures or to risk one's life for a super-individual cause is a trait associated with earlier and more primitive forms of society. Thus, there is a certain inner contradiction in the free society, which can only be compensated for by bringing into play anti-utilitarian forces, such as religious faith (this was practically a lifelong study of Constant's).^[17]

Constant's "critique" of civilization also has a non-political aspect: he tended to identify civilization with sophisticated intellectuality, with the spirit of the 18th century and the Enlightenment. This was the milieu in which he was reared, and like many intellectuals, especially those touched by Rousseau's romanticism, he was sick of it, and sick of the part of himself that reflected that spirit. It had the effect, he thought, of excluding spontaneous feelings, real warmth of affection and human closeness, substituting a shallow brilliance and perfection of outward, artificial social graces. Heroism and poetry were annihilated by Voltairian irony and skepticism, he believed, and were more likely to be found in earlier and more primitive societies — he was a great lover of ancient Greece — than in more complex ones. Tocqueville, incidentally, built on both of these notions of Constant's — the problem of the compatibility of utilitarianism and the free society, and the mediocrity of modern life — and helped to spread them.^[18] The second idea, particularly, has become very widely shared; it is, for example, the kernel of Max Weber's concept of the increasing routinization and bureaucratization of the modern world; and Irving Kristol seems to be making a reputation for himself by bringing a few of Constant's and Tocqueville's ideas somewhat up to date and presenting them to those who have never read

Democracy in America.

Lastly, Professor Liggio performs a great scholarly service by continuing to mine the rich vein of classical liberal social theory, in so many respects so disgracefully neglected by Establishment academics. Ourselves having witnessed the shabby treatment meted out to the great Mises — based on the almost universal assumption that a Galbraith, a Harold Laski or even a Walter Lippmann were more significant social philosophers — we have some idea why the Establishment should act as if Saint-Simon or Auguste Comte had infinitely more to tell us about how society works than did Charles Comte, Benjamin Constant or Jean-Baptiste Say. The kind of work represented by Professor Liggio's paper will help redress the balance.

NOTES

1. Cf. Raymond Ruyer, *Eloge de la société de consommation* (Paris: Calmann-Lévy, 1969), pp. 144–145.
2. Alexis de Tocqueville, *Recollections*, trans. Alexander Teixeira de Mattos (New York: Meridian, 1959), pp. 2–3.
3. Karl Marx and Frederick Engels, *Selected Works* (Moscow: Progress, 1968), pp. 170–171.
4. *Ibid.*, p. 293. He adds: "The [Paris] Commune [of 1871] made that catchword of bourgeois revolutions, cheap government, a reality, by destroying the two greatest sources of expenditure — the standing army and State functionarism."
5. *Ibid.*, p. 261.
6. Cf. his *De l'esprit de conquête et de l'usurpation*, in *Oeuvres*, ed. Alfred Roulin (Paris: Pléiade, 1957).
7. George Macaulay Trevelyan, *The Life of John Bright* (London: Constable, 1913), p. 141.
8. "Speech at Birmingham, 29 October 1858," in Alan Bullock and Maurice Shock, eds., *The Liberal Tradition. From Fox to Keynes* (Oxford: Oxford University Press, 1967), pp. 88–89.
9. Trevelyan, *op. cit.*, pp. 433–434.
10. *Ibid.*, p. 434.
11. *The Political Writings of Richard Cobden* (New York: Garland, 1973) I, p. 238.
12. *Loc. cit.*, p. 89.
13. *Op. cit.*, II, p. 376.
14. *Ibid.*, p. 455.
15. *Ibid.*, p. 458.
16. Stanislaw Andreski, *Parasitism and Subversion: The Case of Latin America* (New York: Schocken, 1969), pp. 12–13.
17. Cf. Ralph Raico, *The Place of Religion in the Liberal Philosophy of Constant, Tocqueville and Lord Acton* (Unpublished Ph.D. thesis, Committee on Social Thought, University of Chicago), pp. 1–68.
18. *Ibid.*, pp. 69–128, 178–183.

SOCIAL CONTRACT: A CRITIQUE*

WILLIAMSON M. EVERS

Department of Political Science, Stanford University

I. SOCRATES IN THE CRITO

In the *Crito*, Plato's dialogue on the death of Socrates, Socrates makes an argument about political obligation to justify his acceptance of the death penalty imposed on him by the Athenian mass jury.

Socrates' fundamental argument, which he puts in the mouth of the personified Laws in the *Crito*'s dialogue-within-the-dialogue, is that the government is "more to be valued and higher and holier far than mother or father or any ancestor, and more to be regarded in the eyes of the gods and of men of understanding, also to be soothed, and gently and reverently entreated when angry, even more than a father, and either to be persuaded, or if not persuaded, to be obeyed".^[1]

To restate this, Socrates is simply maintaining that political society is valuable to people, a contention which he supplements by saying that political society could not function without civil obedience to the orders contained in the laws or in commands issued by officials.

Socrates does not specify what conditions must be present to make a regime worthy of obedience. Socrates does point to examples of the educative value of the Athenian regime, whose laws he says made possible his birth, training, and moral education.^[2]

Socrates conflates rule of law and the institution of government. It is clear that rules delineating rights and obligations are necessary to societal life. But such rules may be accepted as a matter of custom, habit or rational insight. They do not have to be political in the narrow sense of being authorized and imposed by a government.^[3]

* The original version of this paper was delivered at the Fourth Annual Libertarian Scholars Conference, October, 1976, in New York City.

While Athens may have had a rather uniform mode of governmental supervision of the raising and education of children, other societies have been more permissive or pluralistic. Modern Western liberal societies have largely left early childhood to the privacy of the family and have allowed some nongovernmental education.

A society is certainly conceivable in which there was no governmental intervention in family life or education and in which the sole function of law enforcement was the upholding of universal rights.^[4]

Socrates relies fundamentally on the conduciveness of the Athenian regime to the good life. He supports this account of the regime by noting benefits received from the state by citizens, the regime's openness to reasoned participation by citizens in political decision-making, and the possibility of free emigration.

Neither benefits nor openness to participation can be enough to obligate one to a regime. Just because someone gives you a gift does not make you obliged to follow his instructions in all things. As Richard Flathman says:

If past benefits constituted a sufficient condition of obligation any citizen who had received benefits from, say, the Nazi regime would have an obligation to obey the commands of that regime.^[5]

Mere participation is not enough for obligation. If a burglar lets you argue with him while he is relieving you of your valuables, it does not place you under an obligation to him.^[6]

Socrates' argument seems to be that reasoned argument about the laws (as opposed to mere participation) is the best way to bring the laws into accord with justice. But this does not seem to be a compelling justification for general obedience. It is the link with justice that is decisive. Just laws deserve to be obeyed. But

reasoned discourse by professional jurists and other interested persons can take place outside the state apparatus. Just as rules of social conduct can arise and be accepted outside the governmental process, so consideration of the proper content of those rules can take place outside the governmental process.

The possibility of free emigration is most important for our purposes here. Socrates' continued residence in Athens in the face of an opportunity to emigrate is said to set up a social contract between him and the Laws. Undertakings giving rise to obligations can be established by actions, as well as by formal written or spoken contract, according to the personified Laws who speak in the dialogue-within-the-dialogue.^[7] By the act of remaining in Athens, Socrates is said to have "entered into an implied contract that he will do as (the Laws) command him".^[8]

The contract argument set forth in the case of refusal to emigrate proves too much and embraces too much. In this sense it is like the benefits argument. It can be maintained that anyone living under the control of a regime receives something that the regime might call benefits. Ultimately, thus, the benefits argument reduces to the claim that all under the control of state should obey the state.^[9] One thing that makes the benefits argument slightly more plausible than the refusal to emigrate doctrine is that one perhaps can reject the benefits and thus shuck off the obligation, but there is no way to stay put, refuse to emigrate, and yet dissolve the bonds of obligation.

Socrates does not find either the benefits or the social contract arguments to be ultimately decisive. In the *Apology*, we have three indications of this: Socrates once refused to go along with the trial of Athenian naval officers who had neglected to rescue Athenians captured in battle.^[10] This trial was later widely recognized as unconstitutional. In another case, Socrates disobeyed the command of the Thirty Tyrants to arrest another citizen so that citizen could be executed.^[11] Most importantly, Socrates considers the possibility that the Athenian jury might acquit him if he were to agree to stop practicing philosophy. He says that he would never obey a command to stop

practicing philosophy.^[12] These three examples show that other considerations could override any obligation apparently arising from benefits conferred or from a social contract to which there could be said to have been tacit agreement. In fact, Socrates' doctrine on contract and social contract is very carefully hedged about with requirements that contracts be in accord with justice. Socrates asks Crito "Ought one to fulfill one's agreements, provided they are right, or break them?"^[13] So for Socrates, it is ultimately justice, and not contracts, which is paramount.

In stating his fundamental position that the Athenian government is valuable and hence ought to be obeyed, Socrates falls into a role-governed, or status-governed, argument about political obligation. He contends that a citizen has a role in his native state just as a child has a role in family life, and with such roles go duties. If the parents (or the Laws) have fulfilled their roles properly, the fact that they have a just claim over the children (or citizens) is a one-way, not a two-way, street. The duty to obey the state is like that owed by a child to a parent. The parents' duty (like the state's) is to nurture its subjects, not to obey them.^[14]

In summary, we can say that Socrates' social contract, based on a refusal to emigrate, relies heavily on the tacit contract approach criticized above. It also contains a notion of contracts in which alienation of the will is legitimate.

The more justice-oriented, status-governed approach in the analogy to parent-child relations is subject to all the difficulties inherent in a modern justification of status-based obligation. In any case, Socrates' analogy breaks down. In a family, obedience to parents can be a legitimate, voluntarily accepted condition of parental supply of room and board to a child. Once such benefits are refused by the child, the obligation conditionally attached to them by the parents goes at the same time. In contrast, the obligation to obey the state described by Socrates is something imposed, not something that comes as a condition attached to a gift.

The alternative, that one should obey because the regime is just, is difficult to link to all acts of the regime. Socrates himself disobeyed

under certain circumstances and considered disobedience a valid option under other hypothetical circumstances. The traditional claim that by breaking a single unjust law one overthrows all rule of law is either nonsense or a notion that relies heavily on an implausible analogy between lawbreaking and contagious diseases — a metaphor that manifestly denies the free will and rational potential of human beings.^[15]

II. HOBBS

Part of the historical setting of Hobbes' version of social contract doctrine is the decline of scholastic philosophical thought. With the rise of experimental science and of the University of Padua's resolute-compositive approach came a questioning of the classical Aristotelian-Thomist account of the natures of entities.^[16] Some of this questioning of classical metaphysics had implications for classical political thought.

While in the *Crito* undertaking a social contract was supplemental to and confirmatory of the obligation that according to Socrates was owed to good regimes, in later political thought the social contract became the primary source of obligation. Patrick Riley provides a suggestive sketch of the way in which this came about:

What is probable is that the ancient quasi-aesthetic theories of the best regime and the proper end of man gave way, with the introduction of Christianity, to thinking about politics after the model of "good acts": just as good acts required both knowledge of the good and the will to do good, politics now required moral assent, the implication of the individual in politics through his own volition. The freedom to conform voluntarily to absolute standards had always been important in Christian doctrine; the Reformation doubtless strengthened the element of individual choice in moral thinking, while downplaying the role of moral authority. And it was natural enough that the Protestant view of individual moral autonomy and responsibility should spill over from metaphysics into politics, forming the intellectual basis of contract theory. The mere excellence of a social institution would no longer be enough; it would now require rational assent.^[17]

The background to Hobbes' social contract doctrine then includes shifting attitudes toward the proper models in natural science and toward the importance of the will in moral philosophy. Hence Hobbes' theory of the instituting of government via social contract is heavily

reliant on his concepts of liberty, will, representation, and contract.

Hobbes lays great stress on clarity of definitions and consistent use of words. He says that men deceive themselves by "the inconstancy of the significance of their words".^[18]

Hobbes defines liberty as "the absence of external impediments" to human motion, energy, or power.^[19] Hobbes relates liberty to the will by stating that a free person has no hindrance, no impediment, no stop to what he has "the will, desire or inclination" to do.^[20]

This full-fledged bodily liberty is not the same as the liberty of subjects under a government. Subjects are bound by "artificial chains" called civil laws by which the subjects have fastened themselves to the commands of the sovereign.^[21]

When we encounter Hobbes' discussion of the will a problem arises. He seems to be the heir of the tradition that rests political legitimacy and moral obligation on the assent of a free will. On the other hand, he seems to be a proponent of a mechanistic picture of man and to reject free will in favor of determinism.

Hobbes calls the will "the last appetite" in the process of deliberation.^[22] This view of the will as appetite seems in accord with a view of human nature in which the will is not a morally relevant faculty but is merely a part of the human mechanism.

On the other hand, when Hobbes is discussing the transferring of rights to others or the abandonment of rights, he says that it is a person's *duty* not to make void his own voluntary act.^[23] In this view, the will is a morally relevant faculty and voluntary assent sets up an obligation. In fact, Hobbes calls will "the essence" of contracts.^[24]

For Hobbes, the social contract is a simultaneous agreement by all persons except the new sovereign to abandon full use of their powers and hence to permit the thus-created sovereign to make full use of his power without being hindered by his subjects.^[25] The sovereign is really a beneficiary rather than a party to the Hobbesian social contract.

Not only was this regime initiated by the voluntary act of the individual citizens, but it is, according to Hobbes, sustained by their will as

borne by their designated representative, the sovereign.

To understand how Hobbes could view a subject's will as having been transferred via authorization to the sovereign in cases of government instituted via social contract and how Hobbes could view the will of subjects as transferred to conquerors in cases of government instituted via conquest, we have to go back to Hobbes' notion of will as appetite. This appetite is something that is pushed around by "fear of violent death". The subject faced directly with death abandons his rights and powers to the sovereign who faces him either as social contractor or conqueror. This sovereign therefore bears the will of the subject, and Hobbes can call him the subject's representative.

It is worth noting that Hobbes takes the analogies which he uses to illustrate his concept of representation not as one might expect from attorney-client relations or from the law of agency but rather from the dramatic stage. He says that an actor is authorized by the author of a play to do what is done on the stage and hence bears in his person the will of the author.^[26] Similarly, the subjects authorize the sovereign to act for them.

In cases of conquest, kidnapping, or capture, Hobbes contends that contracts made under such conditions are entirely valid.^[27] This more than anything else demonstrates that the will has for Hobbes a peculiar moral status. In the writings of most moral philosophers for whom assent generates obligation, contracts entered into under duress are invalid. Not so for Hobbes.

Because he believes that self-preservation is an elemental force in human nature, Hobbes does not expect a physically chained captive not to try to escape. But he says a captive who is trusted by his master with bodily liberty and is not kept in chains owes it as a duty to obey his master in all things.^[28]

In some respects, there is little difference for Hobbes between government instituted by social contract and those instituted by conquest. He clearly states that the same sovereign can rule over different persons whose obligations have arisen some from contracts, some from conquest.^[29] Both sorts of governance are instituted via surrenders or abandonment of

rights because of fear of violent death. In fact, both sorts of obligations could be established via acquiescence rather than any express declaration of will for Hobbes allows the existence of tacit contracts to be inferred from silences, forbearances, and the consequences of actions.^[30]

Without Hobbes' peculiar ambiguousness as to whether the will is a moral faculty or part of a mechanical apparatus, without his notion of representation in which one person can transfer or surrender his will and rights to another, without Hobbes' stamp of legitimacy on contracts made under duress and without Hobbes' reliance on the always rather open-ended notion of tacit consent, Hobbes' political theory of political obligation cannot stand.

III. LOCKE

Locke, in contrast to Hobbes, is able at least by 1694, in his revisions of the *Essay Concerning Human Understanding*, to develop a concept of the will as a moral faculty. The human will, according to Locke, is governed by a person's judgment and understanding, as opposed to a Hobbesian pleasure-pain mechanism that is pushed around by external pressures.^[31]

Unlike Hobbes, Locke does not believe a person can, by consent or contract, enslave himself to someone else or place himself under the arbitrary power of another.^[32] But Locke does say that at the time persons leave the state of nature to unite via a social contract in forming political society, they "must be understood to give up all the power necessary to the ends for which they unite into society".^[33] Locke also believes that political obligation consists in authority which can be obtained by right of contract "when someone has voluntarily surrendered himself to another and submitted himself to another's will".^[34] Consent then forms for Locke the mark of distinguishing characteristic which separates a pirate (like the one Cicero describes as confronting Alexander the Great) from a legitimate ruler.^[35]

Again unlike Hobbes, Locke does not recognize the legitimacy of conquest or of contracts made under duress.^[36]

Like Hobbes, Locke does rely on tacit consent. For Locke, consent is signified by the receipt or

acceptance of benefits, whether this be travelling on the roads enjoying the government's protection or, more importantly, holding real estate under the government's protection. In fact, Locke makes the social contract for landholders a covenant which runs with the land so that the inheritor of a piece of real estate inherits the obligation to the government.^[37] Of Locke's tacit consent doctrine, Gough writes: "If consent could be watered down like this, it would lose all value as a guarantee of individual liberty, and the most outrageous tyrant could be said to govern with the consent of his subjects".^[38]

While Hobbes was in rebellion against the natural law tradition in political theory, Locke was a continuer and modifier of natural law. So while the social contract sets up an absolute sovereign in Hobbes' theory, in Locke the social contract brings together the citizens so that they can delegate enforcement of the natural law to a trustee for the sake of convenience.^[39] As Patrick Riley summarizes Locke's position:

Locke's view . . . was that even though God has "appointed" moral and political "ends" in the form of natural laws and rights, the "consent and contrivance" of men is necessary if those "ends" are to be *effective* on earth because men must voluntarily set up a "known and indifferent judge" who will require men to conform their conduct to God's appointed ends: "The law of nature would . . . be in vain, if there were nobody . . . (that) . . . had a power to execute that law". And the "power" which "executes" that law must be set up by consent and contract, since there is no natural political authority.^[40]

The questions still remain whether consent of the majority can substitute for the consent of all.

Hobbes sought only to justify the original instituting of a government. Locke, however, does not believe that ancestors can bind future generations^[41] and does not believe that members of a living generation can contractually enslave themselves. Therefore the legitimacy of the government depends not only on consent to its founding but also on consent to its ordinary on-going operations.

It seems as if Locke has given a plausible account of why all persons in some area might together appoint a policeman, who would be subject to continuing civilian review. But what if everyone does not concur? How can Locke

defend majority rule as a kind of consent?

His first argument draws on an analogy from physics. He says that it is necessary that a body move in the direction in which the greater force is applied. He then extends this out of physics to apply it to the body politic.^[42] However, on another occasion Locke had forcefully argued that the number of persons imposing a government on those who did not consent made no difference and added no moral weight.^[43]

A second argument Locke makes for majority rule is one based on expediency. He contends that obtaining unanimous consent is difficult and costly. At a minimum, sickness or the press of business will keep at least some citizens from participation in voting.^[44] If Locke wished to make this argument for the convenience of majority rule he should have argued directly for the rule of the many over the few, rather than stressing consent since *all* parties bound by a contract must consent to it.

A third argument that Locke makes begins with the desirability of a government as a common judge of disputes and the fact that some persons recognize this. Locke says that the actions of this group would be in vain if they were not able to include minorities under their control. Once again, however, this seems to be an argument about the convenience of majority rule and has no bearing on consent.

Of course, if primacy is given to majority rule, it will be at the expense of individual rights. John Stuart Mill properly identified the majoritarian peril to liberty when he noted that what is called self-government turns out in practice to be not "the government of each by himself", but rather rule by the most numerous or most active.^[45]

IV. ROUSSEAU

The principal problem of political theory for Rousseau is how to make the chains of society legitimate.

Rousseau considers invalid a contract by which one sells oneself into slavery. Since selling oneself into slavery deprives one of the opportunity to exercise one's free will, it deprives all one's actions of their moral character.^[46]

Rousseau wants to establish a relationship between citizens that will provide each with adequate protection backed by the community while preserving the free will and liberty of each. Rousseau's suggestion is the simultaneous alienation by each person of his rights to the absolutely sovereign community.^[47]

Rousseau argues that this subordination of each to all is not an instance of illegitimate self-enslavement. He advances two reasons. First, for Rousseau, the essence of slavery is personal dependence of one person on another. It is subjection to the arbitrary, despotic will of another individual. Rousseau, in fact, defines freedom as "that condition which by giving each citizen to his country, guarantees him from all personal dependence".^[48] Hence, the process of each giving himself to the community creates an impersonal sovereign.^[49]

In addition, Rousseau expects that the laws enacted via popular sovereignty will be general and impartial in form. A necessary condition for the development of a popular desire for generality in the applicability of the laws is the re-education of the populace.^[50]

Rousseau hopes that a charismatic law-giver on the model of Moses or Lycurgus will instill in the populace the civic virtue that was characteristic of ancient Sparta or the Roman Republic.^[51] Once the populace has been re-educated, the laws decided on by the sovereign people will reflect the common interests and values around which the people have been united by the prophetic Legislator. The assembly of people will be inspired by a will to generality in the laws.

Second, Rousseau contends that in a contract of self-enslavement, there is no mutuality. The slave loses all. The contract negates his interests and his rights. It is entirely to his disadvantage. Since the slave loses his status as a moral agent once the slave contract is enforced, the slave cannot act to enforce anything owed to him by his master.^[52]

On the other hand, Rousseau believes that since there is no member of the social group over whom we do not acquire precisely the same rights as those over ourselves which we have surrendered to him it follows that we gain the exact equivalent of what we lose, as well as an added power to conserve what we already have.^[53]

Rousseau's account leaves several questions unanswered. First of all, if ancient virtue is the mainstay of a good regime, why is consent necessary to its imposition? Since societies like Sparta were characterized by destruction and suppression of individual will and choice, it seems singularly inappropriate and unnecessary to require for the sake of legitimacy an act of will whereby one gives up being willful.

Second, there is the question of the extent to which law violators consent to have the law imposed on them. Hobbes says that since the sovereign bears the will of his subjects, the subjects do consent to law enforcement. Thus punishments are no injury since each subject authorizes the sovereign who imposes the penalty. In the case of decisions of the sovereign which imperil the life of the subject, the subject can either obey in order to preserve societal life, or, for the sake of his own self-preservation, return to a state of war *vis-à-vis* the sovereign.

The problem for Rousseau lies in the fact that the body politic is sovereign and thus is attacking itself by executing or punishing its own members. This problem does much to reveal the practically Hobbesian character of Rousseau's supposedly democratic state.

Rousseau's solution reveals the consequences of confining the function of the popular law-making assembly to the making of general rules. The sovereign people delegate to a supposedly subordinate commission of magistrates or rulers the administration of government on a day-to-day basis. It is this ruler or commission of rulers that asks the citizen to die for the sake of the state to which the citizen has surrendered all rights. The member of the sovereign populace must (like the citizen of Hobbes' state) submit to the supposedly subordinate ruler or be excised from the body politic through exile or death as a violator of the social contract.^[54]

Third, the day-to-day administrative government is subject to the iron law of oligarchy. It is a sociological law of organizational life that the few will govern the many. Rousseau himself says: "It is against the natural order that a large number should rule and a small number be ruled".^[55]

Thus, not only will the people eventually forget or lose sight of the importance of ancient virtue and a will to generality in law-making, but from the first there will be a tendency for the democratic elements in Rousseau's mixed regime to be subordinated to the oligarchic elements.

Fourth, this tendency to oligarchy is encouraged by Rousseau's reliance on tacit consent once political society has been instituted. Whereas Locke required continuing consent of the majority, Rousseau says that commands issued by the day-to-day rulers will properly appear the same as the general will of the populace as long as the people are silent and do not oppose the commands.^[56] He says that once the state is founded, residency implies consent to the regime. "To live in a country means to submit to its sovereignty."^[57] Here, as in previous thinkers' writings, the open-ended concept of tacit consent when it is reduced to brute facticity is the same as being under a government's control.

Finally, Rousseau's social contract does appear to be a contract of self-enslavement. On the one hand, personal rulers have reappeared in Rousseau's society as administrative magistrates, who can have the power of life and death over citizens. On the other hand, since the sovereignty of political society is unlimited and includes the right to impose capital punishment or send persons to their death in war, it is not clear that the social contract puts all in the same condition and in a more advantageous position than they enjoyed before the social contract. Even the inculcation of conscientiousness in striving for generality in the laws is an inadequate protection against abuse. For laws written in general language can easily be aimed at repressing specific individuals or minority groups.^[58]

V. RAND

Ayn Rand's social contract theory is in some respects more Hobbesian than Lockean. Locke believed that the content of the natural law was discoverable by man's reason. He further held that the natural law was directly obligatory for humans.^[59]

However, Rand speaks of the individual consenting to the natural-rights principle of non-aggression.^[60] For Rand the citizen must consent not merely to the law-enforcement agency (as in Locke), but also to the law of nature. Ordinarily in political theory, natural law is right for man whether or not men consent.

Rand appears to share Locke's fears that without a state monopoly on law enforcement, it will be difficult to have a single legal code, impartial judgment, and final settlement of disputes. But the language which Rand uses to depict a society without government is Hobbesian. She describes a war of all against all, while Locke had spoken somewhat more mildly of the inconveniences of the state of nature.

Paul Beard has expanded on the brief contractarian passages in Rand in an effort to develop a Randian theory of political obligation. Beard maintains that his account of political obligation "answers all of the objections anarchists have made" to Rand's account. Like Rand, Beard appears at crucial points to make the will of men more important than natural law. Beard calls voluntarism, "the beginning principle of libertarianism".^[61]

Beard writes:

A government derives its just powers from the consent of the governed. If a government (or defense agency) is to provide justice justly, its first requirement is that it act only on those who have consented to its activities.

... Since a proper government may act only on those who consent to it, its proper object of action is only the life and property of those persons who subscribe to it.^[62]

He explicitly contends that the fundamental principles of justice are not simply right in and of themselves but must be assented to:

In any legal clash between two parties there can be a just settlement only if both parties are agreed on the grounds of justice.^[63]

In Beard's system:

1. Government has monopoly on procedure, retaliation, and rectification.^[64]
2. Persons can hire private guards, enlist the help of neighbors, or defend themselves to enforce man's natural rights to life, liberty, and justly owned goods.^[65]
3. But even here all persons affected by the self-defense must consent.^[66]

4. If the accused criminal does not consent to what the private sword is doing to him, he is entitled to call upon the public sword.^[67]
5. This is because the procedural rights belonging to a suspect override any ontological truth of his having committed a crime: "Even if (the suspect or criminal) was unmistakably seen committing a crime and was immediately captured, it is his rights the government is protecting".^[68]
6. Beaird does not derive these procedural rights for us from the nature of man. So we remain ignorant of their derivation until he writes more on the subject.

Other natural-rights liberals may favor exacting evidentiary standards and careful procedures for prudential reasons. Good procedures will help prevent those engaged in law enforcement from themselves committing crimes. No consent doctrine is needed to favor prudent law enforcement. Beaird wants criminals to consent to their own punishment. But he never explains adequately why he rejects the notion that "the criminal has lost at least the measure of his rights equal to the destruction he caused, so his consent is not necessary to that extent".^[69]

7. In Beaird's scheme, persons tacitly consent to the principles of justice enforced on some piece of territory and to the governmental agency giving effect to those principles of justice by stepping onto a piece of property that has been placed under a government's jurisdiction by a property-owner.^[70]
 - (a) To make principles of justice binding in this fashion is unlikely in practice even to meet the standards of due notice that Rand and Beaird set for themselves.^[71]
 - (b) Fundamental principles of justice should always be based on rational inquiry into the nature of man and human society, never on the whim and caprice of property-holders.
 - (c) Beaird appears to have a double standard of tacit consent. He says criminals cannot and do not consent to private action against them when they enter on a piece of private land. But criminals can and do consent to government action against them when they enter a piece of

land under some government's jurisdiction. One can't have it both ways.^[72]

- (d) If the law-enforcement agency enforces correct principles of justice and is in every way what Beaird calls "proper", why must as a matter of right notice be given of this fact to every entrant onto the territory served by that law-enforcement agency? Furthermore, surely if the law administered in some territory is unjust, a person is not rightfully subject to it, even if he is given notice.^[73]
- 8: In Beard's proposed regime, property-holders can secede from a government. But the rules governing secession are governed ultimately by the explicit provisions of the social contract signed between the government and the property-holder. Apparently, there is no way for a person who merely steps onto a piece of land under some government's control to secede from the government if he discovers that the legal principles applied by that government are in fact unjust.

In contrast, in Locke if the legislators invade rights, they are the rebels against law and the people have a right to protect themselves against such aggressors just as they do against robbers and pirates.^[74] In Locke's view, the king unlinks himself if he violates the rights of individuals. It is at least possible that in the case of unjust governments, according to Beaird's political theory, it is right to rebel only through contract-release provisions in the case of property-holders. For others, it may never be permitted as a matter of right to rebel.

VI. CONCLUSION

Social contract doctrine is no longer taken seriously as an accurate historical account of the origins of the state. But social contract doctrine still survives as an account of political obligation. For example, John Rawls' widely-acclaimed *Theory of Justice* is very much part of the contractarian tradition.

Yet careful consideration of the social contract theories of Socrates, Hobbes, Locke, Rousseau, and Rand shows that they do not survive close scrutiny. Socrates ultimately relies on an analogy between citizens and children in a

patriarchal family. In doing so, he is relying on a concept of status-governed duty that is difficult to rationally justify as a basis for political obligation. Hobbes makes consent quite like succumbing to force and relies heavily on cryptic signs of tacit consent. Socrates, Locke, and Rousseau rely somewhat more definitely on tacit consent inferred from benefits received or from residency. But this too is an overbroad extension of consent that makes it meaningless as a criterion of legitimacy.

Most importantly, all the social contract theories appear to entail in practice a contract of at least partial self-enslavement to Socrates' Athenian regime, to Hobbes' sovereign, to Locke's majority, to Rousseau's popular law-making assembly and administrative government, or to Rand's law-enforcement monopoly.

In the end, therefore, social contract theory is incompatible with natural-rights liberal theory since this latter theory derives rights from the factual premise of the inalienability of the will and hence rules out from the start legitimate self-enslavement. Instead, we can recognize that the duty of obedience to the rule of just law can be explained, without any recourse to a social contract, in terms of the duty of non-aggression which is the necessary correlative of human rights.^[75]

NOTES

1. *Crito*, 51 in Plato, *Dialogues* trans. by B. Jowett, 3rd ed. (London: Oxford University Press, 1892) Vol. 2, p. 152.
2. *Crito*, 50, Vol. 2, p. 152.
3. Richard Flathman, *Political Obligation* (New York: Atheneum, 1972) p. 262.
4. Murray N. Rothbard, *For a New Liberty* (New York: MacMillan, 1973) Chap. 7.
5. Flathman, p. 279.
6. Rothbard, "Civil Obedience", *Libertarian Forum*, Vol. 2, No. 13-14 (July 1970); Flathman, p. 292.
7. *Crito*, 52, Vol. 2, p. 154; cf. Hobbes, *Leviathan* (Oxford: Basil Blackwell, n.d.) Chap. 14, p. 88.
8. *Crito*, 51, Vol. 2, p. 153.
9. Flathman, p. 288.
10. *Apology*, 32, Vol. 2, p. 125.
11. *Apology*, 32, Vol. 2, p. 125.
12. *Apology*, 29, Vol. 2, p. 123.
13. *Crito*, 49, Vol. 2, p. 151.
14. *Crito*, 51, Vol. 2, pp. 152-153; Willmoore Kendall, *Contra Mundum* (New Rochelle, N.Y.: Arlington, 1971), p. 153; A. D. Woozley, "Socrates on Disobeying the Law", in Gregory Vlastos, ed., *The Philosophy of Socrates* (Garden City, N.Y.: Doubleday, 1971) p. 313.
15. Flathman, pp. 271, 274.

16. J. W. N. Watkins, *Hobbes' System of Ideas* (New York: Hillary House, 1965).
17. Patrick Riley, "A Possible Explanation of Rousseau's General Will", *American Political Science Review*, Vol. 64, No. 1 (March 1970), p. 87.
18. *Leviathan*, pt. 1, chap. 4, p. 19.
19. *L*, pt. 1, chap. 14, p. 84; pt. 2, chap. 21, p. 136.
20. *L*, pt. 2, chap. 21, p. 137.
21. *L*, pt. 2, chap. 21, pp. 138-139.
22. *L*, pt. 1, chap. 6, p. 38.
23. *L*, pt. 1, chap. 14, p. 86.
24. *L*, pt. 3, chap. 40, p. 307.
25. *L*, pt. 1, chap. 14, p. 85; pt. 2, chap. 17, p. 113.
26. *L*, pt. 1, chap. 16, pp. 105-106; Hanna Pitkin, "The Problem of Thomas Hobbes", in *The Concept of Representation*, pp. 14-37.
27. *L*, pt. 1, chap. 14, p. 91.
28. *L*, pt. 2, chap. 20, pp. 132-133.
29. *L*, pt. 2, chap. 20, p. 133; see also J. W. Gough, *The Social Contract*, 2nd ed. (London: Oxford University Press, 1957) p. 110.
30. *L*, pt. 1, chap. 14, p. 88.
31. Patrick Riley, "Locke on 'Voluntary Agreement' and Political Power", *Western Political Quarterly*, Vol. 29, No. 1 (March 1976), pp. 136-145; compare Hobbes, *De Cive*, V, 1.
32. *Second Treatise of Government in Two Treatises of Government*, ed. by Peter Laslett (New York: New American Library, 1965), para. 23, p. 325 and para. 135, p. 402.
33. *Second Treatise of Government*, para. 99, p. 377.
34. Locke, *Essays on the Law of Nature* (London: Oxford University Press, 1954) p. 185; *Second Treatise of Government*, para. 192, p. 441.
35. *Essays on the Law of Nature*, p. 185; *First Treatise of Government*, para. 81, p. 240.
36. *Second Treatise of Government*, para. 176, p. 432.
37. *Second Treatise of Government*, para. 120, p. 394.
38. Gough, p. 139.
39. *Second Treatise of Government*, para. 134, p. 402; para. 149, p. 413.
40. Riley, "Locke on 'Voluntary Agreement'", p. 136.
41. *Second Treatise of Government*, para. 116, p. 390.
42. *Second Treatise of Government*, para. 96, p. 375.
43. *Second Treatise of Government*, para. 176, p. 432.
44. *Second Treatise of Government*, para. 98, p. 376.
45. Mill, *On Liberty* (New York: Norton, 1975) chap. 1, p. 5.
46. *Social Contract*, Barker, ed., bk. 1, chap. 4, p. 175; *Second Discourse*, Masters, ed., pt. 2, pp. 167-168.
47. *Social Contract*, bk. 1, chap. 6, p. 180.
48. *Social Contract*, bk. 1, chap. 7, p. 184.
49. *Social Contract*, bk. 1, chap. 6, p. 181.
50. *Social Contract*, bk. 2, chap. 6, pp. 202-203.
51. *Social Contract*, bk. 2, chaps. 6-7, pp. 204-209.
52. *Social Contract*, bk. 1, chap. 4, p. 175.
53. *Social Contract*, bk. 1, chap. 6, p. 181.
54. *Social Contract*, bk. 2, chap. 5, p. 200.
55. *Social Contract*, bk. 3, chap. 4, p. 232.
56. *Social Contract*, bk. 2, chap. 1, p. 191.
57. *Social Contract*, bk. 4, chap. 2, p. 272.
58. Ronald Hamowy, "Freedom and the Rule of Law in F. A. Hayek", *Il Politico*, Vol. 36, No. 2 (1971), p. 366.
59. *Essays on the Law of Nature*, Sixth Essay, pp. 181-189.
60. Rand, *Virtue of Selfishness* (New York: New American Library, 1964), p. 110; see also John Hospers,

- Libertarianism* (Los Angeles: Nash, 1971), p. 445.
61. Beaird, "On Proper Government I", *Option*, Vol. 3, No. 6 (January 1976), p. 20.
 62. "On Proper Government II", *Option*, Vol. 4, No. 1. (Mar.-Apr. 1976) p. 12.
 63. "On Proper Government II", p. 13; see also "On Proper Government III", *Option*, Vol. 4, No. 2 (May-June 1976), p. 23.
 64. "On Proper Government I", pp. 19-20.
 65. "On Proper Government I", p. 19.
 66. "On Proper Government I", p. 19.
 67. "On Proper Government I", p. 19.
 68. "On Proper Government I", p. 20; "On Proper Government II", p. 14; "On Proper Government II", p. 27 n. 14; "On Proper Government III", p. 22; Compare Randy Barnett, "Whither Anarchy?" *Libertarian Forum*, Vol. 8, No. 12 (December 1975).
 69. "On Proper Government II", p. 12.
 70. "On Proper Government II", p. 12.
 71. "On Proper Government II", p. 12.
 72. "On Proper Government I", p. 19; "On Proper Government II", p. 12; "On Proper Government III", p. 22.
 73. "On Proper Government II", p. 12.
 74. *Second Treatise on Government*, paras. 227-228, pp. 464-465.
 75. Gough, p. 255. My statement of the proper ground of political obligation here paraphrases Gough in large measure.

ON LOCKE'S ARGUMENT FOR GOVERNMENT

DAVID B. SUITS

Department of Philosophy, University of Waterloo, Ontario, Canada

What requires explanation or justification depends on what is taken as being given: what comes into question depends on what one already believes. The inertia of one's present outlook — sometimes too hastily labelled by others as a bias — gives one a sense of commitment without which possible justifications for one's position might be overlooked. Nor does an ability to empathize usually carry such a sense of commitment. Locke wrote and argued from a point of view well within the framework of civil government. The problem, as he saw it (and as many others in the social contract tradition had seen it before) was how to justify civil government on the basis of certain considerations about the nature of man. When he asks (in effect), "How can political societies be justified?", we ought to understand that he was not at the same time attempting to answer anarchistic arguments against government. He was not much interested in anarchism — a version of which he called the State of Nature — except as it provided a context in which to describe the Law of Nature and its consequences, which he then applied to matters of political organization.

Let me declare at the outset that in this paper I take it for granted that governmentlessness is an innocent state of affairs and requires no justification, but that the formation and continuance of political societies do. But I shall not attempt to demonstrate that political societies are unjustified: It is the purpose of this essay to imagine in what ways Locke's conclusions would have been altered had he been more fully committed to the investigation of the State of Nature as a condition which people are "naturally in" rather than as a condition which people naturally *start from* in their move to a governed society. That is to say, from the point of view of the State of Nature Locke's arguments are not persuasive — not persuasive especially on account of his failure to

recognize the possibilities for social organization without government.

I. THE STATE OF NATURE

What is the State of Nature? It is, according to Locke, a condition all men are "naturally" in, which is

a *State of perfect Freedom* to order their actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other Man (II, 4).⁽¹⁾

The Law of Nature referred to here is Reason. It

teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. ... [A person] may not unless it be to do Justice on an Offender, take away, or impair the Life, or what tends to the Preservation of the Life, Liberty, Health or Goods of another (II, 6).

Given the State of Nature and this Law of Nature which governs it, people in such circumstances would seem to have a straightforwardly peaceful existence. But Locke claims that men, in such a State of Nature, would forsake this "perfect freedom" and institute a Commonwealth, i.e. a governed society. Why? Because there are certain "inconveniences" in the State of Nature, the remedy for which is civil government (II, 13). What are these inconveniences? They may be described, generally, as the inconveniences attendant to a state of war. But this is not to say (as Hobbes, for one, would have it) that a condition of governmentlessness is necessarily a condition of war of "all against all". Locke, that is, recognizes the possibility of peaceful coexistence among anarchists. But such an existence is precarious: If once there should occur the use of force without a justifying right to that force, a state of war arises (II, 19). Moreover, since, in a State of Nature, there is no

common authority to which appeals for the resolution of disputes may be made, war, once begun, continues (II, 20). It is to avoid such wars that men put themselves into a society and under an authority and power which may decide controversies (I, 21).

It is not unreasonable, Locke argues, to expect that in a State of Nature men may use force without right. There are, first of all, certain uses of coercion which *are* justified: A person may "take away, or impair the Life, or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another" only if it is "to do Justice on an Offender" (II, 6). This law, which I shall be so bold as to restate as "People ought not to be coerced except in response to the initiation of coercion", and which I shall name the Rule of Political Justice, is part of the Law of Nature (see above). But although certain (retaliatory) acts of coercion may be justified (and, hence, each person is given the right to so act in execution of the Law of Nature [II, 7; 125; and *passim*]), some people may overstep the bounds of justified coercion: if a person is negligent in his obedience to the Rule of Political Justice, or is ignorant of the application of the Rule to some particular case (II, 124), or if a person is simply corrupt, vicious and degenerate (II, 128), then the initiation of coercion may take place. Once having occurred, coercion may then be used as a proper response in order to punish the initial transgressions and to prevent their recurrence. But the right to punish may be misused, says Locke: people may become too passionate in dealing with their own cases and negligent or unconcerned when dealing with others (II, 125). In addition,

They who by any Injustice offended, will seldom fail, where they are able, by force to make good their Injustice: such resistance many times makes the punishment dangerous, and frequently destructive, to those who attempt it (II, 126).

There is then the possibility of the occurrence, the recurrence, and the continuation of the improper use of force in the State of Nature, which makes for inconveniences in such a State. What are the remedies for such inconveniences? There are three things which the State of Nature lacks, but which, when present, Locke argues, can either prevent the initiation of force, or else ameliorate its harm when it does occur.

(1) In the State of Nature,

though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biased by their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the anticipation of it to their particular cases (II, 124),

the remedy for which is

an *established*, settled, known *Law*, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them (II, 124).

(2) In the State of Nature, everyone

being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own cases; as well as negligence, and unconcernedness, to make them remiss in other Mens (II, 125),

the remedy for which is

a *known and indifferent Judge*, with Authority to determine all differences according to the established Law (II, 125).

(3) In the State of Nature, the response to transgressions of the Law of Nature may be both inconsistent and dangerous, wherefore a competent power to execute sentences against offenders is desired (II, 126ff).

Let this suffice as a brief indication of Locke's reasons for the claim that persons in a State of Nature will find it reasonable to seek the apparent security of a governed society. One may question whether such a remedy for the inconveniences of a State of Nature might not give rise to conditions even more inconvenient than those in the original State of Nature, and so it becomes an important task to describe in some detail both the kind of governed society calculated to relieve the insecurities of a State of Nature and the precautions which must be taken to insure that any such government does not itself become a traitor to the purposes for which it was formed. Such matters occupy Locke's attention in the second half of the *Second Treatise*.

Although I believe that the history of the transgressions of the Law of Nature (or the Rule of Political Justice specifically) by government is sufficiently horrible to occasion a serious reevaluation of the comparative disadvantages of a governed society versus a State of Nature, I do not wish to argue that point here. Rather, the balance of this essay shall be devoted to an analysis of the reasons Locke offers for the claim that certain inconveniences

in a State of Nature find their proper remedy only in a governed society. To that end, I shall examine those three putative failings of the State of Nature: lack of an established and known law, lack of a known and indifferent judge, and lack of power to support and execute sentences. (See also II, 136.)

II. EXECUTIVE POWER

As for the third claim, that in anarchy there is no power to enforce sentences, that is surely questionable (provided, of course, that we ignore for the moment the matter, next to be discussed, of whether there can be, in a State of Nature, sentences to be enforced). In fact, Locke does not categorically deny the possibility of such power, but only says that it is "often" wanting (II, 126). This power I take to be of two sorts, or, rather, to have two motives: (1) in the case of persons found not guilty of transgressions, power to protect them (and their property) from unconvinced or disgruntled accusers; and (2) in the case of persons judged guilty, power to exact compensation for injury damage and/or to impose penalties. In a State of Nature can the vindicated be protected and the guilty be dealt with satisfactorily? It will not do, as an argument against anarchism, merely to ask (rhetorically): "But what happens if no persons or organizations are willing to use, or are capable of using, power in support of sentences?" For the same question may be posed in the case of governed societies as well. It is more important to know whether, in a State of Nature, there can be expected to be persons or organizations dedicated to the enforcement of sentences. Clearly, there will be a *motive* for organizing such enforcement powers, because this motive is, according to Locke, supposed to incline men to form political societies in the first place. But when it is asked, above, whether such organized power can be expected to occur in a State of Nature, one or both of two things may be meant: (1) given a condition of anarchy, are people more likely to organize enforcement powers within an anarchical context, or are they more likely to form a political unit in order to effect such powers? (2) Given a condition of anarchy, is it plausible to suppose that organized enforcement powers *could* be maintained without having to establish a political community? The answer to the first question, it seems to me, is clearly that persons are inclined toward the political route. But whatever the history of

human society evidences in this regard, the second question requires something more for its answer.

An organization dedicated to the enforcement of sentences is a group of persons, each of whom makes it his business to coordinate certain of his activities toward a common goal. In this it differs not at all from organizations dedicated to other goals, such as the ploughing of a field, the erection of a building, or the pleasant rendition of a choral tune. Unless it be supposed that anarchists would be incapable of cooperative farming, construction and singing, there must be something unique about enforcement organizations such that free people could not maintain stable enforcement powers. Alas, this uniqueness is elusive. Perhaps it resides, not in any particular characteristics of enforcement power, but rather in the (numerical) singularity of such an organization. It is an easy, though mistaken, supposition to make, that a police agency ought to have no competition in pursuit of its goals. Thus, when Locke says that "in a State of Nature there often wants *Power* to back and support the Sentence..." (II, 126), he may be read as referring to a single or sole power rather than to a certain kind of power. Such a reading becomes more plausible when it is recognized that sections 124 and 125 can be read in a similar way. That is, the three sections (124, 125, 126) which list the important failings of the State of Nature may be taken to indicate that a State of Nature is inconvenient on account of the lack of three special monopoly organizations. Section 134 more explicitly declares that the legislature, which also had judicial power, or else power to appoint magistrates (II, 89), and which also has the executive power, or else power to appoint an executive (II, 143f),

is not only *the supream power* of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a *Law*, which has not its *Sanction* from that *Legislative*, which the public has chosen and appointed.

Section 212 declares that

the Members of a Commonwealth are united, and combined together into one coherent living Body... [and] the *Essence and Union of the Society* consist[s] in having one Will, the Legislative....

Considering the executive power in isolation

from legislative and judicial powers, however, there seems to be no very good reason why if one organization has power to enforce sentences, any other organization cannot also have such power. Each person in the State of Nature is the executioner of the Law of Nature, says Locke. But each person has the right to delegate that executive power to some other person or organization. This right of delegation, after all, allows for the formation of political societies by consent.^[2] But if executive power can be delegated^[3] to a political organization, it can be delegated to other organizations, namely, to bodyguards, or (private) protection agencies. If there are good reasons, then, why executive organizations must be without competition, such reasons must be derived (if they can be) from considerations about the nature of judicial power (or legislative power, or both)^[4], which is also supposed to be absent in the State of Nature, and to which we now turn.

III. THE KNOWN AND INDIFFERENT JUDGE

In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences according to the established Law (II, 125).

There are five important points to discuss in connection with Locke's characterization of this judicial power.

(1) The judge must be known. How a person or organization^[5] comes to be known, in a political society, for being a judge, seems to involve nothing more nor less than what would be the means by which a person or organization could be recognized as a judge in a State of Nature. Anyway, how many people in political societies know who the judges are? Locke objected to any claim that some persons are by nature (or by divine appointment) fit to be judges. And even if there were such persons, there are no evident "marks" which would let us know who they were (I, 81). In a Lockean commonwealth, certain persons would be designated as judges. (Judges are created, not born.)

But may not an anarchist also appoint a judge? And may not a person announce that he is now in the arbitration business, in case anyone needs a judge? To be *known* as a judge, I need only advertise that Suits is a judge. It is not so far important whether Suits is a fair judge, a

hanging judge, or an expensive judge. The question of a judge's *authority* to arbitrate disputes will be considered in point (3) below.

(2) The judge must be indifferent. How is a judge determined to be indifferent? The problem arises in a political society no less than in non-political ones. Whether, in a political society, those persons or organizations appointed by, or working with, or under contract to, or forming part of, the governing body of that society, as judges usually are, have the right even to be *presumed* to be indifferent until proven otherwise, is a question I shall not deal with here. (Let the judicial body be independent of the government, if that is possible. But if it is successfully independent, what is there about a political society such that an indifferent judge could be found in it, but not in a State of Nature, in which judges would also be independent of government — since there would be no governments?)

Persons, in the State of Nature, are, according to Locke, apt to be biased when judging their own cases, and may be negligent or unconcerned about the cases of others. Well, if these are failings of the State of Nature, are they not also failings of Commonwealths? Why may not a judge in a political society be apt to be biased in his own case or be negligent or unconcerned with the complaints of others?^[6] Unless there is something unique about political societies which would make for the flowering of indifference in people who arbitrated controversies (whereas in non-political societies these persons would be biased), there seems to be no very good reason to suppose that the unbiased judgments of complaints could not be successfully carried on independently of any governmental actions.

(3) A judge must have authority. (See also II, 19 and II, 90.) Authority comes from somewhere, unless the judge has it by nature. But what authority — what rights — a judge has by nature is what any other person has by nature; a judge is no unique entity in this regard. In a Lockean political community, then, a judge is an authority because he has been delegated the right to pass judgments, and such a transference of rights comes from members of the society, either directly or indirectly (through the legislature). But the delegation of these rights may take place in an anarchical society as well^[7] (unless by merely any kind of delegation of judicial power a State of Nature is transformed

into a political society — a queer claim, and Locke does not make it). And if an anarchist wishes to have a judge, he will ask (or hire) someone to act as arbitrator. But Locke intends something much stronger by urging that a judge have authority.

(4) A judge has authority to determine *all* differences. (See also II, 89.) The delegation of authority may be manifested in two ways: (a) all persons, whose actions might come before the judge, delegate the authority to one man (or organization) or to a certain set of men (or organizations); (b) only some persons, whose actions might come before the judge, delegate the authority to one man (or organization) or to a certain set of men (or organizations). And in both cases two variations are possible: (i) the principals (whether all or some of the people) give to the judge the right to review *all* differences, complaints and controversies; (ii) the principals (whether all or some of the people) give to the judge the right to review only some (or some kinds of) difference, complaints and controversies. Although Locke says that a judge is to decide on all controversies, we may take him to mean all controversies relevant to the Law of Nature (or to the Rule of Political Justice in particular). For I take it that the inconveniences of the State of Nature are such because, in the first place, or most importantly, one's life and property are in hazardous surroundings — are, that is, under the threat of the initiation of force by others (II, 127ff). It is not for the purpose of settling mere differences of opinion that judges are supposed to be useful tools. It is the clash of actions, which fall within the scope of the Rule of Political Justice, which arbitrators are supposed to resolve.

But a judge may be a valuable part of society without having to decide on all controversies (regarding actions) which the society's members might have. A judge might be effective even though his jurisdiction (the scope of the authority delegated to him) includes only one or several kinds of actions relevant to the Rule of Political Justice. A judge, in either a political society or a State of Nature, might appropriately be authorised to decide only on questions of theft of property, for example, or only on matters pertaining to acts involving loss of life or limb, or only on controversies concerning parent-child relationships. To restrict a judge's power in such a way has been a tradition in at least some political communities, and anarchists

might be expected to do the same, perhaps under the assumption that no one mind is omniscient, or under the assumption that effective social arrangements involve a division of labor. Supposing that Locke would agree that the division of jurisdictions is likely or desirable even in a political society, then, when he says that judges must have authority to determine all differences, he ought to be taken to mean that for any controversy there must be some judge or other to decide the matter. That is, it is inconvenient to be a party to a controversy where there is not some judge with authority to decide that particular issue.

These considerations do not by themselves require there to be judges whose authority precedes the occurrences of the issues they are to decide. (Cf. II, 91.) It may be a matter of prudence or insurance to retain someone to act as a judge *in case of* complaints, but the effectiveness of an arbitrator is not necessarily diminished on account of his being given *ad hoc* authority to resolve a dispute. And if various judges may specialize in one or several kinds of controversies, it may be a feasible social arrangement for parties to a dispute to authorize a person (or organization) only temporarily for the purpose of judging the particular case at hand.

Nor need the hiring of judges, for use *in case of* disputes, always involve the unconditional transfer of one's judicial power (even assuming that such a transfer is naturally possible. See note 3 above.) If parties to a dispute can manage to settle their differences out of court, it may be wasteful for there to be a third party as arbitrator who insists on enforcing his own judgment in the matter.

The most conspicuous problem associated with arbitration in a governmentless society has to do with cases of disputes in which the contestants do not agree on which person or organization, if any, to employ in the attempt at resolution. Locke thinks that this problem would be solved (or rather avoided) in a political society

by setting up a Judge on Earth, with Authority to determine all the Controversies...; which Judge is the Legislature, or Magistrates appointed by it (II, 89).

That is, all members of a political society would agree on a *common* judge and authority. I advance no moral complaint against such a procedure, since, if it is authorized by every person,^[8] no moral complaint can be sus-

stained: I argue only that there are better alternatives. The problem, after all, is not, as Locke thinks, that in a State of Nature there is no one common judge for everyone, but only that in a State of Nature there may be controversies for which there is no judge. Had Locke viewed the matter in this way, he might have come to quite different conclusions.

In some political societies a citizen is allowed to appeal a judge's decision to a higher judge. If this appeal procedure is in aid of safeguarding citizens' rights, then persons are well advised not to give irrevocable and unconditional power to any *one* judge. Better to have a variety of judges from which to choose in the first place. Suppose that each person may choose between a number of judges (such as might be expected in a governmentless society); how can it be assured that any controversy will have a mediator? That is, if there are a number of judges, each party to a dispute might have a different judge, in which case the problem of mediation is not solved, but only pushed back a step. An approach to the solution may be this: people in a State of Nature will have excellent motives for hiring bodyguards or defense agencies. In case a person claims that the Rule of Political Justice has been broken, he might take his claim first to that defense agency, which will have arrangements (it would be in their interests to do so) with other organizations to appeal disputes between them to some judge they both choose.^[9]

In a political society *à la* Locke there is a judge for every dispute, since there is one judge (or organization) who has been given, by all the members of the society, the authority to hear all complaints. But in an anarchy, there may be some persons who have delegated judicial authority to no one. This may cause some inconveniences in some social interactions, but it does not present any fundamental problem different from what could be found in a political society, wherein a person might claim to revoke the authority he is supposed to have previously granted to the government, or might in some other way refuse to recognize the authority of a judge. Ordinarily, such revocation would be illegal (II, 134), but even Locke admits that a judge loses his authority when he fails to perform, or misperforms, his duties (II, 240ff).

(5) A judge must rule according to established law. An anarchy, as well as a commonwealth, may have established laws, according to which judges form their decisions. But an anarchy,

unlike a Lockean commonwealth, need have no *one* system of, and no single ultimate source of, law. (This, of course, has an alternative: the resolution of conflicts according to some conception of Natural Law instead of according to one of various systems of positive laws.) This matter will be discussed in the following section, which deals with the last of the three features, on account of the lack of which, Locke claims, a State of Nature is to be avoided.

IV. LAW

There is a Law of Nature, Locke says; but apparently not all people consult it, although if they did, they would find it intelligible (II, 125). And there may be expected to be occasions on which people do not understand the application of the Law of Nature to their particular cases. Some people are ignorant, some biased, and some just plain evil. But if people have before them a civil law, they may hold that law up to be the "Standard of Right and Wrong, and the common Measure to decide all Controversies between them" (II, 124). The ability to appeal to this standard takes men out of the State of Nature, where appeal is, according to Locke, only to "Heaven" (i.e. to force). Locke does not insist on a clear distinction between legislative and judicial powers in a political society (but I have separated them for better analysis); hence, the appeal to the standard of right and wrong is also an appeal to certain *persons*, namely, to the lawmakers (or their appointed magistrates). That there can be persons in the State of Nature to whom appeals can be made I have argued above. Can there also be, in the State of Nature, standards by which the judges judge cases?

We should notice first of all that Locke mentions *a* standard, as though there ought to be but one. But a single, or even a unified, system of laws may not be necessary. Indeed, where there is a variety of judges, there might also be a selection of laws (or legal systems). Even some political societies offer a choice not only regarding the person who is to be the judge, but also regarding the laws by which the judgment is to be made. To try a case before a judge or before a jury (and a judge), for example, may be an option in some political communities. In addition, one may have a say in who those persons are who sit on the jury. And

although the right to a choice of legal systems is unusual, it is not non-existent. The apparent advantage of a single legal system for a group of persons is that for any dispute between members of that group a standard of decision already exists. But a single standard is not necessary any more than it is in the case of coevaluations of products or services exchanged on a free market. Any standard will do, just so long as it provided a satisfactory common ground for the parties to that particular dispute. If disputants are content to resolve their controversy by appeal to, say, majority rule; or if they agree to appeal to the gods, as manifested, say, in the configuration of chicken entrails; or if they decide to stage a trial by a jury of peers; or if any other method is mutually agreeable to them, what objection could be raised, as long as the dispute is settled in a mutually agreeable fashion?^[10]

There are, we know, many acts which are in one geographical area penalized by civil governments, but in a bordering geographical area are left untouched by legal devices. And there are acts penalized by local or subordinate governments which go unnoticed by superior governments. There are, that is, jurisdictional boundaries for legal systems, as a result of which there may be different sets of laws even within single nations. These boundaries may be either geographical or constitutional. Imagine such geographical areas to be reduced in size so that for each of them, one person's private estate composes the whole of it. Unless there are constitutional overrides to these geographical jurisdictional boundaries, a condition exists which may be some form of (but certainly not the *only* kind of) anarchism. "When you are on my estate," the owner of such an area might say, "we settle our differences in my court."

On the other hand, there could be legal systems which take no notice of geography,^[11] but have to do solely with the actions of the clients or subjects of the system, never mind where they are: the Catholic Church or the Boy Scouts, for examples. Such organizations may, of course, also stipulate that their members abide by the rules of local political organizations, but such a stipulation is not necessarily a part of such organizations, which may come outfitted with laws, authorities, and methods for adjudicating disputes.

States of Nature, then, need not lack legal frameworks.^[12]

V. SUMMARY AND CONCLUSION

The State of Nature, Locke claims, is inconvenient on account of people's ignorance of, or misapplication of, the Law of Nature. And even those who do not understand that Law may not be able to apply it to some particular cases, especially their own. And even those who can faithfully apply the Law may not have power to enforce its applications. Locke argues that these problems are solved by the introduction of three institutions (or one institution, namely, civil government, which has three important features): (1) an established law, (2) a known and indifferent judge, and (3) power to execute decisions made by the judges on the basis of the law.

While such a solution might conceivably cure the ills of insecurity of a State of Nature, it might on the other hand turn out to be a bit of overcure. Less drastic steps could also be taken, viz. the establishment of private defense agencies, private courts (or occasional arbitrators), and a marketplace of legal systems, all with or without interconnections, depending on the wishes of the clients of such systems. (There are, of course, other alternatives as well.) The question of alternatives to a Lockean political organization as a response to the apparent inconveniences of the State of Nature will be important for two reasons: (1) people, in a State of Nature, may wish to know whether political organization is the most efficient means to their goals; and (2) if people are concerned about acting according to the Law of Nature (and the Rule of Political Justice in particular), and if the operation of a proposed political organization would include either the initiation of coercion or else actions which, on account of their ambiguous moral standing, might be construed as the initiation (or the threat) of coercion, they will want to know if there are less coercive — or at least less threatening — means of achieving their goals. The answer to the first question I believe to be in the negative, but a full account of it would require a discussion of some economic issues which cannot be considered here. For this essay, the second question is the more important one. That a political organization, as conceived by Locke, even though it is established in the first place by the consent of its members, involves or may threaten to involve significant acts of coercion (aside from coercion used in response to transgressions of the Rule of

Political Justice), may be understood by reference to the means whereby the political society determines its particular actions:

the act of the Majority passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole (II, 96).

For if the consent of the Majority shall not in reason, be received, as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such a consent is next to impossible ever to be had.... Such a Constitution as this [unanimous consent] would make the mighty *Leviathan* of a shorter duration, than the feeblest Creatures; and not let it outlast the day it was born in: which cannot be suppos'd till we can think, that Rational Creatures should desire and constitute Societies only to be dissolved. For where the majority cannot conclude the rest, there they cannot act as one Body, and consequently will be immediately dissolved again (II, 98).

Just so. It is seen as preferable — were it only possible — to have each individual agree on what everybody, as a whole, ought to do. But since consensus cannot be expected, then some other method (namely, majority rule) is introduced in order to force minority dissenters to act against their own judgments. The problem arises in the first place by attempting to bring it about that all the people, as one body, do the same thing. The whole affair is avoided if alternatives such as private defense, legal, and judicial systems are adopted, where there is no need for the whole body of citizens to act as one.

But even if, for some compelling reason, the founding members of a political community expressly agree to a system of majority rule, it is possible that some actions by the majority will nevertheless take on an ambiguous moral standing. Here is Locke, for example, telling us of one of the limitations placed on the legislature:

The Legislative cannot transfer the Power of making Laws to any other hands. For it being but a delegated Power from the people, they, who have it, cannot pass it over to others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be. And when the People have said, We will submit to rules, and be govern'd by Laws may be such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorized to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and

not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands (II, 141).

The argument is lame. Once having been given authority and power, the majority may deem it expedient to change radically even the fundamental agreement by which they were empowered. Who is to complain but a minority, who cannot in any case “conclude the rest”? And to whom are complaints addressed but to the majority (or their representatives)? And who is to judge that complaint but the majority (or their representatives), beyond which there is no appeal but to “Heaven”? Locke’s attempts to answer these questions — they occupy his attention for a major portion of the *Second Treatise* — do not carry much conviction. But more subtle surprises may occur. Once having been authorized to act for the whole, the majority may delegate that authority so that they rule not directly but through representatives. These representatives, in turn, may find it desirable to delegate at least some of their authority to subordinates. But does not Locke say that such delegation is prohibited? Yes and no. It is Locke himself who points out that the legislature may give *judicial* authority to magistrates (II, 89). Now, magistrates, of course, are not supposed to have power to make laws — at least not in the sense that legislators do. But magistrates are authorized to determine whether and how laws are applied to specific cases: They are official interpreters of the law, and as such may announce *what the law is*. The more the legislators’ laws are vague, the more power the magistrates have to interpret the laws one way or another, i.e. to determine whether the law does or does not apply to specific cases before them. The tactic of distinguishing “the spirit of the law” from “the letter of the law” (which tactic is almost sure to exist whenever there is a question about whether a law does or does not apply to a certain case) also gives to magistrates the power to say what the law is: Magistrates’ power, if they have it, to pronounce as law what they consider to have been in the minds of the original legislators when they set certain words on paper, could, in principle, void even the written law.

Even if one is morally required to abide by one’s original promise to sustain a principle of majority rule (and surely this is questionable), the possibility of the majority’s ruling on cases not originally anticipated by the founding

members gives to the principle of majority rule a coercive aspect. Cautious persons, on entering agreements with others, might select a revocable principle rather than an irrevocable one. People concerned about what undesirable results having to bow to majority demands might eventually lead to, or knowledgeable about what surprising

consequences people committed to majority rule have in fact had to face, might be wise to choose instead more easily discontinued arrangements for law making and law enforcement — arrangements, perhaps, along the lines suggested in this paper.^[13]

NOTES

1. All references to Locke shall be to *Two Treatises on Government*, edited by Peter Laslett (New York: Cambridge University Press, 1960).
2. Locke insists that a society is legitimately formed only by means of a contract among the members, i.e. by voluntary and explicit consent of all concerned. (II, 14, 15, 57, 73, 87, 89, 95, 106, 112, 122, 171, 211, 243.)
3. I shall not discuss the argument that such powers or rights are inalienable and hence cannot be delegated. Such a tack was taken, for example, by Lysander Spooner in *Letter to Grover Cleveland*, especially pp. 102–104 (*Collected Works*, Charles Shively, ed., Weston, Mass.: M&S Press, 1971, Vol. 1). Such an objection, though interesting, does not meet Locke on his own ground, for he nowhere says that such rights are inalienable in the sense Spooner intends.
4. This is to neglect possible economic arguments to the effect that even given competitive police organizations, there will eventually emerge a single, monopoly police organization (within some geographical area). See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), esp. chap. 2.
5. Such an organization may be an association of individuals, each of whom may independently judge a case, or it may be an association of persons, each of whom separately has no judging power, only the collective body having the power of decision; trial juries, for example.
6. A judge in a Commonwealth is not *supposed* to judge his own case. (Although see II, 240 ff.) Would an anarchist feel content to let his opponent, in a dispute, be the judge?
7. See note 3 above.
8. The original contract is supposed to be authorized by each person. See note 2 above. The appointment of judges, however, may be by vote of the majority of the voluntary members of the society. In order, then, that such judges be (indirectly) authorized by *all* citizens, each citizen would have to agree to a system of majority rule in the first place. But they might have second thoughts about this later on. See below, section V.
9. See, for example, David Friedman, *The Machinery of Freedom* (New York: Harper & Row, 1973), and Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973).
10. This is a point already made by Thomas Hobbes. See *Leviathan*, esp. what he calls the second Law of Nature, Part I, chap. 14; also chap. 15. See also my "On Hobbes's Argument for Government," *Reason Papers* (forthcoming). One might argue that some standards would be immoral, even if accepted by the parties to a dispute. Perhaps so. But the discussion of that problem is beyond the scope of this paper.
11. ...or, which involve geographical considerations only in case the people who place themselves under those systems also place their estates under those systems, and providing, of course, that the systems allow for doing so.
12. ...unless, trivially, by definition. But I have been trying to point out that the alternation "either a political society with one law and one judge common to all, or else a State of Nature wherein every man is his own judge" — an alternation which Locke, in effect, accepted — by no means exhausts the alternatives.
13. This paper was written while I was a graduate student at the University of Waterloo. Thanks are due to Prof. Lawrence Haworth for his helpful comments on an earlier draft of this paper.

POLITICAL FREEDOM AND ITS ROOTS IN METAPHYSICS

MOSHE KROY

Department of Philosophy, La Trobe University, Australia

1. CONTEXT

Libertarianism — the political philosophy based on the concept of *individual rights* — seems to be an inherently clear, unambiguous position. Its fundamental principle, the principle that man's rights to his life, liberty and property are non-compromisable foundations for human co-existence in society, seems to offer sufficient basis for answering, or solving, all so called "social problems" — as libertarian literature amply demonstrates.^[1]

There is, however, one threat to this seeming clarity: the debate between limited government libertarians, headed by Rand,^[2] and anarcho-capitalists, mainly influenced by Rothbard.^[3]

At first sight, the debate seems easily localizable. It seems to affect no fundamental principles, but to involve merely a specific application of these principles. If one reads some of the literature written concerning this debate^[4] the major impression both sides give is that the other side is inconsistent, that he fails to understand what the commonly agreed upon principle of individual rights implies, and that once his inconsistency is indicated to him, he (or them) will change (their) mind. Surprisingly enough, this change of mind did not take place in the last decade, though some "conversions" did take place. Each side has its own arguments, and its own rebuttals of the other side's argument, and the debate seems to persist, not to die out.

2. PURPOSE

The purpose of the present article is to show that what seems to be a fundamental agreement concerning basic principles, uniting libertarians of both traditions, is, to a large extent, an illusion. The illusion is created both by the use

of the same terminology (i.e. of individual rights), and by the fact that there exists a large core of agreement between the two camps — agreement concerning the principle of *individualism*. But this agreement is much less thoroughgoing than what it seems.

More specifically, I will try to show that the "political" debate — what form should a free society take politically — anarcho-capitalism or limited government, follows from much deeper, though undetected, disagreements. The most fundamental one is *metaphysical*: what kind of freedom does human nature allow — and to what extent is man unfree, or determined, in his actions. This fundamental disagreement is reflected in a variety of derivative disagreements: are values objective — as Rand claims, or are they inherently subjective, as Rothbard implies? Does the principle of individual rights follow from the principles of objective ethics — as Rand preaches,^[5] or does it follow from a second-order understanding of the *objective moral principles* which make possible individual, subjective first order value systems, as Rothbard presupposes?^[6]

Does the principle of individual rights, in any way, require for its implementation any preceding *contract*, and does it rely on any moral principle of the sanctity of promises and contracts, as is implied by Rand's philosophy,^[7] or does it rely on the metaphysical concept of a *free will*, and the concept of "sacred contracts" is superfluous? I will try to show that these questions divide the two camps, and that their legal recommendations, in specific cases, also differ.

Since I am not a subjectivist, I do believe that there is right and wrong in this debate. But I will not present any systematic argument to support any position in this article. I will do that in a

separate article. In the present article I only wish to point out that a proper understanding, and resolution of the debate which, at present, divides the libertarian movement, cannot stop at political examples and arguments. I must go right back to metaphysical premises, and to examine them.

3. AN EXAMPLE

To clarify my point, and make my later, more abstract arguments easier to follow, let us consider an example. I make a contract with you to exchange my dog for your hen. I gave you my dog. You now say: "Sorry, I refuse to give you my hen. I love it too much". Clearly, you are morally in the wrong, and a just system of laws would imply just that, when applied to this case. But *why* are you in the wrong, what are your liabilities, what is the way to right the wrong? Here Rand and Rothbard would differ. Since none of them has ever considered in writing this specific example, I allow myself to represent their positions as I understand them.

To begin with, Rand would say that you are wrong because you have defaulted on a promise, contained in a contract. You owe me a hen, because you have promised to give me one once you will possess my dog. Your debt has been incurred by your promise. This is a matter for a civil court, dealing with restoration of justice damaged by contract violation.^[8]

Rothbard, however, would say that you are in the wrong for a different reason. You don't owe me a hen. The hen is yours, and remained yours. As for the contract, your default amounts to a cancellation of it. The contract ceases to be valid once one of us refuses to abide by it.

But if so, what makes you morally wrong? Simply, the fact that you now control a dog which belongs to me, makes you a criminal. Once you have, by refusing to fulfill your part of the contract, cancelled the contract, you have, thereby cancelled your right to control the dog. If you continue to hold the dog, you are in the same category as a robber, or a thief. You control and use property which belongs to another without his permission, by force. Thus, the correct procedure to right the wrong is for me to sue you at a criminal court.

Observe the difference: For a Randist, a

promise creates an obligation. You are free to make a promise. Once you have made it, you are not free, morally speaking, to default on it. A later decision cannot cancel the prior decision. Once you have promised to give your hen, when certain conditions have been satisfied, the satisfaction of these conditions transfers automatically the hen to me, from the point of view of right to own it. If you refuse to deliver the hen, you are trying to detain the transfer of property which is *already* not yours. But the dog does belong to you.

For a Rothbardian, though, a promise does not create an obligation. A promise is a declaration of an intended action, or a declaration of a present decision to do something in the future. It has no moral significance beyond that. The same fundamental freedom of choice which makes it possible for you to promise, makes it possible for you, later, to cancel the promise. You cannot be sued for cancelling promises.

But, on the other hand, for a Rothbardian, your property right cannot be transferred without your consent. Thus, if you give somebody a dog, on the condition that you will get a hen from him, and he fails to deliver his part in the contract, the condition for transfer of ownership is not fulfilled, so the ownership has not been transferred (though the physical transfer of the good in question did imply a transfer in actual control of the property). Thus, the injustice incurred by a contract violation is not that a promise has been broken. It is that a breach has been created between ownership and control and that breach is maintained by force (because you refused to return the dog to me).

Observe that this creates *practical differences* between a Randist and a Rothbardian, concerning their recommendations to handle this case and other similar cases:

1. A Randist would demand, acting as a judge, that the contract be fulfilled, or that the defaulter will recompense the injured party in accordance with the value of the property he promised to transfer and failed. In other words, if a hen costs now \$30, and it should have been transferred 10 days ago, and the value lost by the fact of non-transfer is \$10, a Randist judge would order payment of \$40 compensation.

But a Rothbardian judge would demand the criminal to return a dog, not a hen, or, equivalently, to pay for the value of the dog in the market now (so as to enable the victim to buy a new dog) and also to pay, according to market rates, for the services provided by the stolen dog throughout the period in which there was a breach between ownership and control. If the contract was written say, 12 days ago, and at that time hens and dogs had the same market price, but *now*, when the trial takes place, they have different prices, the two judges would reach different verdicts.

2. A Randist judge would demand compensation whenever a promise was unilaterally made and broken (i.e. a promise of a gift, or of charity service.) A Rothbardian judge would not consider these legal matters — though he may privately advise the victim to advertise the fact of default as much as he can so as to make the defaulter realize that breaking promises is bad for your business reputation.^[9]

3. A Randist judge would have to defend, in court, a contract in which a man sells himself to be a slave: once a man made a contractual commitment to be a slave, and to forego any further freedom of choice, he has to abide by his promise. A Rothbardian would consider the contract cancelled the minute the slave refuses to be a slave any more (thereby implying that the contract was never valid). At the same time, if the slave got some money, which he has been capable to continue to control independently, for becoming a slave,^[10] then he no more legally holds the money: the money belongs to the deceived, purported slavemaster. Thus, the institutions of justice should remedy the breach of control and ownership incurred.

These are considerable differences between the two positions. But let us consider another example, this time of a non-contractual nature.

4. ANOTHER EXAMPLE

Suppose I wake up in the middle of the night and find you there, rushing out of my window, with my watch at your hand. Obviously, you are a thief. Obviously, I should take you to some form of court or other. Obviously, you have initiated force against my right to my property. All these points are agreed upon by libertarians,

as well as most non-libertarians. There is, still, however, a divisive question: on the basis of what authority (moral authority) do I take you to court? Do I have the right to make you compensate me without a court action? Does your action affect your rights? Here, again the Randist and the Rothbardian would markedly differ. The Randist (as P. Beaird has most convincingly argued)^[10a] would claim that by violating my property rights, you have lost your property right to the same extent. Moreover, your action justifies me in taking you to court because by *consenting* to live in a human society you have consented, in principle, to the fundamental principle underlying the possibility of human co-existence in society: the principle of individual rights. In a way, you have, by your action, breached a contract. My appeal to court is necessary to restore justice, because your action has been a default on an implicit contract. I cannot, however, redress justice by my own action, because any contract has, as P. Beaird has indicated, a delivery clause and a recourse clause. Once you failed to deliver (by violating my right to property) the contract still is in force. In this case, the “implicit” contract between us allows me only to take you to the police, because you have consented, by being in this specific society, to be thus treated in the case of breach of “social contract”.

Observe that this is *not* a social contract theory. It does not assume that if we are all in a society which has some government or other, we are all to be considered to have implicitly consented to the rule of this government and to the authority of its laws. The social contract theory, as Hobbes has shown by example, allows for all sorts of dictatorship and is incompatible with individual rights.

But, still, there is an element of “social contract” here, in the following sense: individual rights are objective values, to be identified by human consciousness as necessary conditions for human existence in society. If one identifies these values, he thereby has to secure some means of safeguarding these values by subscribing, voluntarily, to a government which implements these principles — namely, a minimal government.^[12] This act of subscription (which, Beaird stresses, must be explicit and

voluntary), binds contractually all subscribers — both to the principle of individual rights and to the authority of the government to which they have subscribed to administer justice in accordance with these rights. Thus, any criminal violation of rights is a breach of such a contract, and it must be handled by the government, not by the victim. In other words, the Randist analysis of the nature of crime implies the necessity for a minimal government, which governs with the consent of the governed. To put the issue more crudely, each crime is a case of contract violation. Individual rights are enforceable, as legal principle, only on the basis of contractual commitment to them. Thus, while individual rights have objective validity as values, they have no legal force without the consent of all concerned. In other words, if you did not subscribe to any government, your rights have not been “translated” to enforceable terms, and you have no *right* to use force (your own force) to defend them.

Rothbard, however, tells a different story: a story in which no concept of “social contract” plays absolutely any role, and in which individual rights have nothing to do with anybody’s contractual subscription either to the abstract principle, or (additionally) to a government enforcing it. Individual rights are natural, deriving from man’s nature as a free being. A man has the right to his life, property and liberty independently of whether or not he lives in a social context, subscribed to a government, or made any direct or indirect contractual commitments with others. Contractual commitment, as we have seen above, has no independent moral significance in Rothbard’s framework. A breach of contract is only bad because it creates a breach of property ownership and its control — and only when it produces this effect.^[13]

5. CIVIL LAW AND CRIMINAL LAW

In order to clarify the difference between the two points of view, an extra bit of terminology is needed. This pertains, fundamentally, to the difference between *civil law* and *criminal law*.

Civil law usually pertains to offenses arising from contractual relations. A default in delivery on a commercial contract is usually dealt with by a civil court of law. Criminal law usually

pertains to offenses against individual rights (such as theft, murder, robbery, rape, etc.) which do not involve any violation of pre-existing contractual relations. What makes them “bad” is their being violations of individual rights. In terms of this distinction, Rand’s position implies an implicit reduction of criminal law to civil law — in the sense that any violation of individual rights is conceptualized by reference to a pre-existing social contract (between the subscribers to government and their government) which makes the violation punishable, or actionable. Rothbard’s position implies an explicit reduction of civil law to criminal law: a contract violation is bad only because, and to the extent, that it involves dissociation of ownership and control. This is a large difference, and it relates directly to the opposing views concerning minimal government. For Rand, the contract which makes individual rights defensible is a contract with a government.^[14] Hence, for her, libertarianism is impossible without a government: it presupposes a government, albeit a minimal government. For Rothbard, individual rights are independent of any contract, they are natural, and the fundamental defense of them is by the individual himself. The marketing of defense services through defense agencies is not in any way a necessary ingredient in the implementation of rights. Rather, it is a special case of the principle of specialization of services on the market, and has nothing to do with the moral validity of individual rights, or with their implementability.^[15]

6. VALUES, AND METAPHYSICAL FREEDOM

What is the root of the disagreement between Rand’s and Rothbard’s positions? To answer that, it is important to understand on what basis each of them establishes the moral validity of individual rights. Rand’s concept of rights derives from her particular theory of values. This, in turn, depends on her theory of man’s metaphysical freedom. Similarly, Rothbard’s position is ultimately defensible through recourse to his fundamental assumptions concerning values and human freedom. According to Rand’s theory of human freedom, man’s only

fundamental freedom, the sole domain in which he is capable of being a “first cause”, the only realm where he can exercise absolutely undetermined choice, is his own consciousness. Man’s basic choice is between identifying the facts of reality through an act of consciousness, and evading the knowledge of these facts. This freedom does not extend to man’s decisions and actions. Your decisions and actions are the necessary product of your values and premises, Rand claims. Your values and premises are the products of acts of identification.^[16] You identify, as a value, whatever sustains your life.^[17] You identify, as premise, any fact of which you are aware. Thus, your values are the products of two factors: your needs, or requirements for survival, which are factual givens, over which you exercise no choice, and your readiness to identify and acknowledge these needs, over which you have voluntary control. But if you evade the knowledge of your needs, they still exist, and so are, objectively speaking, values, though they are unidentified values.

Rothbard’s theory of man, however, assumes another dimension of freedom in man: the freedom to make decisions, to originate action. For Rothbard values, and their hierarchy, are not the product of perception alone, though, clearly, his writing implies that awareness of the facts is highly relevant to your choice of values. (That is why you will prefer 3 ounces of gold to 2 ounces of gold.)^[18] But the ultimate source of values are your choices and there are no subject independent (or “objective”) factors which determine what your values should be. Indeed, Rothbard does not assume, as Rand does, that your own life is necessarily your highest value. He leaves the question of what is your highest value outside of philosophical (and economical) discussion, to you. This, observe, is not subjectivism, in the sense that values are arbitrary. It is subjectivism in the sense that the subject, not the external facts, is assumed to be the source, or generator of values. Consequently, it is impossible, in Rothbard’s framework, to speak about any common values which are thereby established as objective moral principles. Rather, the principle of individual rights, in so far as any explicit formulation is to

be given to Rothbard’s implicit presentation, is established on the second level of value analysis.^[19] It is not a value in the economic sense (the question of the price of individual rights cannot arise, because the concept of price presupposes the concept of ownership which presupposes the concept of right to property).^[20] It is, rather, established by reflection on the implications of man’s metaphysical nature: as a fundamentally free agent. For Rothbard, if I understand him correctly, individual rights are self-evident implications of the metaphysical nature of man for social coexistence.^[21] The argument is mainly by elimination.^[22] Clearly, somebody must decide what you will do: why should it be, and how could it be anybody else, but you? Again, somebody must decide what to do with the property you have produced: how could it be anybody else but you?^[23] I will not try to elaborate on the argument beyond the Rothbard quotes in the notes. But the point I am trying to make is the following: the whole argument presupposes that *action* (including use of property) requires *decision*, and that there are no automatic solutions to the problem: what action shall who take? Thus, the question is who is to make the decision. In other words, man’s fundamental metaphysical freedom to make decisions is a necessary component of the argument. Hence, the argument does not require that other persons would either recognize my rights or pledge themselves to respect them. No social contract of any nature (and no preceding large scale comprehension of the philosophical principles involved) is presupposed in the defense of individual rights. Having the right to life, liberty and property, you automatically have the right to defend these rights, and you only derivatively transfer the exercise of the right to a defense agency of your choosing. Moreover, in view of the fact that all violations of your rights (including what Rand would have labelled “contract violation”) are criminal, in all cases the purpose of defense is to reclaim stolen property (of goods or services or their equivalent). Hence, the consent of the offender is not required, because his rights are not violated in any way through the reclamation.^[24]

Thus, the fact that Rothbard’s libertarianism is more “extreme” than Rand’s, because she

consents to a minimal government and he requires abolition of all government, is not accidental. Neither does it arise because one of them (or any of their followers) has committed a trivial mistake in the understanding of agreed upon moral principles. Randists and Rothbardians are not libertarians in the same sense — though they talk a misleadingly similar language. They mean different implications in the concept of rights — because they have different metaphysical assumptions to back their endorsement of the morality of the principle of individual rights in the first place. Rothbard is more extreme than Rand politically, because he is more extreme than her metaphysically. Rand allows only freedom of consciousness. Rothbard also allows freedom of decision. The choice between the two positions cannot be consistently made on political grounds. It has to deal with the basic metaphysical disagreement, and to deal with certain corollaries of it as well, such as: are there objective values? Are values determined solely by my decisions, or by my awareness of given facts? Similarly, while for Rand a promise (and any other decision) is a necessary product of the totality of one's premises and values, and once it is made, it is a *fact*, which one can either *identify* or *evade*, so that the immorality of breaking promises reduces to the primary sin of *evasion*, for Rothbard a promise is a reflection of a free *decision*, and a decision is valid only till another decision supersedes it.

7. TOWARDS RESOLUTION

Does my analysis imply that the seeming unity of libertarians is illusory, and that we, actually, comprise two different groups, which have very little in common? I do not think so.

The point is as follows: both Randism and Rothbardism presuppose a common metaphysical premise, which is very profoundly important: the ultimateness of human individuality.^[25] This premise is crucial, because it denies *determinism*, which is the unifying common assumption of the official culture.^[26] Indeed, if man has no kind of freedom of choice, if his actions are predetermined, then it is impossible to defend his metaphysical

individuality. It won't do, as Machan tries, to speak about "self determination" and "other determination", acknowledging metaphysical determinism but justifying individuality (and individual autonomy) by reference to internal determination.^[27] To begin with, this position can be refuted by a mechanical adaptation of the argument that its proponents use to defeat other determination (such as Skinner's).^[28] Worse — once you say that your choices are predetermined by your brain, then obviously your brain is affected by perception of external environment, so the tracing of causal sequences (even if conceived of in terms Randists favour, such as the entity–action model of analysis of causality, and not the event–event model of causality)^[29] will lead ultimately, even if partially, to outside your body. Thus, any form of determinism would imply that man is a part of a larger natural system, acting according to its deterministic laws, and being in no way originator of choice which is not further predetermined. Then, the only grounds left to defend human individuality would be to speak about the discreteness of one human body from other human bodies, which is a very weak argument, on physical grounds.^[30] Actually, within a deterministic context, any concept of *entity* as an ultimately discrete existent loses all significance. All entities easily reduce to parts of larger systems.^[31]

Only the stress on the individual as *ultimately free* establishes his individuality — being a *distinct first cause*. And it is this stress on freedom (however confused by some with attempts to reconcile it with "deterministic" and "naturalistic" fetishes) which is common to all libertarians, as well as the consequent acceptance of reason, rational argument, and factual evidence, as ultimate epistemological court of appeal. Thus, I propose that the conflict between Randists and Rothbardians be referred to its proper context — the issue of the metaphysical nature of man, and that it will be referred to with full understanding of human individuality, and with no appeal to authority: let reason be the judge, and, of course, individual reason, your reason.

NOTES

1. See Ayn Rand, *Capitalism, the Unknown Ideal* (New York: Signet Books, 1967.) Murray N. Rothbard, *Man, Economy and State* (Los Angeles: Nash, 1970.) Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973.) Morris and Linda Tannehill, *The Market for Liberty* (Tannehill, 1970.)
2. Cf. Rand, *Capitalism*, pp. 329–338 for Rand's statement of her position.
3. Cf. Rothbard, *New Liberty*, pp. 47–78, among others, for a clear statement of Rothbard's position.
4. I could not find any explicit statement by Rothbard on this subject. But his whole economic analysis is based on taking individual preference scales (Rothbard, *Man, Economy*) as givens, on which praxeological analysis is based. While Rothbard is evidently not an ethical subjectivist or irrationalist, he never discusses, as I can ascertain, any moral principles apart from those of individual rights. These, as discussed in Rothbard, *New Liberty*, pp. 23–46, are discussed independently of any discussion of individual values.
5. Cf. Ayn Rand, *The Virtue of Selfishness* (New York: Signet Books, 1964.)
6. This is my understanding of the argument in Rothbard, *New Liberty*, pp. 23–46. The justification of this interpretation is offered in the pertinent notes below.
7. Cf. Rand, *Virtue of Selfishness*, pp. 110–111, 116–117 as well as Paul Beaird, "On Proper Government," *Option* (Jan–June, 1976).
8. Rand, *Virtue of Selfishness*, pp. 110–111: "In a free society, men are not forced to deal with one another. They do so only by voluntary agreement and, when a time-element is involved, by *contract*. If a contract is broken by the arbitrary decision of one man, it may cause a disastrous financial injury to the other — and the victim would have no recourse except to seize the offender's property as compensation... the protection and enforcement of contracts through courts of civil law is the most crucial need of a peaceful society".
9. Rothbard, *Man, Economy*, pp. 152–153: "Contracts must be considered as agreed upon exchange between two persons of two goods, present or future. Persons would be free to make any and all property contracts that they wished; and for a free society to exist, all contracts, where the good is naturally alienable, must be enforced. Failure to fulfill contracts must be considered as theft of the other's property. Thus, when a debtor purchases a good in exchange for a promise of future payment, the good cannot be considered his property until the agreed contract has been fulfilled and payment made. Until then, it remains the creditor's property, and non-payment would be equivalent to theft of the creditor's property.

An important consideration here is that contract not be enforced because a promise has been made that is not kept. It is not the business of the enforcing agency or agencies in the free market to enforce promises merely because they are promises; its business is to enforce against theft of property, and contracts are enforced because of the implicit theft involved...take the case of a promise to contribute personal services without an advance exchange of property. Thus suppose that a movie actor agrees to act in three pictures for a certain studio for a year. Before receiving any goods in exchange (salary), he breaks the contract and decides not to perform the work. Since his personal will is

inalienable, he cannot on the free market be forced to perform the work there. Further, since he has received none of the movie company property in exchange, he has committed no theft, and thus the contract cannot be enforced on the free market....

It certainly would be consistent with the free market, however, for the movie company to ask the actor to pay a certain sum in consideration of his breaking the contract, and if he refuses, to refuse to hire him again, and to notify other prospective contracting parties (such as movie companies) of the person's actions. It seems likely that his prospect of making exchanges in the future will suffer because of his action. Thus, the blacklist is permissible on the free market."

10. Indeed, one of the inherent difficulties of the concept of self-sale to slavery is the inability of the slave to continue to possess any personal property. If slavery means total obedience to one's master, how can a slave refuse an order to transfer his property to his master?
- 10a. Beaird, "Proper Government," p.16: "To give this personal moral failing the social impact it has, we must bring in the others. If one has a right to the consequences achieved by the action one chooses, then others are not in the wrong to visit the criminal as equal a measure as possible of the consequences of his action...Why must the punishment fit the crime? If a man achieves only as much as was specifically possible to the actions he chose, then he forgoes only so much as would have been gained or kept by the actions he did not take. In this context that means that he forfeits his rights — his freedom of action — only to the degree of his interference with the right of another. Or, he deserves only so much injury as he caused."
11. Rand, *Virtue of Selfishness*, p. 110: "There is only one basic principle to which an individual must consent if he wishes to live in a free civilized society: the principle of renouncing the use of physical force and delegating to the government his right of physical self defense for the purpose of an orderly, objective, legally defined enforcement." Thus, one must make an act of commitment, a promise, whenever he joins a Randist free society: he must transfer his right of self defense to its government. Rand does not specify whether or not this commitment is explicit. But, anyhow, this commitment is assumed to exist. This is why Rand's framework necessitates the existence of a minimal government and why her version of the principle of individual rights is inconsistent with anarcho-capitalism, as she correctly observes.
12. Rand, *Virtue of Selfishness*, p. 110: "Since the protection of individual rights is the only proper purpose of a government, it is the only proper subject of legislation...The source of the government's authority is the consent of the governed". Observe that this quotation, as the one given in [11], presupposes that promises are the proper source of obligations. By obliging yourself, through a promise, or a commitment, you are, thereby, obliged. You cannot later cancel your commitment by a later decision. This relates directly to Rand's view of the significance of contracts as delineated above.
13. Rothbard, *New Liberty*, p. 2, and especially 28–30 where Rothbard explicitly disconnects rights from any government action.
14. Cf. [11, 12].
15. Cf. [13].

16. Rand, *Virtue of Selfishness*, chap. 1.
17. Rand, *Virtue of Selfishness*, chap. 1.
18. Cf. Rothbard, *Man, Economy*, pp. 260–268.
19. This is my interpretation of arguments such as the following in Rothbard, *New Liberty*, pp. 26–28: “The most viable method of elaborating the natural rights statement of the libertarian position is to divide it into parts, and to begin with the basic axiom of the right to self ownership. The right to self ownership asserts the absolute right of each man, by his virtue of his (or her) being a human being, to own his or her body; i.e. to control that body free of coercive interference. Since each individual must think, learn, value and choose his or her ends and means in order to survive and flourish, the right to self ownership gives man the right to perform these vital activities without being hampered and restricted by coercive molestation.
 Consider now the consequences of denying each man the right to own his own person. There are then only two alternatives: either (1) a certain class of people, A, have the right to own another class, B or (2) everyone has the right to own his own equal quotal share of everyone else. The first alternative implies that while Class A deserves the rights of human beings, Class B is in reality subhuman and therefore deserves no such rights. But since they are indeed human beings, the first alternative contradicts itself in denying natural human rights to one set of humans....The second alternative, what we might call participatory communalism or communism holds that every man should have the right to own his own equal quotal share of everyone else...this ideal rests on an absurdity; proclaiming that every man is entitled to own a part of everyone else, yet is not entitled to own himself...the libertarian therefore rejects these alternatives...” Clearly, the argument here does not rest on any specific *values* which an individual consciousness identifies as required for survival. Rather, it rests on considering the various possibilities of allocating control over human action to individuals, whatever be the specific goals directing specific actions of specific individuals. In this sense, the argument is a “second level” argument, assuming a lower level of individual goals and actions.
20. Indeed, the concept of defense agencies introduces the issue of the price of defense of rights. But this issue is irrelevant, because an individual has rights even if he chooses to defend them himself, and not to relegate his defense to a specializing defense agency.
21. Cf. [19].
22. Cf. [19].
23. Cf. [19].
24. Rothbard, *Man, Economy*, p. 771: “It has been asked: Is not this police function an act of intervention?...If governments, or private agencies, for that matter, are employed to check and combat intervention in society by criminals, it is certainly obvious that this combat imposes losses of utility upon the criminals. But these acts of defense are hardly intervention in our sense of the term. For the losses of utility are being imposed only upon persons who, in turn, have been trying to impose losses of utility on peaceful citizens.”
25. By “individuality” I mean: the conception of man as a fundamentally discrete entity, on the metaphysical level. Man as an “island unto himself” — and not as a part of some larger system, social or natural where his separate identity is largely conventional and fictitious.
26. For a valuable discussion of determinism cf. Nathaniel Branden, *The Psychology of Self-Esteem* (New York: Bantam, 1969), pp. 53–57.
27. For such an attempt, cf. Tibor R. Machan, *The Pseudo Science of B. F. Skinner* (New York: Bantam, 1969), pp. 164–165: “It will be recalled that Skinner rejects self determination, yet never considers the evidence for it. From what Sperry (among others) has found, however, we get a scientifically coherent picture of man as a free agent, yet a physical, psychological organism. No inconsistency between science and human freedom arises....This does not mean that man is free from the forces of his own decision making machinery. In particular what this present model does not do is to free a person from the combined effects of his own thoughts, his own reasoning, his own feeling, his own beliefs, ideals and hopes, nor does it free him from his inherited makeup or his lifetime memories”. It is incredible to see how Machan clings to “scientific respectability” and considers some form of determinism to be a presupposition of being “scientific”. Indeed, if science has necessary presuppositions like this, it is based on *a priori* assumptions, hence contains a necessary dogmatic component, to be accepted on faith. Moreover, this “complex” he quotes with approval from Sperry of feelings, etc. must be the product of the person’s experience. When a man is born he, on Machan’s assumptions at least, has no innate concepts, premises, hence hopes, feelings, etc. Now, his first feeling, hope, premise, concept or whatever must, on the assumptions of “self determinism” be the product of (and predictable from) the given physiological hardware (as well as the environment). Thus, it is pre-determined, and one has no choice over it. The second “mental element” is the product of the first + the physiological hardware + environment + recorded experience (again, physiology). It, again, is pre-determined. So by applying a principle of mathematical induction over *time*, it is easy to see that the “n+1” mental entities (thought, feeling, whatever you like) is determined by n mental entity preceding it in existence + the physiological hardware + the environment. So, we have full-fledged metaphysical determinism. As for the refutation of determinism, see the next note.
28. Machan, *Pseudo Science of Skinner*, p. 29: “To ascertain what is being said as true or false requires however that one be capable of objective, unbiased judgment. If the mind can only go in one direction, the person is unable to render an objective judgment...therefore by the tenets and requirements of determinism, it is impossible even to render a decision as to whether determinism is a true doctrine.” This is a conclusive argument for the irrationality of determinism — including the determinism to which Machan, the originator of the quoted formulation of the argument, holds.
29. Both Branden, *Psychology of Self-Esteem*, pp. 57–61 and, more emphatically, Machan, *Pseudo-Science of Skinner*, pp. 157–158, stress that causality is a relation between an entity and an action of this entity. This is valuable in order to dispel the Humean argument against the validity of the concept of causality, because the “necessity” of the relation between cause and effect becomes a corollary of the nature of the acting entity, hence is no more puzzling. While, indeed, if causality is a relation between two different events, it

- can be reconceptualized, *à la* Hume, as a superstition based on past observations of repeated coincidents. But this revision of the concept of causality has no value whatsoever in solving the problem of free will as against determinism. The reason is simple. If causality is a relation between entity and action, then the fact that a given entity (say a match) does not *always* produce a specific action (such as fire) raises the question as to the *circumstances* in which it will perform these actions (such as when rubbed against a matchbox). The circumstances are no more, it is true, taken as *cause* of the action, but merely as a “trigger” for it. Thus, to assert universal determinism is to assert that any action has a trigger. To deny it (still consistently with the principle of causality) is to say that some entities act in a specific way in essentially unpredictable circumstances, where the unpredictability is grounded in the nature of the entity (and not in some *a priori* limitations of human capacity for knowledge). Machan, through his concept of “self determination”, in which the “self” is just a complex of mental and physiological factors accumulated through past experiences, believes that any action has a trigger, and that it is, in principle, always predictable in advance from the knowledge of the factors involved. Moreover, the factors accumulate through experience, and experience involves interaction with external factors, which serve as “triggers”. So his position easily reduces to that of Skinner, with the one (irrelevant) difference that Skinner does not refer to the brain, while Machan does.
30. It is a weak argument, because the distances between my body and yours, relative to the distances between molecules within my body, or between elementary particles in atoms in these molecules, etc., are minute. Physicalism, conjoined with determinism, is absolutely incompatible with the idea of multiplicity of fundamentally individual existents. Cf. [31].
 31. Few realize that Spinoza was the first to express in full this fact. Cf. Spinoza, *Ethics* in R. H. M. Elwes (ed., trans.) *The Chief Works of Benedict de Spinoza* (New York: Dover Publications, 1951.), p.45: “By substance, I mean that which is in itself and is conceived through itself; in other words, that of which a conception can be formed independently of any conception ... by mode I mean the modifications of a substance or that which exists in, and is conceived through, something other than itself.” Thus, a substance alone is an individual. But there is only one individual like that, Spinoza argues, most logically, on determinist assumptions: (p. 55) “only one substance can be granted in the universe.... Whatever is, is in God, and without God nothing can be”. Spinoza’s argumentation, if anybody bothers to check, is most rigorous. But his conclusion presupposes, naturally, its premises: and the major one is determinism. The argument from determinism against individuality was of course repeated by all later haters of individual freedom.
 32. Cf. [27]. “Naturalism” is the name usually given to deterministic materialism. This dogma has never been defended on any grounds, logical or empirical, and it is tantalizing to observe how widely it is taken for granted, even among libertarians. It is one thing to wish to be scientific, namely to opt for reason as one’s method of gaining knowledge and of facts as the basis for knowledge. It is absolutely a different matter to accept certain widespread dogmas of official spokesmen for science, and to swear allegiance to them as a means of gaining (or pretending to gain) “scientific respectability”.
 33. Indeed, if there is a very large similarity between two different thinkers such as Rand and Rothbard, it is due to their insistence that logical reasoning, and factuality, are their methods of gaining knowledge, and that any *authority* is invalid in the field of human understanding.

PROFESSOR KROY ON CONTRACT AND FREEDOM: COMMENT

ROY A. CHILDS, JR.

Libertarian Review

What Professor Kroy attempts to do in this paper, to distinguish between the technical views of Murray Rothbard and Ayn Rand, is very important. Unfortunately, there are some serious misinterpretations of Dr. Rothbard's views, particularly his view of contract and exchange. The problem in interpretation begins with Section 3, "An Example." A has a dog, B a hen, and they make a contract to exchange the dog for the hen. A delivers the dog to B. Then B refuses to give up the hen. Clearly, Prof. Kroy states correctly, something is amiss, and both Rand and Rothbard agree. Where they disagree, he states, is on *why* this is so.

"Rand would say that you are wrong because you have defaulted on a promise, contained in a contract." Rothbard, however, would say that (B) is in the wrong for a different reason. "(B) does not owe (A) a hen. The hen is (B's), and remains (B's). As for the contract, (B's) default amounts to a cancellation of it. The contract ceases to be valid once (A or B) refuses to abide by it. But if so, what makes (B) morally wrong? Simply, the fact that (B) now controls a dog which belong to (A), makes (B) a criminal. Once (B) has, by refusing to fulfill his part of the contract, cancelled the contract, (B) has, thereby, cancelled his right to control the dog. If he continues to hold the dog, he is in the same category as a robber, or a thief." (Kroy)

This however is not an accurate statement of Rothbard's views of contract and exchange. Rothbard would agree with Rand — B owes A a hen — but for subtly different reasons. Rothbard distinguishes between alienable and inalienable property titles. The titles which A and B have to the hen and dog are alienable. If a contract to exchange the dog for the hen is signed, or agreed upon, and if A delivers the dog, *then a transfer of titles has taken place.*

Though he may hold onto the hen, B no longer possesses the just *title* to the hen, for the dog has been delivered and the contract consummated. There is no longer any question of a *promise* to exchange, but an actual exchange has taken place, an exchange of *titles* even if the physical good (hen) remains in the hands of the original, rather than the new owner.

Now for Rothbard, the crime must consist not in keeping the dog, but in refusing to hand over the hen, whose title has now passed to A, upon B's acceptance of the delivery of the dog.

Prof. Kroy gets this backward. The contract is not "cancelled" because one party refuses to deliver the good; the contract has been *violated*. After the fact, some arrangements may be made, but the starting point is that the just title to the hen has been transferred.

When Prof. Kroy focuses on the differences between Rand and Rothbard, he makes a few mistakes. For Rothbard, as for Rand, a promise *may* create an obligation, but not a *legal* obligation, i.e. not an enforceable one. But when Prof. Kroy tries to differentiate between Rand and Rothbard by saying that for Rand, "If (B) refuses to deliver the hen, he is trying to detain the transfer of property which is *already* not his," he neglects that Rothbard holds the same thing, but *not* because a promise had been made; rather, because *the title to the hen has been legitimately transferred.*

On p. 206, paragraph eight ("But, on the other hand...") is entirely wrong. The title was transferred in the contract, and the contract comes into effect when either A or B delivers as per the arrangements made in the contract. B is still wrong, as Kroy suggests, *not* for holding onto the *dog*, but for *refusing* to hand over the *hen* once the title has been transferred. Kroy is right in holding that the illegality rests with the

refusal to turn over something which he (B) has no right to, but *what* he has no right to is the hen, not the dog. This is a key distinction, for how a Rothbardian court would in fact handle the dispute is the opposite of what Kroy suggests, although for generally the same reasons as Kroy suggests, i.e. one is holding onto something which one does not have a just title to, against the will of the proper owner.

This error on Prof. Kroy's part has some implications for the rest of the essay, but it isn't fatal. On the bottom of p. 206 and top of p. 207, (No. 1), Kroy is wrong: the Randian and Rothbardian judges would come to identical conclusions, but for different reasons. The Rothbardian judge would demand that the criminal return the hen. Sections Nos. 2, 3 and 4 as treated by Kroy are fine, and are not affected by the misinterpretation.

A few further comments.

Page 209, Kroy states that for Rothbard, "there are no subject-independent (or 'objective') factors which determine what your values should be." Not quite true, although perhaps it is true if we stress the word "determine." Rothbard is in the natural law tradition, and there are most certainly, for him, "objective" factors which determine what one's values should be: the nature of man and the universe in which he lives.

I also do not think that Kroy's treatment of Rothbard's view of freedom (of the will) is precise enough. Perhaps he should refer to Rothbard's "The Mantle of Science." Rothbard's disagreements with Rand on the question of free will is an extremely interesting topic. We may state the difference this way, drawing on the earlier works of Nathaniel Branden, a one-time philosophical associate of Ayn Rand. Dr. Branden, in his work *The Psychology of Self-Esteem*, develops a neo-Thomistic separation of the functions of man's mind, of human consciousness, into three separable elements: cognition, evaluation, and regulation of action. Ayn Rand and Nathaniel Branden seem to limit man's metaphysical

freedom to the first: the only choice is to think or not to think. The rest follows from this, and other (apparent) choices are reducible to this one. For Rothbard, man's freedom is broader, and includes such elements as *what* to think about and for *how long*.

In a nutshell, Rothbard's view of freedom may be said to integrate the basic Randian argument of why free will exists with the "subjectivism" of Mises and the Austrian school of economics. For Rothbard, a person does not only choose to think, but to think about something, rather than something else, and then for a specific period of time. Thinking, for Rothbard, is in a fundamental sense like all other human activities: in thinking, man faces limited means and unlimited ends; he must *economize*. *Choice*, and hence true freedom, is wider than merely the choice to think or not to think. It operates along the whole sphere of human activity. This is my interpretation of the basic difference between Rand and Rothbard. Rothbard is, in my view, more subtle, recognizing the importance of *degrees*, of selectivity, of choice all along the scale of human activities. Thinking is not for him something to be turned on or off ("to focus or not to focus") with its object *given* by a previously existing set of "premises." Premises do not "determine" the object of thought or the length of time one thinks about any one given thing because thinking is not mechanistic or mechanical; there is selectivity, choice, scarcity, all along the scale.

Finally, if Prof. Kroy wishes to take up the distinctions between the thought of Murray N. Rothbard and Ayn Rand in any detail, he needs to look into some of Rothbard's more obscure publications, such as his early essays on Austrian methodology, and the essay "The Mantle of Science," as well as the unpublished work *The Ethics of Liberty*. Since Rothbard's position is nowhere spelled out in full, one has to piece it together. When that is done, then the reasons for the differences between Ayn Rand and Murray N. Rothbard become more clear.

THE REVOLUTION OF REASON: PETER GAY, THE ENLIGHTENMENT, AND THE AMBIGUITIES OF CLASSICAL LIBERALISM

CHRIS R. TAME

Institute of Economic Affairs, 2 Lord North St., Westminster, London

“The moment will come, then, when the sun will shine only on free men on this earth, on men who will recognize no master but their reason.”
Condorcet

In his seminal essay “Left and Right: The Prospects for Liberty”^[1], Professor Rothbard delineated a libertarian interpretation of history, an interpretation which saw the larger part of humanity’s existence on earth before the 18th Century as dominated by a distinctive “Old Order”. Whether in the form of the primitive tribe, Oriental despotism or feudalism, the Old Order was a “society of status” distinguished by tyranny, fixed class or caste, exploitation, stagnation and hopelessness. It is indeed significant, as we shall see, that this interpretation is at once both a libertarian and, as Karl Popper has put it, a *rationalistic* one. For Rothbard and Popper alike, the dismal record of human history is interrupted by but a few enthralling periods distinguished by (in Popper’s words) “the efforts of men to free themselves, to break out of the cage of the closed society, and to form an open society”.^[2] Undoubtedly the three most important landmarks on the as yet uncompleted journey to an “open society” were, however, those of Graeco-Roman civilization, the Renaissance, and the Enlightenment. But it was this last period, the Enlightenment of the 18th Century, which provided the most revolutionary fulfilment of what had been in its predecessors at best only a tenuous promise. As the eminent French historian Paul Hazard put it, it was in the period from 1715 that “there became apparent an effervescence and a diffusion of ideas so remarkable in its nature, so far-reaching in its extent as to be without parallel in history”.^[3] In essence, it was the age of the Enlightenment that witnessed the creation of a self-conscious and revolutionary radicalism and a new vision of human potentialities and the possibilities of their *liberation*.

Professor Peter Gay’s monumental two

volume study, *The Enlightenment: An Interpretation*^[4] is a work of major importance, and it is a most regrettable fact that it has failed to receive much attention in libertarian circles. For the creation of a sophisticated historical understanding is a vitally important — but all too frequently neglected — part of libertarian analysis, and Gay’s work constitutes an outstanding contribution to the development of such understanding. In fact, *The Enlightenment* is a most refreshing work of scholarship: in a period of increasingly myopic specialization Gay, while undoubtedly in full control of all his materials (a fact attested to by his earlier books and essays and by the extensive and dazzling bibliographic essays at the end of each volume of this work) does not fail to complete the task of scholarship, that of criticism and synthesis in the cause of the grand theme. But what renders Gay’s work all the more attractive to the contemporary libertarian is the author’s own quite explicit sympathy with his subject, with what he describes as “the permanent value of the Enlightenment’s humane and libertarian vision...the permanent validity of its critical method”.^[5] Moreover, Gay’s own conception of his intellectual task as a threefold one, “to account not merely for the philosophes’ ideas and for the interplay of these ideas with their world but also to judge the adequacy or inadequacy of their perceptions”,^[6] leads him to take an unabashed evaluative and critical stance *vis-à-vis* his subject. It is, then, in subject, substance and approach that *The Enlightenment* possesses a direct relevance and importance so often lacking in more orthodox works of intellectual history.^[7]

In tracing the genesis of the Enlightenment and its vision of the past, the first volume of Gay’s study, entitled *The Rise of Modern*

Paganism, in fact constitutes a powerful documentation of the “rationalist interpretation of history”. For Gay, as for the philosophes, Greek civilization was a true revolution in the intellectual history of mankind, a “discovery of the mind”, a period which “liberated men from the tyranny of myth and breathed the bracing air of reason”.^[8] It was not a revolution at one blow, of course, but rather “a long, laborious conquest of myth by reason” which took place, but it was a revolution nonetheless. Gay draws on the work of a number of scholars, including F. M. Cornford, Jane Harrison, Bruno Snell and Henri Frankfort in support of his thesis. But it is Ernst Cassirer’s distinction between two basic patterns of thought, between an essentially pathological “mythopoeic” mentality and rational intelligence, of which he makes most fruitful use.^[9] And it was undoubtedly to Greece that we are indebted for the revolutionary creation of a sustained critical intelligence which cut through the “web of myth” that had for so long constrained humanity.

For the philosophes of the Enlightenment the decline of Graeco-Roman civilization and the rise of Christianity constituted a terrible tragedy: the Middle Ages were for them truly a Dark Ages, when the power of reason was once more subject to superstition and overwhelming religious and political tyranny. The Enlightenment view of the Middle Ages has, of course, been subject to massive criticism, and it is indeed necessary, as Gay points out, to recognize the “beauty, the learning, and the variety of the Christian millenium”^[10], to observe that it was “not merely an abyss...but a transmission belt”.^[11] In fact, the philosophes were themselves often constrained to make such qualifications. But, as Gay states, their polemics were very much to a purpose: “they treated the past ideologically because they were engaged in an ideological battle that knew no quarter. The Christian millennium...was part of their political present”.^[12] Moreover, the philosophes were fundamentally correct in their view of the Middle Ages; it was a qualitatively different period. As Gay puts it: “behind a tissue of erroneous detail and prejudiced judgment stands a major historical truth, a truth that remains valid and becomes more obvious after

its animus has been stripped away and its emotional terminology replaced by neutral language — the Middle Ages were different in vital essence from the ages that preceded and followed them. And they were different, above all, because they introduced — or rather, reinstated — religious myth as the deepest motive power and final purpose of civilization”.^[13]

Nevertheless, the seeds of a new society — “seeds of reason” — remained within the womb of the old. For Gay it is the four centuries between 1300 and 1700 that constitute the “prehistory of the Enlightenment”, a period “when the critical mind resumed its interrupted conversation with classical antiquity and moved toward independence”.^[14] These were the years in which the unity of Christian civilization was increasingly undermined by forces of secularism and rationalism and, indeed, by its own spiritual malaise and loss of self-confidence. If not yet modern, it was an age no longer strictly medieval, an age aptly characterized by Gay as the “era of pagan Christianity” when the new forces and spirit were still subsumed under or controlled by the old. The burgeoning of the Renaissance testified, however, to the vigor of the new spirit, to the new sense of man as “free, the master of his fortune, not chained to his place in a universal hierarchy but capable of all things”.^[15] But while the Renaissance possessed the same general qualities as the Enlightenment, manifesting most of the same intellectual themes and tensions, it resolved them in a different manner. Rather than a revolution, the Renaissance represented a victory for moderation and “compromise”. As Gay puts it: “The central intellectual problem of the Renaissance was to find...a compromise formula...that would enable men to live comfortably with classical forms and Christian convictions, trust in man and trust in God, vigorous secular energies and a tenacious ascetic ideal”.^[16]

It was, then, to the Enlightenment that was left the task — the honour — of finally breaking out of the “holy circle” (as Gay terms it) and of completing what we might call “the revolution of reason”. The “recovery of nerve” manifest in the Renaissance reached its culmination in the sense of life of the Enlightenment, in an ethos in

which the possibility of massive social progress no longer wore a mantle of unrealistic utopianism. And this revolution in attitude, as Gay makes clear, was precisely the product and accompaniment of the growing predominance of reason, of critical intelligence, and its fruits in science and medicine. What Gay's work so effectively and valuably underlines is the inextricable linkage of the two basic values of the Enlightenment, between "the supremacy of philosophy and the autonomy of man". For the revolution of reason was simultaneously and of necessity the revolution of *liberty*. The autonomy of the individual rests only upon the supremacy and exercise of a militant rationalism which blasts aside the pretensions of illegitimate authority and the mystique of the status quo. This revolutionary significance of an unbridled rationalism was indicated most vividly by Diderot's ideal of the philosopher who "tramples underfoot prejudices, tradition, antiquity, universal assent, authority, in a word, everything that overawes the mass of minds, who dares to think for himself, to go back to the clearest general principles, examine them, discuss them, admit nothing save on the testimony of his experience and his reasoning".^[17]

The political temper and tendency of the Enlightenment was, then, fundamentally libertarian. Its politics was essentially a politics of liberty — a "politics of decency" as Gay sympathetically puts it — which launched a growing attack upon a hierarchical class society, upon slavery and serfdom, upon clerical despotism and upon the barbarity of the criminal law, in favour of a free and humane society open to talent and merit. As Gay puts it:

The men of the Enlightenment united on a vastly ambitious program, a program of secularism, humanity, cosmopolitanism, and freedom, above all, freedom in its many forms — freedom from arbitrary power, freedom of speech, freedom of trade, freedom to realise one's talents, freedom aesthetic response, freedom, in a word, of moral man to make his own way in the world.^[18]

Moreover, while hardly a radical libertarian and frequently manifesting many of the orthodox myths and attitudes (he is, for example, quite capable of speaking about "the bourgeois spirit, which would merely rationalize the

cowardice, the greed, and the philistinism typical of the trading mind"!)^[19], Gay makes it thoroughly clear that *economic freedom*, the ideal of the free market and *laissez faire*, was a vital and basic part of the Enlightenment's radicalism. He speaks of Adam Smith's *The Wealth of Nations* as a "cardinal document of the Enlightenment"^[20] and declares that,

(F)undamental values — Enlightenment values — were involved in the issue of economic freedom, most notably man's right to determine his own fate, his right to be treated not as a ward of supremely wise government but as an autonomous being.^[21]

In fact, Gay's — alas too brief — comments regarding the origins of capitalism are remarkably incisive and of some note in an historical area crying out for libertarian revision. Indeed, his remarks lend support to the thesis of Professor Rothbard in his essay "Left and Right: The Prospects for Liberty". They implicitly help refute the view (originated, as Rothbard pointed out, by the late 19th Century German anti-liberal historians) that the growth of the absolute monarchies and of mercantilism was a historically progressive stage necessary for the liberation of the merchants and masses from local feudal restrictions.^[22] Rather, Gay helps show that the genesis of market capitalism was essentially an interstitial one, a development that flourished precisely where coercive authority was exercised less, whether that authority be of feudal lord and guild or royal absolutism and mercantilism. In Gay's words:

The dynamism that is the capitalist spirit was . . . the property of a minority and to an impressive extent of outsiders. In England, the industrial revolution was almost proverbially in the hands of Protestant Dissenters and Scots in search of their fortune. In France, financial and industrial innovations were largely the work of foreign Protestants — Scots and Genevans — and Huguenot families who had survived the great purges of the 1680s. Prussia benefited immensely from those purges: the Great Elector intelligently invited Huguenot refugees into his domains, and thus acquired able administrators and inventive craftsmen. The great port city of Hamburg, one of the many Free Cities in the German Empire, avoided the decay of most of the others by welcoming foreigners of all nationalities and giving them a share in civic and commercial affairs. The Hamburg Constitution of 1712, perhaps the least oligarchical urban charter of the age, reflected this liberal spirit and protected it. And in many European cities the Jews and the Lombards did the financial business that the new spirit demanded and the old religion condemned.^[23]

However, as incisive and valuable as Gay's study is, it unfortunately falls short of perfection in one very important respect. Perhaps it is due to the fact that the author is not himself a radical libertarian, but a relevant and central question regarding his subject is notable mainly by its absence: i.e. what became of the Enlightenment's "humane and libertarian vision"? What happened to a seemingly overwhelming intellectual and political movement toward "natural liberty"? That Gay fails to explore this issue is all the more strange since his own principal intellectual mentor, Ernst Cassirer, had himself voiced such questions:

How was it that all these great achievements (i.e. of the Enlightenment) were suddenly called into question — that the nineteenth century began with attacking and openly defying all the philosophical and political ideals of the former generation?

(What lay behind) the complete and rapid change of ideas that we meet in the first decades of the nineteenth century?^[24]

The major part of the answer to such questions can be found, I believe, *within* the Enlightenment itself. As Paul Hazard wrote regarding the "disaggregation" of the Enlightenment:

(W)ithin those symmetrical designs (i.e. of Enlightenment philosophy) . . . there were hidden certain inconsistencies, certain contradictory elements, which ultimately rendered them nugatory, at least in part . . . we shall see a doctrine brought to nought, not by any hostile intervention from without, but by the operation of some inherent defect from within. We shall see how flaws remained undetected within a system that was so seemingly faultless; we shall see how a victory, prematurely proclaimed, turned out to be no victory at all, and how, yet once again, a mighty effort to bring happiness to mankind was doomed to end in failure.^[25]

In other words, it was the very flaws and ambiguities within the Enlightenment's own philosophy to which we can trace the causes of its dissolution and the failure of its libertarian promise. In fact, in all fairness to Professor Gay he does *partially* recognize all this. He is quite well aware, of course, that "(t)he world has not turned out the way the philosophes wished and half expected it would".^[26] And he does portray those ambiguities which were to prove so fatal — but *implicitly*. What he fails to do, unfortunately, is to draw out *explicitly* the full significance, the political and ideological significance, of those philosophical ambiguities.

What, then, were these fatal ambiguities to

which we refer? Drawing especially from the second volume of Gay's work, *The Science of Freedom*, we can, I think, distinguish four major areas of concern: (i) the status of reason and the reason–emotion relationship; (ii) the nature of human psychology; (iii) the status of "natural law"; (iv) the significance and implications of science.

Although the Enlightenment was eventually to be subject to especially vehement attack for its allegedly "cold and heartless" rationalism it was, ironically, precisely the status of reason and its relationship to the emotions that constituted a serious ambiguity central to most Enlightenment thinkers. For although committed to rationalism and to philosophy as "the organized habit of criticism", the Enlightenment also stressed a certain "philosophic modesty". In their reaction against the abstractions and dogmatisms of both medieval and 17th Century philosophy and theology — against what David Hume termed "an abstruse philosophy which seems to have hitherto served only as a shelter to superstition, and a cover to absurdity and error"^[27] — the philosophes were uncertain as to the nature and ultimate province of reason. As Gay states: "(T)he limits of rational inquiry into ultimate mysteries, the impotence of reason before the passions, were . . . themes that haunted the Enlightenment."^[28] Indeed, he is even able to label this aspect of their thought as a "revolt against reason". Moreover, this uncertainty as to the power and province of reason combined with another fatal ambiguity. For the rehabilitation and celebration of man as a natural creature was a rehabilitation of the "whole" man, of the passions as well as of reason, of man as a sensual and emotional being. And to a certain degree this was all well and good; as Gay states, "the Enlightenment's rehabilitation of the passions was essential to its rehabilitation of man as a natural creature".^[29] But the philosophes were unable to successfully resolve the false dichotomy between reason and emotion, and in fact widened it by their vague and dangerous encomiums to the passions. The "emotional" nature of man, the limits — both philosophic and psychological — of individual reason, was a central message of Enlightenment

thought. Hume's statement that "(r)eason is, and ought only to be, the slave of the passions . . ." was merely one of its most famous manifestations. And thus the Enlightenment had left the path fatefully unobstructed for the progress of those myriad doctrines proclaiming the primacy, psychological, political and moral, of the "passions", for movements seeking the fulfillment of the alleged emotional needs of man, for countless irrationalist theories and cults; in a word, for the statist collectivisms of both "left" and "right".

A similar ambiguity in Enlightenment philosophy arose in the area of its dominant psychological concepts, i.e. because of its Lockean "sensationalism" and "associationism". For although the motivation and predominant interpretation of the Lockean approach was undoubtedly libertarian — i.e. in its undermining of "original sin" and the mystique of the status quo, and establishment of the possibility of rational and radical social improvement^[30] — its potential implications were sinister indeed. The whole tendency of empirical psychology following Locke was the minimizing, ultimately the complete denial, of the significance — the very *existence* — of "reflection", i.e. of reason. In modern terminology, its vision of man was essentially deterministic and behaviouristic, and the implications of such a vision are, as its more radical and frank exponents were eventually to declare, to render "freedom and dignity" quite meaningless. The logic of determinism and environmentalism is most definitely not the logic of liberty, but that of "social planning", "social control", "social engineering" and other such similar formulas for tyranny.

But possibly the most immediately striking ambiguity — certainly the most immediately politically significant — within Enlightenment thought was the tension between the tradition of natural law–natural rights philosophy and that of utilitarianism. And that tension was one resolved increasingly in favour of utilitarianism. As Gay puts it: "As the century went on, the philosophes' attitude toward natural law became more and more skeptical, their relation to it more and more tenuous . . ."^[31] The significance of this change in attitude indeed held the most serious implications for the Enlightenment's

"humane and libertarian vision", for the point is, as Élie Halévy made clear in his classic study of philosophic radicalism, that "(t)he philosophy of utility is not essentially a liberal philosophy... not, in origin and in essence, a philosophy of liberty".^[32] The real nature of utilitarianism was not immediately apparent during the Enlightenment because its exponents and those of a natural rights based liberalism shared many of the same assumptions regarding man and society, assumptions largely libertarian in orientation and result.^[33] But once those assumptions changed, then the logical direction of utilitarianism could be seen clearly for what it was, and that was most definitely *not* a libertarian one. The example of Jeremy Bentham in this respect is particularly illuminating, and although he stands largely outside the main period of concern even Professor Gay is constrained to comment parenthetically upon him. For Bentham's obsessive fascination with his "Panopticon" model prison scheme, a vision of absolute "efficiency" and authoritarian control, illustrates very well the internal logic of the utilitarian position and its hold on the mind of a certain type of intellectual. Gay's dismissal of this authoritarian, manipulative element in Bentham's thought as an "eccentricity"^[34] simply will not do. It should certainly be considered in the context of the other themes in his work, countervailing themes more libertarian and individualist in essence, but it remained nonetheless a very real and powerful element.^[35] And Bentham's significance in the context of this issue should not be underestimated; Gay is surely right in his description of him as "the arch-philosophe, who took eighteenth-century radical ideas into the nineteenth".^[36]

The Enlightenment's ambiguity relating to natural law is rendered all the more striking, however, when we realize that it was David Hume who delivered the real, the philosophical and epistemological, deathblows to the doctrine. For Hume, in Gay's view, represented "the complete modern pagan", and almost archetypal embodiment of the Enlightenment ethos and dialectic: "in his intellectual pedigree, in his intentions, and in his very world view Hume belongs with the philosophes, no matter how

amiable his disposition, individual his argumentation, and unexpected his conclusions".^[37] Yet Gay is also compelled to recognize that in its attack on "mere philosophic fictions" Hume's thought "marks an epoch in the internal history of the Enlightenment".^[38] If reason constituted the basis of the Enlightenment's radicalism and libertarianism, Hume's denial of necessity in causal relations, his denial of any rational basis to moral judgements, and his declaration of the impotence of reason before the passions, clearly represented a major challenge to that libertarianism. Whatever the complexity of motivation and intellectual orientation in Hume's case, a more penetrating assessment of his historical significance is surely that of Sheldon S. Wolin, who declared that "Hume was something more than the Enlightenment incarnate, for his significance is that he turned against the Enlightenment its own weapons . . . (whittling) down the claims of reason by the use of rational analysis".^[39]

At this point it should be stressed that Gay is correct in emphasizing the "humane and libertarian vision" as fundamental to the Enlightenment. The attempt by such scholars as J. L. Talmon and Louis Bredvold^[40] to portray the philosophes simply as proto-totalitarians can only be supported by a highly selective and one-sided reading of their work. However, the point is that totalitarian potentialities were *implicit* in the Enlightenment, within the sort of philosophic ambiguities we have discussed. And Bredvold, in his *The Brave New World of the Enlightenment*, is certainly correct in his view of the ominous implications of the abandonment of natural law. It is, then, precisely in such ambiguity — as much as in its positive intellectual virtues — that the significance of the Enlightenment lies.

Not as immediately important as the abandonment of natural law and the rise of utilitarianism, but undoubtedly as *ultimately* significant, was a further ambiguity arising from the question of the status and implications of Science. As Gay notes, Science became in the Enlightenment a "new mystique", with the figure of Newton being virtually deified.^[41] But in their quite understandable and thoroughly humanistic enthusiasm for the mastery over

nature — the liberation — promised, and increasingly achieved, by Science, the philosophes drew conclusions that resulted eventually in unhumanistic — and inhumane! — developments. As Gay puts it:

The momentous manifestation of the scientific method — one of the most significant, most heartening realities in the world of the Enlightenment — promised a momentous consequence. If the scientific method was the sole reliable method for gaining knowledge in a wide variety of contexts, from the phenomena of the heavens to the phenomena of plant life, it seemed plausible and in fact likely that it could be profitably exported to other areas of intense human concern where knowledge was as primitive now, and disagreement as vehement, as it had been in physics a century before — the study of man and society.^[42]

But as he further states:

The Enlightenment's entanglement with science is pervaded with ironies . . . the philosophes seizure of science was a far from untroubled affair . . . (confronting them) with linguistic, ethical and metaphysical difficulties they had not anticipated and for which most of them were ill-prepared.^[43]

Unfortunately, however, Professor Gay hardly broaches the full irony, the real ambiguity, of the Enlightenment's vision of Science, and why it held such ominous implications. This consists of the fact that it was the methodology of the *physical* sciences which was to be applied to the study of man and society. Thus there was born that phenomenon we now refer to as "scientism", a development perhaps most thoroughly analysed by Friedrich Hayek in *The Counter-Revolution of Science*.^[44] In scientism we confront a profoundly *unscientific*, uncritical attempt to transfer the methodology of one scientific discipline to another, ignoring the crucial and distinctive attributes of their respective subjects — in the case of the study of man, his rational consciousness. Thus, the dominance of scientism has produced "social sciences" characterized by their militant denial of the validity of introspection, by reductionism and determinism, and by methodological collectivism, holism, and historicism. Of course, in the work of the most scientifically inclined of the philosophes — d'Alembert, Turgot, Lagrange, and Condorcet — the full implications of this development were hardly grasped or acted upon. As Hayek observes, they still embraced, both in theory and practice, not insignificant elements of the "abstract and theoretical

method" and indeed remained "staunch individualists". But nevertheless, as Hayek also concludes, "in some respects most of these men unwittingly started trains of thought which produced views on social matters very different from their own".^[45] The ethos of science and rationality, of control over nature, was also transformed by other figures into a "scientific" vision of "humanity determining itself", and other rhetorical formulas which discreetly glossed over the fact that this could only mean in practice *some* men "determining" *others*. Thus, in the "social physics" of Saint-Simon and Auguste Comte, and in the later classic sociology of Durkheim and Mannheim, scientism emerged fully in its true colours — i.e. as a thoroughly anti-individualist, anti-libertarian, and authoritarian movement, a *counter-revolution* in every sense of the term. Once more, then, the Enlightenment's heritage was an ambiguous one. If Gay can pay tribute to its "humane and libertarian vision", then such contemporary advocates of totalitarian social engineering as Ernest Becker^[46] are — alas — equally well justified in tracing to the Enlightenment's search for a "science of man" the roots of their own nefarious and despotic vision.

It is, then, a failure to draw out the full significance — the political and ideological significance — of the ambiguities within Enlightenment philosophy that constitutes the major failing of the otherwise so masterly achievement of Peter Gay's *The Enlightenment: An Interpretation*. Not that he is entirely unaware of such ambiguities, or fails to deal with any of the political aspects of the Enlightenment, of course. He does state, for example, that "politics presented the Enlightenment with a dilemma of heroic proportions".^[47] The issue of whether coercion and manipulation by a paternal and enlightened elite was justifiable for the attainment of Enlightenment ends was, Gay indicates, a major issue, and one rendered all the more central by the generally environmentalist viewpoint of the philosophes.^[48] The anti-libertarian implications of such environmentalism were in fact seen, as Gay recounts, by Diderot, who criticised the ominously authoritarian direction in which Helvetius' extreme

environmentalism had led him.^[49] Yet such points cry out for elaboration, an elaboration they alas fail to receive. Consider the final chapter of the second volume, dealing with Rousseau. What an opportunity, in analysing this paradoxical figure, to sum up all the ambiguity of the Enlightenment and its political meaning. For Rousseau, as Gay does indeed state, while "not wholly in the Enlightenment . . . was of it".^[50] He was, in Gay's view, at one and the same time, "a libertarian who could not get compulsion out of his mind".^[51] He so blatantly manifests, too, that pathological psychological characteristic we so frequently find at the roots of statist-collectivist movements, that "urgent, sometimes frantic longing for community".^[52] In all these things Rousseau gave an unmistakable indication as to the course of future history. And in his typically "dialectical" concept of the "general will", an attempt to offer a solution to "the dilemma between freedom and reform that beset the (other philosophes)"^[53], the path of much future political thought and development could clearly be seen. Professor Gay rightly recognizes that Rousseau was thus more "modern" than his fellow philosophes and that his thought was distinguished by its "anticipation of future problems".^[54] But that Rousseau's solutions "presented glimpses of a future not wholly palatable"^[55] is surely an understatement. In both motivation and thought Rousseau clearly stands, as Crane Brinton has stated, as "one of the prophets of modern collectivist society".^[56]

Although one recognizes that any study of so broad a scope as Professor Gay's is subject to obvious limitations of space, his failure to pursue such important and significant insights beyond a few token sentences or comments is striking — all the more so in comparison with, say, his extremely detailed treatment of such a topic as the aesthetic thought of the Enlightenment.

In *The Rise of Modern Paganism*, the first volume of his study, Gay had seen a major part of his scholarly task as that of judging the "adequacy or inadequacy" of the Enlightenment's *historical* vision of itself — i.e. of its significance and place in history. What we find so grievously lacking (and, as a radical

libertarian, so important) in *The Science of Freedom*, the second volume, is any similar evaluation of the Enlightenment's philosophic-political vision of itself, of the significance and status of its political liberalism and its "science of freedom". In fact, what becomes unmistakable after any serious study of the Classical Liberal tradition is just how ambiguous, how restricted, and how fatally flawed in its libertarianism it was. Its departures from individualist premises, in both normative and analytic respects, were far from infrequent. Thus, we find Adam Smith declaring, in *The Theory of Moral Sentiments*, that "Man was made . . . to promote . . . the happiness of all".^[57] As one Smith scholar has concluded: "It was not to serve the selfish benefit of the individual that he should be given his head . . . the belief that Smith was primarily an individualist . . . is the very reverse of the truth. For him . . . the interests of society were the end".^[58] Similarly, his very view of the individual was as a highly "social" creature, moulded by his social relationships and extremely vulnerable to the alleged horrors of isolation and loneliness. It was indeed an extremely "oversocialized conception of man" (to use the phrase of Dennis Wrong) to which Smith adhered,^[59] and, as Gladys Bryson has written, "in (the) discussions of Smith's . . . which prefigure so much of modern social psychology, there sometimes seem to be no individuals at all, so organic is the relation of person to person conceived to be".^[60] These characteristics were shared by the whole of the "Scottish School" of which Smith was a member — by Hume, Adam Ferguson, Francis Hutcheson, John Millar, Dugald Stewart, the major thinkers who established not merely foundations of political liberalism but much of the basic conceptual framework of modern thought, the intellectual channels in which thought has run since their time. And for the Scottish School, as A. L. Macfie has written, "the ultimate unit is society, and moral obligations consist just in the individual's duty to society, where there is conflict with the claims of 'self-love'".^[61] In the work of Adam Ferguson, for example — which was, significantly, an influence upon Marx — we find an often extreme hostility to individualism and "selfish-

ness", a view of the individual as overwhelmingly socially conditioned, and an early version of the wrongheaded and harmful "alienationist" thesis.^[62]

The same sort of fatal ambiguities and flaws were also present in Classical Economics as a whole. Much of the "communitarian" and nationalist outlook of the Mercantilists was to remain in the Classical approach. "It was", Professor Lionel Robbins points out in his important study *The Theory of Economic Policy in English Classical Political Economy*, "the consumption of the *national economy* which they [the Classical Economists] regarded as the end of economic activity".^[63] And regarding the concept of "laissez faire" it should also be noted that *none* of the Classical Economists ever adopted it as a rigid policy prescription. At best it was only conceived of as a vague tendency within the boundaries of legitimate national sovereignty. Any government intervention in the economy, any restriction of "natural liberty", was to be judged on its individual "merits", not against any standard of natural rights.^[64] Moreover, serious technical ambiguities and failings drastically undercut the Classical analysis of the market. Smith's view of the division of labour (like Ferguson's) left the way clear, even encouraged, the later development of alienationist doctrines. More importantly, however, the Classical labour theory of value provided the foundation for very different conclusions which were to be drawn by Marx and other socialists — and even led astray many individualists in their view of profit, interest and rent. In all, then, as Lionel Robbins concluded, "The Classical analysis abounds in pessimistic vistas and revelations of clashes of interest".^[65]

One could elaborate at much further length, but the point should be clear.^[66] Liberalism, from Smith and the Scottish School, through Classical Economics, Bentham and the Utilitarians, to Mill, Spencer and up to the present day has been completely undermined by its own fatal intellectual ambiguities and flaws. It failed to complete the Enlightenment's revolution of reason, to provide a complete and consistent vindication of human liberty. Instead, its conservative and collectivist

elements overwhelmed its liberal and individualist ones. As Sheldon S. Wolin has concluded in an important and penetrating re-assessment of the liberal tradition:

Liberalism has always been accused of seeking to dissolve the solidarities of social ties and relationships and to replace them by the unfettered, independent individual, the masterless man. In reality, the charge is almost without foundation and completely misses the liberal addiction towards social conformity.^[67]

Professor Gay's failure to deal with the ultimate political significance of the Enlightenment is in fact rendered all the less understandable by his recognition of the dual nature of its concern with "criticism and power",^[68] in his statement that "(t)he science of freedom (i.e. Enlightenment scholarship) was intended as a practical science".^[69] His conclusion of the second volume on a brief consideration of the American Revolution as "the (Enlightenment) program in practice", and an assessment of *The Federalist* as "a classic work of the Enlightenment"^[70] is not only quite inadequate in the depth of its analysis but only serves to underline the fundamental ambiguity of the Enlightenment's politics. For while we can indeed perceive the strong influence of the "eighteenth century commonwealthman", of natural rights libertarianism, in colonial and revolutionary thought, we can also find there, as William Appleman Williams has persuasively argued, strong elements of the mercantilist, nationalist, and conservative traditions.^[71]

If, in the latter half of this examination of Peter Gay's *The Enlightenment: An Interpretation* we have struck a somewhat critical note, it should not be allowed to detract, however, from the profound admiration it nevertheless elicits in us. In an age in which the forces of unreason and irrationality are ever more rampant, in "counter culture" and "ivory tower" alike, Gay's work provides an eloquent^[72] and much needed reminder of — and tribute to — the revolutionary significance of Reason in human history. To enter, via the two volumes of Gay's study, the intellectual world of the Enlightenment is to enter the dazzling realm of the promise of rationalism. If the philosophes failed to fulfil that promise, their work nevertheless still provides us with both inspiration and instruction. Learning from both the

achievements and the errors of the past we must, and can, ensure that *this* time a revolution of reason will not be betrayed, that *every* vestige, political and intellectual, of the "old order" will at last be deservedly swept into the dustbin of history. And to replace that "old order", which is alas still with us, for the contemporary radical libertarian the inspiring vision is that voiced so movingly by Condorcet, of "(t)he moment . . . when the sun will shine only on free men on this earth, on men who will recognize no master but their reason".

NOTES

1. In *Left and Right: A Journal of Libertarian Thought*, Vol. 1, No. 1, Spring 1965.
2. *The Open Society and its Enemies*, Vol. 2, *The High Tide of Prophecy* (London: Routledge & Kegan Paul, 1945), p. 303.
3. *European Thought in the Eighteenth Century* (Harmondsworth: Penguin, 1965), p. 7.
4. *The Enlightenment: An Interpretation*. Vol. 1, *The Rise of Modern Paganism* (London: Weidenfeld & Nicolson, 1967). Vol. 2, *The Science of Freedom* (*ibid.*, 1970).
5. *The Science of Freedom*, p. 567.
6. *The Rise of Modern Paganism*, "Preface", p. xiii.
7. Compare Gay's work with, for example, Preserved Smith's *The Enlightenment, 1687–1776* (Vol. 2 of *A History of Modern Culture*) (New York: Collier, 1962), a quite worthy and exhaustive study on more conventional lines.
8. *The Rise of Modern Paganism*, p. 72.
9. *Ibid.*, pp. 72–82, 89–94. One need not accept the rest of Cassirer's Kantian philosophy to recognize the penetration and value of his working on this topic (and others in the history of ideas). An accessible introduction to his views on the nature of myth can be found in Part 1, "What Is Myth", of his *The Myth of the State* (Yale University Press, 1946). The similarities between Cassirer's concept of myth and the fallacies of conceptual realism and methodological holism are also noteworthy.
10. *The Rise of Modern Paganism*, p. 209.
11. *Ibid.*, p. 225.
12. *Ibid.*, p. 211.
13. *Ibid.*, p. 212. But if the philosophes *were* basically correct, then why should any rational person want to strip away their "emotional terminology", the rightful expression of a righteous outrage?
14. *Ibid.*, p. 256.
15. *Ibid.*, p. 266.
16. *Ibid.*, p. 270.
17. Quoted in *ibid.*, p. 160.
18. *Ibid.*, p. 3.
19. *The Science of Freedom*, p. 48.
20. *Ibid.*, p. 368.
21. *Ibid.*, p. 367.
22. As Rothbard states: "In actuality, this was not at all the case; the King and his nation-State served rather as a super-feudal overlord re-imposing and reinforcing feudalism just as it was being dissolved by the peaceful

- growth of the market economy. The King superimposed his own restrictions and monopoly privileges onto those of the feudal regime. The absolute monarchs were the Old Order writ large and made even more despotic than before. Capitalism, indeed, flourished earliest and most actively precisely in those areas where the central State was weak or non-existent: the Italian cities, the Hanseatic League, the confederation of 17th century Holland . . . industry and the market (expanded) through the interstices of the feudal order (e.g. industry in England developing in the countryside beyond the grip of the feudal, State, and guild restrictions)". "Left and Right: The Prospects for Liberty", *op. cit.*, p. 5.
23. *The Science of Freedom*, pp. 47–48.
 24. *The Myth of the State*, pp. 179, 180.
 25. *European Thought in the Eighteenth Century*, p. 301.
 26. *The Science of Freedom*, p. 567.
 27. Quoted by Gay, *The Rise of Modern Paganism*, p. 138.
 28. *The Science of Freedom*, p. 188; and on this whole issue, pp. 187–201.
 29. *Ibid.*, p. 192.
 30. On this point, see Kingsley Martin, *French Liberal Thought in the Eighteenth Century: A Study of Political Ideas From Bayle to Condorcet* (New York: Harper Torchbook, 1963), pp. 18, 122.
 31. *The Science of Freedom*, p. 459.
 32. Élie Halévy, *The Growth of Philosophic Radicalism* (London: Faber & Gwyer, 1928), pp. 84, 144.
 33. See Kingsley Martin, *op. cit.*, p. 8, on this point.
 34. *The Rise of Modern Paganism*, p. 433.
 35. Gay is commenting specifically on Gertrude Himmelfarb's essay, "The Haunted House of Jeremy Bentham", in her *Victorian Minds* (London: Weidenfeld and Nicolson, 1968), where a powerful case is made for the thesis that Bentham's "Panopticon" scheme was "nothing less than the existential realization of Philosophic Radicalism". (p. 75) A similar interpretation of Utilitarianism is also made by Halévy in *The Growth of Philosophic Radicalism*, *passim*, and especially pp. 82–85 on the Panopticon. Shirley R. Letwin, in *The Pursuit of Certainty* (Cambridge University Press, 1965), dismisses the Panopticon as a "momentary aberration" (p. 182), stresses the individualist and libertarian assumptions in Bentham's philosophy, and argues that "(t)he moral foundation of Bentham's system was not the principle of utility but his conviction that to deny to a normal adult the right to determine his own life was to treat him as a child and to derogate from his dignity as a rational being". (p. 138) However, even Letwin concedes that Bentham in his more austere Utilitarian writings "(b)y ruthlessly ignoring the refractions of ideas and emotions . . . produced devices of a monstrous efficiency that left no room for humanity. In his ardour for reform, Bentham prepared the way for what he feared". (p. 188) And what he feared, Letwin argues, was a coercive and altruistic State paternalism.
 36. *The Rise of Modern Paganism*, p. 432.
 37. *Ibid.*, pp. 401, 403.
 38. *The Science of Freedom*, p. 403 and *passim*.
 39. Sheldon S. Wolin, "Hume and Conservatism", *American Political Science Review*, Vol. XLVIII, No. 4, Dec. 1954.
 40. J. L. Talmon, *The Origins of Totalitarian Democracy* (London: Secker & Warburg, 1952); L. Bredvold, *The Brave New World of the Enlightenment* (University of Michigan Press, 1961).
 41. *The Science of Freedom*, pp. 126–133.
 42. *Ibid.*, p. 164.
 43. *Ibid.*, pp. 126, 128.
 44. *The Counter-Revolution of Science: Studies on the Abuse of Reason* (Glencoe, Ill.: The Free Press, 1955). And see also Murray N. Rothbard, "The Mantle of Science", in H. Schoeck & J. W. Wiggins, eds., *Scientism and Values* (Princeton, N.J.: Van Nostrand, 1960), for a brief, but equally incisive, treatment.
 45. Hayek, *ibid.*, p. 107.
 46. *The Structure of Evil: An Essay on the Unification of the Science of Man* (New York: George Braziller, 1968). A particularly incisive assessment of scientism has been made by Yves R. Simon, in his *The Philosophy of Democratic Government* (University of Chicago Press, 1951): "A new lust for domination over men, shaped after the pattern of domination over nature, had developed in technique-minded men . . . (its) highly emotional humanitarianism . . . did not blind everybody to the fact that a new imperialism, a new lust for absolute power, was finding expression". (p. 44).
 47. *The Science of Freedom*, p. 497.
 48. *Ibid.*, p. 48 and *passim*.
 49. *Ibid.*, pp. 514–516. Interestingly enough, Helvetius was the most anti-individualist, anti-market and utilitarian of all the philosophes — a fact one does not learn from Gay. See Kingsley Martin, *French Liberal Thought in the Eighteenth Century*, pp. 178, 181–186.
 50. *The Science of Freedom*, p. 529.
 51. *Ibid.*, p. 530.
 52. *Ibid.*, p. 532.
 53. *Ibid.*, p. 530.
 54. *Ibid.*, p. 552.
 55. *Ibid.*, p. 530.
 56. Crane Brinton, *The Shaping of the Modern Mind* (New York: New American Library, 1953), p. 135.
 57. Quoted, p. 219, T. D. Cambell, *Adam Smith's Science of Morals* (London: Allen & Unwin, 1971).
 58. A. L. Macfie, *The Individual in Society: Papers on Adam Smith* (London: Allen & Unwin, 1967), p. 54.
 59. See, on this topic, Sheldon S. Wolin, *Politics and Vision* (London: Allen & Unwin, 1961), pp. 344–345.
 60. Gladys Bryson, *Man and Society: The Scottish Inquiry of the Eighteenth Century* (Princeton University Press, 1945), p. 160.
 61. Macfie, *op. cit.*, p. 49.
 62. In fact praised by Marx. See Duncan Forbes, "Introduction", p. xxxi, to Adam Ferguson, *An Essay on the History of Civil Society* (Edinburgh University Press, 1966), on this point, and also David Kettler, *The Social and Political Thought of Adam Ferguson* (Ohio State University Press, 1965), "Introduction". On the oversocialized conception of man in Ferguson, see Kettler, pp. 193–197, and W. C. Lehman, *Adam Ferguson and the Beginnings of Modern Sociology* (Columbia University Press, 1930), pp. 69–73.
 63. (London: Macmillan, 1965), p. 11, my emphasis. Smith's general "moderation", his nationalism, and his conservatism are also stressed in William Clyde Dunn's "Adam Smith and Edmund Burke: Complementary Contemporaries", *Southern Economic Journal*, Vol. VII, No. 3, Jan. 1941, which demonstrates the wide intellectual agreement of the two respective founders of Classical Economics and Classical Conservatism. And, of course, as Liberalism became

- synonymous with Utilitarianism it became progressively less concerned with individualism, libertarianism and justice. Robbins in fact makes a very firm distinction between the "two distinct philosophical origins" of Liberalism, i.e. between natural law and utilitarianism, and stresses that, while sharing certain individualist sentiments, it was utilitarian to the core. This was true even for Adam Smith, who was influenced by the Stoic concept of natural law and frequently used the rhetoric of "sacred rights" and "natural liberty".
64. As Lionel Robbins shows, all the major Classical Economists were quite vehement in their denunciation of laissez faire as an abstract standard. The acceptance of the principle and legitimacy of state intervention by the Classicists, whatever their disagreements regarding the degree of such intervention that was desirable at any moment in time, leads Professor Robbins to stress, from Adam Smith to J. M. Keynes, "the essential continuity of thought in the tradition of economic liberalism concerning the positive nature of the co-operation between the State and the individual" (*The Theory of Economic Policy* . . . , *op. cit.*, p. 38). And for the significance of this fact to Robbins himself, see Mark Brady and Chris R. Tame, "A Note on Lionel Robbins", *Wertfrei: A Review of Praxeological Science*, No. 2, Spring 1974.
 65. Robbins, *op. cit.*, p. 26. On Adam Smith specifically, see Robert L. Heilbroner, "The Paradox of Progress: Decline and Decay in 'The Wealth of Nations'", *Journal of the History of Ideas*, Vol. XXXIV, No. 2, April/June, 1973. On Ricardo's fatal errors concerning the conflict of interests within the market, see Ludwig von Mises, *The Free and Prosperous Commonwealth* (Princeton, N.J.: Van Nostrand, 1960), and Leonard P. Liggio, "Mises and History", *Libertarian Forum*, Vol. VI, No. 1, Jan. 1974.
 66. See my own forthcoming essay, "The Tragedy of Classical Liberalism", for a detailed treatment.
 67. Wolin, *Politics and Vision*, *op. cit.*, p. 343. Of course, Wolin tends to *overstate* his case, ignoring the other intellectual themes present in the thought of those he analyses (and, for that matter, in the choice of those figures, and the exclusion of others, itself). Nevertheless, he does demonstrate an important truth, that concerning the frequent pessimism, conservatism, and collectivism that featured — and eventually predominated — within the mainstream of Liberalism.
 68. Gay, *The Rise of Modern Paganism*, "Preface", p. xiii.
 69. Gay, *The Science of Freedom*, p. 555. It might be objected that Gay has anticipated such criticisms in his comments in the "Preface" to the second volume. He states therein that he has deliberately avoided "one large area of evaluation", i.e. of "the possible relevance of the Enlightenment to our time" — the reason being "to avoid value judgements" and to restrict himself to "an act of definition, not evaluation" (*ibid.*, p. xi). But it is surely apparent, from both this essay and Gay's own work, that such a separation cannot be viably made. The questions we ask in any historical analysis, in any attempt at an historical "definition" (especially so in the history of ideas), are a product of our conception (whether it is made explicit or not) of the abstract nature of ideas and values and by our own values themselves. Gay's failure to come to terms adequately with the ultimate and political significance of the Enlightenment is thus not simply a matter of failing to tag on some concluding comments regarding its "possible relevance . . . to our time". It is a failure to deal with its most vital and central *defining* characteristics, its *inherent* and abstract intellectual, philosophic, and moral nature. The Enlightenment's relevance to our time lies precisely in the answers (and their implications) to the most "scholarly" questions regarding its defining qualities — was its scheme of values internally consistent or not, did its philosophy contain fatal features that undermined much of its original intention, was its perception of its own significance an accurate one . . . ? It is such questions we have attempted to *begin* to answer in this essay.
 70. Gay, *The Science of Freedom*, p. 563.
 71. See Williams, *The Contours of American History* (Chicago: Quadrangle Books, 1966), especially the Introduction, "British Mercantilism as the Political Economy of English Backwardness", and pp. 77–125 of the first section, "The Age of Mercantilism, 1740–1828".
 72. We have not commented in this essay on the felicities of style and literary construction of Gay's work, on its lucidity and almost symphonic construction which integrates with such apparent ease and in so sparkling and rational a manner so vast a degree of learning. This characteristic is indeed fitting from an author whose latest work is in fact on *Style in History*, in which he stresses the intellectual significance of style, the unity of style and philosophic outlook, in the work of the historian.

MEDICINE AND THE CRIMINATION OF SIN: "SELF-ABUSE" IN 19th CENTURY AMERICA*

RONALD HAMOWY

Department of History, University of Alberta

What this essay will attempt to show is that while, during the 19th century, the prohibition of sexual immorality played a comparatively unimportant role in American criminal law, the medical profession arrogated to itself the task of dealing with moral questions. Psychological medicine particularly, by substituting "treatment" of disease for legal punishment of moral transgression, placed itself in the position of enforcer of virtuous conduct. Medicine was so successful in assuming this function that, by the end of the century, it had enlisted the great mass of the literate public in support of its findings respecting the connection between sexual behavior and mental disease. At that point it became possible to alter the direction of American law to encompass the conclusions reached by the psychiatric and medical professions and to criminalize sexual immorality under the guise of legislating in the area of preventive medicine.

The expansion of the medical discipline into the area of private moral conduct is as old as the history of psychiatry — the branch of clinical medicine purporting to deal with the arcana of psychic life. In the United States, however, it was only in the last third of the 19th century that its influence reached significant proportions. By that time the profession was successful not only in maintaining social sanctions against immoral behavior with which the criminal law was not concerned, but of enlarging, without theoretical limit, the area of private behavior within its purview.

The thesis of this paper assumes that legal rules are distinct from moral rules and holds that while the American legal system found it inconvenient to enforce the latter the task was taken on by medicine, and particularly by psychiatry. It is, therefore, essential to fix the area in which law, in the sense in which I mean it, can be differentiated from morality.^[1] A contemporary legal theorist writing on the subject points to three cardinal features which permit the one to be distinguished from the other.^[2] Firstly, the concern of law, at least in the Western tradition, is far narrower in scope than is that of morality. Law ideally attends only to those aspects of conduct indispensable to the maintenance of the basic fabric of society. Morality has no such limitation; rather, it calls for conformity with an ideal in both thought and behavior. Secondly, the law is primarily concerned not with interior attitudes but with external conduct. Responsibility in the law is assumed solely on the basis of criminal intention established by external evidence. Morality's concern rests primarily with the nature of the motive of the actor, with his interior attitudes, states of mind, and the long-run condition of his soul. Finally, the most salient difference between law and morality revolves around the nature of sanctions imposed and who imposes them. With respect to legal rules, sanctions take the form of deprivation of property or liberty — possibly even of life — and are imposed by some formalized governmental apparatus; moral sanctions, on the other hand, when not self-imposed by conscience, are generally non-violent, such as social ostracism, and are imposed by individuals acting on their own behalf or voluntarily with others.

The Protestant Reformation and a capitalist

* This paper was delivered at the Conference on Crime and Punishment, sponsored by the Liberty Fund and the Center for Libertarian Studies, at the Harvard Law School, March, 1977.

I am indebted to Mr. W. M. Bartley of the University of Alberta for his assistance in researching much of the data presented in this paper.

economic system which culminated in 19th-century liberal doctrine both worked towards a more pronounced distinction between legal rules and moral rules. The earlier ideal based on the Platonic tradition of a system where the law was as comprehensive as the moral code and where its primary function was to promote virtue gave way to emphasizing individual activity wherein one's behavior, freely chosen, privately determined one's salvation or damnation, either in this world or the next.^[3]

The growing distinction between law and morality is intimately connected with the history of freedom and the theory of inalienable private rights,^[4] enshrined in the American legal framework, in the Declaration of Independence, and the first ten amendments to the Constitution. The movement to secure individual rights in the United States, making all government intrusion into the peaceful daily lives of citizens suspect, undermined the rationale by which the State could be regarded as having authority over private moral decisions. That the government should take onto itself the task of offering a positive function in moral affairs contravened the political philosophy inherent in a structure of law consistent with limited government.^[5]

It is true that the criminal law in colonial America was active in the enforcement of public morality. In 17th-century New England especially, the penal codes of the colonies were heavily oriented towards the punishment of sin.^[6] However, after the Revolution, American law significantly altered its direction. The law then, and throughout most of the 19th century, was strongly biased towards individual autonomy and the free market as against public power. This was true not only of the law of contract, as would be expected in a system based on economic individualism, but of tort and criminal law as well.^[7] The singular importance of placing strict limits on governmental power led to a reduction in the importance of criminal law generally and, with it, crimes which were regarded as transgressing sexual morality.^[8] With respect to sexual behavior, the common law heritage was almost invariably the guide in determining which acts were indictable. The canon of criminal law that developed

throughout most of the 19th century was an amalgam of judicial extensions based on common-law analogies and statutory enactments which themselves codified pre-existing common law.^[9]

In the area of sexuality, indictable offenses were — in the main — limited to the common-law felonies of rape and sodomy and to lesser wrongs such as adultery, notorious lewdness, and frequenting or keeping a bawdy house.^[10] Because of the common-law bias in the interpretation of criminal law, the determination of criminal liability in the area of sexual conduct — in the absence of an explicit statutory provision to the contrary — was customarily interpreted to rest on proof of the “open”, “notorious”, “public”, and “scandalous” nature of the act. For example, at common law an indictment on a charge of haunting a house of ill fame had expressly to charge the open and notorious nature in which the bawdy house were frequented by the defendant.^[11] Lewd and indecent conduct was indictable only when “habitual, open, and notorious”.^[12] “Mere private lewdness or indecency”, in itself, was not an offense.^[13] With respect to this requirement, a recent commentator writing on indecent exposure notes:

To be indictable at early common law this act not only had to be public, but had to actually be seen by more than one nonconsenting person. The “more than one person” rule was soon relaxed to the extent that acts were held indictable if they were committed in a place “so situated that what passes there can be seen by a considerable number of people if they happen to look”. [*Van Houten v. State*, 5 N.J.L. 311 (Essex Quarter Sess., 1882), *aff’d*, 46 N.J.L. 16 (Sup. Ct., 1884)]. However, courts retaining this modified requirement have still refused to indict the act when committed in private before a single nonconsenting person. [E.g., *Lockhart v. State*, 116 Ga. 557, 42 S.E. 787 (1902); *State v. Wolf*, 211 Mo. App. 429, 244 S.W. 962 (1922)].^[14]

The provision that a sexual act, to be regarded as criminal, required an open and public flaunting of social norms found its way into a number of statutes prohibiting adultery and fornication. Of the states that eventually enacted statutes prohibiting adultery,^[15] fifteen^[16] required that proof of a single act was not in itself sufficient to substantiate a charge of adultery. To be criminal the adulterous relationship had to be “open and habitual”. The same was true of the fornication statutes. By 1920,

thirty-two states had prohibited fornication; of these only fifteen^[17] made a single act a crime. In the other seventeen states the offense was not, properly speaking, fornication but "lewd and vicious cohabitation".^[18]

With respect to rape, "carnal knowledge of a woman without her consent", it is notable that, during the 19th century, the age below which a female was presumed by law to be unable to consent was, in most jurisdictions, 10 years.^[19] Thus, the current crime of statutory rape — which is not really rape at all — effectively did not exist throughout most of the century since the penal codes defining rape either stipulated 10 or 12 years as the age of consent or were silent on an age of consent, in which case the common-law age of 10 years would apply.

Sodomy, at common law, consisted solely in "sexual connection, *per anum*, by a man, with a man or woman".^[20] Although almost every state prohibited the act by statute, prosecutions throughout the 19th century were exceedingly rare inasmuch as both parties to the act were regarded as accomplices, equally guilty of the crime.^[21] As a result, the courts held that a conviction could not be sustained on the basis of the unsupported testimony of a party to the commission of the offense. Vern Bullough, in his history of sexuality, points out that the effect of this provision "was to exclude sexual activities between consenting adults in private from prosecution, whether homosexual or heterosexual", especially "since solicitation to commit a sex act was not an offense".^[22]

The intrusion of the law into sexual behavior throughout most of the 19th century was far less extensive than the comprehensive system of legal restrictions which obtains today. Indeed, other than a few offenses such as adultery and sodomy, the criminal law was concerned more with proscribing the public flaunting of sexual activities than with prohibiting the sexual acts themselves. Morris Ploscowe has pointed out that since the ecclesiastical courts of the Church of England, traditionally responsible for a large area of sexual behavior, were not received in the United States, American law initially provided no institutionalized means for dealing with sexual conduct that had been

ignored by the common law. Lacunae, therefore, had to be filled by statute.^[23] Although the statutory law underwent a general inflation over the course of the 19th century, laws relating primarily to sexual conduct began to be enacted in great numbers only in the last two decades of the century. Even as late as 1916, in the midst of a period which saw a great many statutes respecting sexual morality enacted by the various state legislatures, one prominent member of the New York Bar could still complain that

All communities and people find themselves quite in accord as to the seriousness of the crimes of murder and theft, but until recently, there was no law in the United States that made pandering a more serious crime than disorderly conduct, and in a few States pandering is still so little defined as to make the crime "merely a breach of manners and to put it in the same class of offenses as selling a street-car transfer". The treatment of commercialized prostitution not only differs in each city, but changes in the same city under each different administration. The prohibition in the Decalogue against adultery is no less definite than that against murder, and yet, while the law against murder is uniform and constant, that against adultery has been diverse and unstable. In some States adultery is a felony, in others a misdemeanor; . . . In New York, adultery did not become a criminal offense until 1907, and since then it has been practically impossible to obtain a conviction in the absence of unusually aggravating circumstances. Illicit sexual intercourse is a crime in only a very few States, and in other States only becomes such when it is attended by notorious lewdness and indecency, resulting in public scandal and nuisance. In rape, the age of consent ranges throughout the United States from the common-law age of ten years to that fixed in New York at eighteen years.^[24]

With 19th-century America governed by criminal laws incorporating comparatively few restrictions on private sexual conduct and with a general laxity in enforcement of those laws which did exist, the medical profession found circumstances particularly favorable for assuming the role of arbiter of the moral behavior of the nation left vacant by the law. The rise of the science of psychiatry as a specialized branch of medicine, armed with the prestige accorded to all scientific disciplines together with the power to compel treatment, provided physicians the opportunity to employ legal sanctions to enforce moral rules. Asserting that they had uncovered the fundamental laws governing mental health and disease, physicians and psychiatrists were able to offer their moral

pronouncements as objective truths and, ultimately, to force compliance with their conclusions through liberal commitment law.^[25]

Psychiatry from its inception as a distinct area of medicine at the end of the 18th century had underscored the singular importance of sexual life in the etiology of psychic disease. Although the psychiatric and medical professions — up until the last decades of the 19th century — suffered from some of the same reticence regarding uninhibited discussion of sexual matters as did the general public, doctors felt comparatively free to speak of sexual issues which they considered of immediate and common concern. This was especially true of masturbation, to which they devoted particular attention. There are several reasons for this: first, although viewed as having serious consequences, it was a common practice among the young and the mentally disturbed, groups less able to hide their activity than were prudent adults; second, if it could be shown that masturbation were harmful and linked to psychic disorders, so would it be true of excessive fornication. Thus, masturbation and “excessive venery” were commonly linked in medical discussions of sexuality. Finally, if it were scientifically demonstrated that masturbation and incontinence led to neuropathic conditions, *a fortiori* would this be true of the more *recherché* forms of sexual expression, such as homosexuality. Indeed, it has been argued by Vern Bullough and Martha Voght that many physicians, fearful of offending the sensibilities of the more squeamish, employed words such as “masturbation” and “onanism” as generic terms under which they meant to include all sexual aberrations, including homosexuality.^[26] Although the Bullough-Voght thesis is somewhat problematic, it is certainly true that it was within the context of their disquisitions on masturbation that physicians and psychiatrists developed a general theory of sexuality covering all sexual conduct.

By the end of the 19th century medical science had elaborated a comprehensive doctrine relating sexual indulgence and mental disease. As a result when, largely at the urging of physicians and moral reformers, a flood of legislation restricting sexual conduct was

introduced in the period from 1880 to 1920, the theoretical foundation, scope, and direction of these new laws were provided primarily by the scientific conclusions earlier reached by physicians and psychiatrists. This paper proceeds to discuss both these movements. The next section of this essay traces the development of the theory of sexuality which emerged in 19th century medical discussions of the inter-relationship between masturbation, incontinence, and mental disease. It is followed by a discussion of the efforts made by physicians to translate these findings into law through an intensive lobbying campaign aimed at the passage of legislation prohibiting a wide range of sexual behavior.

I

During the formative period of the psycho-analytic movement in the United States, from 1910 to 1918, when Freud's theories gained prominence on this side of the Atlantic, much hostility was aroused among portions of the public because of the heavy emphasis psycho-analysis placed on sexual matters.^[27] What many lay readers were unaware of was that medical men, particularly those concerned with diseases of the mind, had much earlier investigated the effects of sexual behavior on the psyche. Masturbation was of particular concern and was commonly regarded as the root of a host of medical and physical disorders. By the beginning of the 19th century the emerging field of psychiatry had concluded that sexual self-stimulation, when chronic, invariably brought insanity in its wake.^[28] The earliest definitive statement of this thesis is that which appears in the work of the father of American psychiatry, Dr. Benjamin Rush.^[29]

Rush, whom Thomas Szasz describes as “the first American physician to urge the medicalization of social problems and their coercive control by means of ‘therapeutic’ rather than ‘punitive’ sanctions”,^[30] held that even occasional masturbation “produces seminal weakness, impotence, dysury, tabes dorsalis, pulmonary consumption, dyspepsia, dimness of sight, vertigo, epilepsy, hypochondriasis, loss of memory, manalgia, fatuity, and death”.^[31] In support of this rather startling conclusion,

Rush quotes from a letter of an agonized sufferer:

I rest badly at nights, and am much troubled with dreams. . . . The external organs of generations have a numb or dead feeling. The lower part of my back is weak; my eyes are often painful and my eye-lids swelled and red. I have an almost constant cold, and oppression at my stomach. In short, I had rather be laid in the silent tomb, and encounter that dreadful uncertainty, *hereafter*, than remain in my present unhappy and degraded situation.^[32]

Indeed, as Rush points out, "the morbid effects of intemperance in a sexual intercourse with women are feeble, and of a transient nature, compared with the train of physical and moral evils which this solitary vice fixes upon the body and mind".^[33]

The hypothesis that masturbation was a significant cause of insanity became a prominent tenet in international psychiatric thinking between the publication of Rush's work in 1812 and mid-century, and was echoed in the most advanced medical literature of Britain and Europe. In France the pioneer psychiatrist J. E. D. Esquirol joined Rush in claiming that masturbation was symptomatic of mania and that it reduced those who practiced it "to a state of stupidity, to phthisis, marasmus, and death".^[34] He was joined by, among numerous others, Guislain of Belgium, who observed that the habit gave rise to hysterical attacks, asthma, epilepsy, melancholia, mania, suicide, and dementia — often dementia with paralysis.^[35]

In the meanwhile, preoccupied with the same problem, British students of insanity had also uncovered the pernicious consequences of the vice. For example, in 1838 Sir William Ellis, then Superintendent of Harwell Asylum, concluded that "by far the most frequent cause of fatuity is debility of the brain and nervous system. . . in consequence of the pernicious habit of masturbation". Ellis provided a physiological explanation for this; the act of masturbation, he contended, diverted needed blood from the brain to other portions of the body, thus damaging the cerebellum and bringing on dementia.^[36]

An actual case of masturbation eventuating in death is reported by Dr. Alfred Hitchcock in 1842. A young man of 23 was noticed to have become timid, dilatory, languid, and lacking in perception. After the onset of jaundice,

dyspepsia, and epileptic fits, Dr. Hitchcock was sent for and gained from the man the admission that he had, for the previous 6 years, been regularly masturbating. "In view of the imbecile and delirious state of his mind", the physician recounts, "I expressed to his father my opinion of the cause of his sickness, and advised his immediate removal to the lunatic hospital. This opinion and advice was rejected by the father, although corroborated by several medical gentlemen who saw the patient, and more positively confirmed by confessions from his ruined son." The patient is reported to have died some 5 months after this interview, "the body wasted to the most extreme degree of atrophy". "For the last 2 months of his life", Dr. Hitchcock notes,

his mind seemed unceasingly fixed upon that spot [the genital area] as the seat of all his trouble. He would implore every one that he saw to cut him open and "fix something that was wrong" — and from morning to night he would toss himself upon the floor or the bed, wringing his skeleton hands in anguish, shrieking and groaning with a sepulchral voice, because no one would "operate on him". In short, a more deplorable, loathsome or ghastly specimen of human suffering could not well be imagined.^[37]

That the result of sexual impurity was such an insidious disease, under which the body and mind tottered and decayed into insanity and death, was an established principle of psychiatry at mid-century. What was lacking, however, was a theory of mental disease within which masturbation could be shown to result in a discrete, identifiable symptomology.

A significant analytic breakthrough in this regard occurred in 1863 when David Skae, a Scottish psychopathologist and Physician Superintendent of the Royal Edinburgh Asylum, maintained that masturbation brought on a particular and specific variety of insanity, producing characteristic, clearly identifiable symptoms.^[38] Skae's classification of the forms of mental disease, first postulated in his book on the subject,^[39] was based solely on the assumed causes of insanity, of which there were three specific types: idiocy, epilepsy, and masturbation.^[40] In the Morisonian Lectures of 1873^[41] Skae's nosological system was expanded to 34 distinct forms of insanity; masturbation remained, but satyriasis and nymphomania, previously classified under

masturbational insanity, were made separate entities.^[42] Skae's symptomology of masturbation is extensive: nervous debility, mental and physical depression, palpitation of the heart, noises in the head and ears, indecision, impaired sight and memory, indigestion, loss of energy and appetite, pains in the back, timidity, self-distrust, groundless fears, muscular relaxation, a dislike of female society, "the inability to look you straight in the face", suicidal, and sometimes homicidal, impulses, and, occasionally, religious delusions.^[43] With respect to a prognosis, much depended on how early in the development of the disease the masturbator came under the care of an alienist. "If these cases are put under proper care and treatment before the mind has become too impaired to exert self-control when reasoned with", Skae notes, "they generally recover. But when dementia has begun to show itself in impaired memory, and energy, silly vanity, and self-satisfaction, the cases assume a very hopeless aspect, with a tendency to gradually increasing dementia if the vice is persevered in."^[44]

Skae's analysis of masturbational insanity as a specific variety of mental disorder was taken up by the great British psychiatrist Henry Maudsley, who, in 1868, published an extensive paper on the "mental derangement brought on by self-abuse".^[45] Maudsley distinguishes between the characteristic features of masturbatory insanity when the act is first engaged in by those still in their teens and in cases where the habit continues on into adult life. Among younger masturbators the psychic disorder is easily recognizable. "The miserable sinner whose mind suffers by reason of self-abuse becomes offensively egotistic. . . His manner is shy, nervous, and suspicious, his dress often untidy or slovenly; there is a want of manliness of appearance as of manliness of feeling. The pupils are often dilated, the breath bad, the face sallow, and the body somewhat emaciated."^[46] Maudsley is reluctant to assign the term insanity to this stage of the disease. "When we are consulted about a case presenting these general features", he writes, "we may hardly feel justified in signing a certificate of insanity, but we have little doubt of the nature of the mental degeneration which is begin-

ning."^[47] In the older masturbator, however, the symptoms of complete lunacy are unmistakable and consist in large measure of the symptomology which present-day psychiatry would diagnose as paranoid schizophrenia: violent outbursts of anger and abuse, delusions of persecution, hallucinations, deep gloom and depression, and wild frenzies of passion alternating with moody self-absorption.^[48] "It is needless to say", Maudsley concludes, "that [these degenerate beings] have lost all healthy human feeling and every natural desire. The body is usually much emaciated, notwithstanding they eat well; and though they often last for a longer period than might be thought possible, they finally totter on to death through a complete prostration of the entire system, if they are not carried off by some intercurrent disease."^[49]

The early work of Skae and Maudsley on the relation between masturbation and mental disease had a profound impact on the course of 19th-century psychiatry in Britain and the United States.^[50] Indeed, masturbation as a proximate cause of insanity was accepted by a significant percentage of the American medical profession into the early 20th century, even while the thesis was losing currency among more observant psychological clinicians. Medical journals in the United States are filled with articles on the evils of the practice despite the obvious absence of any scientific justification for these conclusions. A strikingly heterogeneous collection of symptoms were assigned to the disease, all of which were comprehended under one causal mechanism. That this was possible reflects on the nature of the category of mental disease however used. As an historian of medicine recently pointed out:

Although vice and virtue are not equivalent to disease and health, they bear a direct relation to these concepts. Insofar as a vice is taken to be a deviation from an ideal of human perfection, or "well-being", it can be translated into disease language. In shifting to disease language, one no longer speaks in moralistic terms (e.g. "You are evil") but one speaks in terms of a deviation from a norm which implies a degree of imperfection (e.g. "You are a deviant"). The shift is from an explicitly ethical language to a language of natural teleology. To be ill is to fail to realize the perfection of an ideal type; to be sick is to be defective rather than to be evil.^[51]

American psychiatry particularly seized on

the ability to shift from the language of ethics to the language of science in dealing with sexual behavior. Once "the mind who would choose to act immorally" became, in the language of psychiatry, the diseased mind, it lay open to "treatment" and "cure" and, under the guise of enforcers of mental health, psychiatrists and physicians became the enforcers of sexual morality. The direction of psychological medicine in the United States was clearly to provide this scientific basis for the prevailing moral orthodoxy. Among psychiatrists, "unchaste behavior" was transmuted into the more technical and impressive "aberrations of the sexual instinct", even where the content was identical. In one of the earlier articles on sexuality to appear in American psychiatric literature, the author affirms that

Aberrations of the sexual instinct may consist, 1st in tendencies to sensual gratification without any union of the sexes, as in the "besetting trial of our boys", &c; 2ndly, in union of the sexes without due provision for the ends for which such union was intended — viz., in casual and temporary union, of which *infanticide* is the necessary result; 3rdly, in marriages artificially barren, for which . . . America is gaining a bad preeminence; 4thly, there are aberrations of a more innocent character, because often forced upon individuals by a wrong moral or political condition of society, amongst which we may include *androgynism*, if so awkward a word may be taken to mean the intrusion of either sex, voluntarily or not, into the province of the other; to wit, when a woman dissects a dead body, or a man measures a young woman for a pair of stays. To which may be added the many strange and fantastic modes of relations of the sexes — Free Love, Pantagamy, &c, &c, and the Manichean notion that the union of the sexes is itself sinful.^[52]

The author goes to the point of maintaining that nondiseased sexual behavior consists solely in the following: "(1) the procreation and due education of children; (2) the avoidance of incontinence; (3) the mutual society, help and comfort of the married pair. Any union of the sexes in which provision is not made for fulfilling every one of these purposes, may be proved contrary to natural law, using the word in its widest sense."^[53] It is indeed marvelous that these sentiments appear, not in a theological work, but in a journal purporting to offer scientific insights into the nature of the mind.^[54]

Masturbation, "the besetting trials of our boys", was a singularly appealing subject of study for American medicine because, once

shown to be pathogenic, it laid open the possibility that all sexual behavior differing from orthodox morality was also disease-causing and strongly suggested that all deviations from acceptable sexual practice were psychic perversions of the natural sexual function.

In diagnosing the causes of mental and physical disorders, the same clinical acumen shown by Skae and Maudsley was displayed by American psychiatrists and doctors, the great bulk of whom, by the 1870s, accepted the theory that masturbation brought on dementia. In 1876 Dr. A. Jacobi, Clinical Professor of Diseases of Children at the College of Physicians and Surgeons in New York, observed that children who masturbated were given to headaches, convulsive attacks, trigeminal neuralgia, and, generally, to severe irritation of the whole nervous system.^[55] Masturbation could result in lowering the status of sensitive nerves of skin, muscle, spinous processes, or spinal meninges, resulting in permanent hyperaesthesia or local neuralgia. Dr. Jacobi notes that "where the presence of other causes of exhaustion in the child can be excluded, the suspicion that the incompetency and faulty function of the sensitive nerves are due to masturbation will frequently be well founded".^[56] Continued over-excitation of the genital nerve centers in the young could eventuate only in hysteria and dementia.

Three years after the appearance of Jacobi's article, Dr. Allen Hagenbach, one of the senior physicians at the Cook County Hospital for the Insane, wrote that of the 800 male inmates admitted to the hospital since its opening in 1860 the exciting cause of insanity was masturbation in 49 of these.^[57] The author describes symptoms similar to those observed previously by Skae and Maudsley, with the disease passing through two stages, the first, or conscious, stage terminating in a second, or unconscious, stage, "when owing to impaired mental and especially weakened volitional powers" reform is impossible and dementia and death result.^[58]

More importantly, Dr. Hagenbach touches upon a theme which became of significant interest to other alienists over the succeeding 30 years, that part of the clinical character of masturbatory insanity in some cases included

an increased morbidity of the sexual sense before the onset of complete dementia which resulted in further perversion of the sexual instinct. He notes the case of a masturbator who began forming morbid attachments for another male, presumably because of his inability to control his passions and driven to frenzy by habitual practice of the vice.^[59] The theory that masturbation lay at the root of other sexual perversions was taken up by a number of subsequent medical writers and instilled new life into the notion that masturbation would cause severe harm to those who indulged in it, at the same time offering a causal mechanism for all sexual degeneracy.^[60]

It proved a simple matter for psychiatry to show a connection between masturbation among females and nymphomania. Since the normal, non-aberrant sexual state of women was one in which no gratification was found, almost any indication of sexual pleasure exhibited by women could be taken as a perversion of their natural sexual condition. That women had no natural sexual drive was an accepted tenet of 19th-century medicine. For example, this is what a Professor of Physiology and Pathological Histology of some eminence had to say on the subject of impotence in women:

The ideal young woman is almost necessarily impotent. From time immemorial the prerequisites in her moral and social qualifications have been modesty and chastity. Those lapses from absolutely virtuous living that in the male are condoned as charming little irregularities, when indulged in on her part, invariably call down upon her luckless personality a damnation worse than death, at the same time often barring her from her highest mission — maternity. That a universal law, acting through the ages, calling for unquestioned chastity in the maid and mother, should have had its effect in a large proportion of the sex in modifying the sexual organs and desires is not surprising; that it has not absolutely extirpated sensuality is perhaps more surprising.^[61]

And, from the pen of a Professor of Obstetrics and Diseases of Women and Children in an article on nymphomania:

It is not natural for women to have a desire for sexual intercourse; it is submitted to as a duty. This exceedingly latent sense may be corrupted by some occurrence in childhood [the author refers to masturbation] till the immoral thought grows by brooding and ultimately becomes so vast as to swallow up the whole being, but of course it is rare for such to be the case.^[62]

Sexual norms have become scientific truths, and

deviations from propriety diseases. Nowhere is this translation from vice to disease more palpable than in the observed effects of masturbation on the two sexes. The consequences masturbation had for males and females were, clinicians found, significantly different; but what they had in common was the socially unacceptable — hence “diseased” — nature of the resultant behavior. “The boy masturbator”, writes a prominent American psychiatrist,

usually becomes shy, and above all when in presence of female company. The girl masturbator, while shy in general society, seeks out persons of the opposite sex, makes advances to boys, and may even seduce them. To some extent this difference between the two sexes is maintained throughout later life. The adolescent and adult male masturbator, with a few exceptions, . . . has in the earlier period of his vice a shyness before, and in later ones an aversion to women. The adolescent and adult female onanist usually entertains ideas of an erotic character, develops foolish marriage notions, and may throw away all reserve before males.^[63]

A firm theoretical foundation supplying the causal link between masturbation, sexual excess, and the more spectacular sexual perversions such as nymphomania was offered by the American neurologist George M. Beard, who, in 1869, published his first paper on a neurological disorder to which he supplied the term “neurasthenia”.^[64] Beard’s first essay was supplemented by a more extensive one which appeared 10 years later^[65] and finally was expanded to book length in 1880.^[66] Neurasthenia, or nervous exhaustion, Beard defined as being a chronic functional disease of the nervous system marked by abnormal susceptibility to internal and external irritants, liability to quick exhaustion, deficiency of reserve, and the lack of controlling powers, both physical and mental. The disorder he regards as increasingly frequent “among the in-door class of civilized countries”, and particularly common to the United States.^[67] The symptomology is extensive and includes headache, irritability, lack of concentration, morbid fears, insomnia, nervous chills, palpitations of the heart, sweating hands and feet, tremulous pulse, and heaviness of the loins and limbs.^[68] Untreated, neurasthenia could result in, among other things, melancholic insanity.

The peculiar susceptibility of Americans to neurasthenia Beard adduced from a variety of

factors among which were increasing demands for stimulants and narcotics, the peculiar sensitiveness shown by Americans to cold and heat, the premature decay of the teeth, and the particular delicacy of digestive systems manifested by urban dwellers. The frailty of the reproductive systems of Americans, Beard felt, required extreme sexual restraint lest the sexual sense be over-excited and the delicate balance of the nervous system be disturbed and debilitated. "One of the many evils of our time", he writes,

is, that the habit of self-abuse is on the increase, and that men are more indulgent than formerly. Hence the increase of nervous diseases that are connected with the genital functions; and hence the terrific results that sometimes follow early begun and long-continued masturbation. But so far as can be learned from all sources of information on these difficult themes, it would appear that among savages and the semi-civilized, sexual abuse, both in a natural and unnatural way, is carried to a far higher degree, on the average, than among the civilized; we cannot, indeed, bear these abuses as our fathers could. The observation . . . that it requires a strong constitution to be dissipated, is a just and sound one. The modern young man is not strong enough to abuse himself as perhaps he would be willing to do, or as his ancestor did. Both natural and unnatural methods of sexual indulgence react with fearful and almost immediate power on the nervous system, . . .^[69]

Masturbation and sexual indulgence — both "natural" and "unnatural" — might have proved physiologically manageable for those who lived a hundred years earlier, but its results on the constitutions of 19th-century Americans were nothing less than disastrous.

In 1884 Beard's work on sexual neurasthenia was posthumously published and it is here that he presents a fuller version of his theory of nervous disease relating specifically to sexual behavior. Of masturbation he writes that "when long kept up it is the cause of insanity, usually of the form classed under melancholia, in quite a proportion of the cases that enter our asylums".^[70] With respect to nymphomania, erotomania (lustful thoughts), and satyriasis, "these desires, though not necessarily, usually depend on sexual neurasthenia, although they may be in some degree and in some cases complicated with it".^[71] Beard's causal theory of homosexuality is of particular interest because of its impact on contemporaneous American psychiatry. Homosexuality, he claimed, was occasioned by debilitation and

irritation of the nervous system, either through masturbation or excessive venery, leading to a species of nervous disease in which the system seeks relief in the condition opposite to that which brings on the disorder. "Exhaustion of the sexual organs, through excess or masturbation", he theorizes,

brings on at first indifference to the opposite sex, then positive fear or dread of normal intercourse; confirmed, long-standing masturbators of either sex care little or not at all for the opposite sex; are more likely to fear than to enjoy their presence, and are especially terrified by the thought of sexual connection; similarly, excess in a normal way tends to make us hate the partners in our excess; the unhappiest marriages are those where there is the greatest indulgence; irritability, aversion, positive hatred and disgust toward the object of our former love, follow protracted debauches. The subjects of these excesses go through the stages of indifference and of fear, and complete the circle; the sex is perverted; they hate the opposite sex, and love their own; men become women, and women men, in their tastes, conduct, character, feelings, and behavior. Such, as appears to me, is the psychology of sexual perversion, whenever and wherever found.^[72]

The notion of sexual excess and masturbation proliferating into a broader spectrum of perversions, morally less acceptable and hence more clearly pathological, was quickly adopted by Beard's contemporaries in the last two decades of the century.^[73] At the same time, the earlier theory of masturbatory insanity as propounded by Skae and Maudsley was losing ground. The work of Edward Spitzka seems to indicate a turning point in the treatment of masturbation by American psychiatry. Although Spitzka, one of the founders of the New York Neurological Society and a highly respected neuropathologist, rejected Beard's concept of neurasthenia as nonsensical and continued to adhere to the Skae-Maudsley thesis, he too observed that masturbation could, in certain instances, eventuate in sexual perversion. Of the 28 cases of masturbatory insanity he discusses in an extensive monograph on the subject,^[74] two showed sexual perversion as part of their clinical character and two more manifested what he calls "moral perversion" with sexual overtones.^[75] Indeed, as Spitzka elsewhere observes, "unlimited indulgence and absence of responsibility are competent to make sexual monsters out of mere voluptuaries".^[76] Following the publication of Spitzka's paper in 1887-88, few psychiatrists continued to accept

the older form of the doctrine of masturbatory insanity. Henceforth most psychiatrists in the United States adopted some variation of Beard's theory that masturbation was causally associated with severe aberrations of the sexual instinct through perturbations and over-excitations of the genital nerve center, leading to derangement of the sexual sense.

For example, one of the most prominent American clinicians of sexual perversion, J. G. Kiernan, Superintendent of the Cook County Hospital for the Insane and Professor of Forensic Medicine in Chicago, adopted Beard's hypothesis of sexual exhaustion as the link between masturbation, sexual excess, and perversion. In classifying the sexual aberrations, Kiernan held that there is a category of vices — such as pederasty, necrophilia, and oral-genital contacts — which sprang from “conditions in which sated libertines seek abnormal stimuli for exhausted sexual appetite”.^[77]

In the same year in which Kiernan offered his classification, 1884, an editorial in the *Medical Record* of New York suggested that, even in cases of congenital perversion, aberrant feelings could be cultivated and intensified by excessive sexual indulgence. “We may question”, the editorial continues, “whether in a few cases the condition would have ever developed, were it not for an early abuse and misdirection of the sexual powers, [for] in conditions of nervous exhaustion and weakness, the symptoms are exaggerated.”^[78]

It is illustrative of the success of Beard's hypothesis that in 1889 G. F. Lydston, possibly the foremost American sexual pathologist, accommodated the neurasthenic theory in his etiological classification of perversion. Lydston's nosology was divided into two principal classes, “congenital, and perhaps hereditary, sexual perversion”, and “acquired sexual perversion” of which one sub-group was clearly Beardian: “sexual perversion from over-stimulation of the nerves of sexual sensibility and the receptive sexual centers, incidental to sexual excesses and masturbation”.^[79] To this category could be charged instances of homosexuality, bestiality, the desire for “abnormal methods of gratification”, satyriasis, and

nymphomania.^[80]

A significant proportion of the American medical profession were strong adherents of the theory linking masturbation and sexual deviance after the work of specialists in the area confirmed Beard's thesis. It is therefore not surprising that “over-stimulation of the sexual centers brought on by masturbation” was observed to be the cause of a case of lesbianism reported in an editorial in a prominent medical journal in 1892.^[81] It was found to be responsible for the sadism, pederasty, and bestiality which physicians claimed were common among southern Negroes;^[82] and, in 1896, it was offered as one of the contributing causes of the rampant pederasty practiced among inmates at the New York State Reformatory at Elmira, in an article penned by its chief physician.^[83]

In 1905 the noted psychiatrist William Lee Howard offered a further example of “the insidious and baneful effects of masturbation” on a girl who, in later life, became bi-sexual. When 14 years old, Howard recounts, the girl was sent to a boarding school some distance from her home. While on the journey the train became snowbound and the passengers took shelter in a nearby town. There a woman passenger “took a motherly interest in the child”. “The rest of the story is soon told”, notes Howard.

That night, the weak, undeveloped sexual cells of the cortex were awakened — directed in the wrong channel, and a child masturbator with psychic imaginings and fancies of women constantly arising, was the result. These inverted pictures kept up until the woman reached the age of about thirty, when the condition now present gradually made its appearance.^[84]

“In this case”, the psychiatrist concludes, “we have an undoubted case of inversion through acquirement.”

It should be noted that Howard is not suggesting anything untoward in the behavior of the older woman toward his patient; the proximity of her interest in the young girl to the child's masturbatory act alone seems to have been sufficient to direct her desires into a perverse channel. Clearly, awakening the weak, undeveloped sexual cells of the cortex was fraught with danger.

A somewhat different physiological theory of the effects of masturbation was put forward by

the great American psychologist G. Stanley Hall, Professor of Philosophy at Johns Hopkins University. While at Johns Hopkins, Hall founded both the first experimental psychology laboratory in the United States and the *American Journal of Psychology*; he later became President of Clark University, where he also held a chair in psychology. In his classic study of adolescence, Hall contended that masturbation drained the body of "spermin", necessary to removing the products of decomposition from the cells, and thus prevented the proper respiration of tissue.^[89] The effects of the habit are such that

growth, especially in the moral and intellectual regions, is dwarfed and stunted. There are early physical signs of decrepitude and senescence. Gray hairs, and especially baldness, a stooping and enfeebled gait, the impulsive and narrow egoism which always goes with overindulgence, . . . all the troubles ascribed to this cause are distinctly senescent in their nature. Life has been lived out with abandon; its energies have been overdrawn, and its wheels have run down like the mainspring of a clock the regulator of which has been lost, so that the term "fast" has a profound biological significance.^[89]

Its connection with acquired perversion is clear. "All agree that the early years of puberty", the years in which spermin is most essential to the body, "are those in which [masturbation] is most common."

Sometimes an epidemic of mutualism or some other form of it, devastates an entire school, . . . During the teens the intensity of it in individual cases, particularly in those of sanguine and choleric temperament, is no less difficult to believe. It sometimes reaches a satysiac and nymphomaniac degree, and many, if not most, of the perversions originate in these years.^[87]

Howard and Hall were by no means atypical of psychiatric opinion in the first decade of the new century. Almost 100 years after the birth of the profession in the United States, masturbation was as firmly condemned by medical opinion as it had been when Rush penned his immortal words in 1812. Sexual behavior differing from the Protestant orthodoxy, narrowly conceived, was entrenched in the medical and psychiatric schema as products of diseased minds desparately in need of the physical and mental therapy which the medical profession alone could offer.

Since masturbation was conceived of as seriously harmful to the body and mind and as the exciting cause of a series of far more severe

psychological disorders, it is understandable that psychological and medical practitioners were prepared to employ radical methods of treatment if they were found necessary to avoid such dire consequences. The history of the treatment of masturbation is testament to the atrocities which men, otherwise of good will, are prepared to perpetrate in the name of saving damned souls. Those who are familiar with Alex Comfort's account of the methods employed to deal with masturbators^[88] will have already been apprised of how commonly surgical interventions and physical restraints were resorted to during the 19th century. It is in their treatment of sexual offenders that the professions whose putative purpose was to heal the sick most clearly showed the punitive aspect of their role. Under the guise of therapy, psychiatrists and physicians — convinced of the necessity of stamping out sexual deviance in general and masturbation in particular and faced with habitual offenders for whom moral exhortation did no good — turned to forcible restraint and, if need be, to genital mutilation to prevent the further degeneration of their patients.

Advocacy of these extreme measures was not confined to only a few of the particularly zealous. Throughout a good part of the 19th century, a substantial number of physicians supported radical therapeutic techniques in dealing with masturbation. Indeed, there seems to have been an escalation in the severity of treatment over time. While up to 1850 it was still common to prescribe bland diets, vigorous exercise, and a host of drugs, many of which were patented as "cures" for chronic onanism, by mid-century surgical interventions and the use of physical restraints were supported by fully three-quarters of the medical profession in the United States.^[89]

Surgery as a repressive measure for masturbation is apparently the invention of the British physician Isaac Baker Brown who, in 1858, introduced the operation of clitoridectomy.^[90] Baker Brown, Fellow of the Obstetrical Society and later President of the prestigious Medical Society of London, observed that masturbation in women often led to hysteria, epilepsy and a host of convulsive diseases. He therefore

decided that the most efficacious method of dealing with the habit was to simply remove the organ on which it was performed. For this purpose he established a "Surgical Home" in London, where, he reported in 1866, he performed the operation on large numbers of women, adults and children. His over-enthusiastic support for this procedure led to his being expelled from the Obstetrical Society in 1867, after a series of contentious debates.^[91] The operation subsequently fell into some disrepute in England as a standard method of treating female masturbators except in the more "severe" cases.

Even after the operation lost favor with the British medical profession, it seems to have remained a viable therapeutic tool in America. Thus, in 1877 one American physician notes that he would not hesitate to resort to clitoridectomy to save a patient from the pernicious consequences of the habit "should all else prove unavailing", although the preferred method of treatment involved the administration of camphor, chloral, the bromides, belladonna, and digitalis.^[92] Six years later, in 1883, Dr. Joseph Howe recommended the operation in instances of chronic masturbation complicated by symptoms of nymphomania.^[93]

A renewed interest in clitoridectomy seems to have been sparked by the connection made between masturbation and the more serious sexual perversions in the 1880s and '90s. In 1894, for example, Dr. A. J. Bloch, visiting surgeon at the Charity Hospital in New Orleans, published a paper on sexual perversion in women in which he characterized masturbation as a "moral leprosy" of late reaching epidemic proportions. "Its taint", he remarks,

is entering into the homes of our most elegant and refined; this contagion exists in our schools, seminaries and asylums; its handiwork is shown by our many obscure and unrecognized nervous disorders. It is not only necessary that we pursue a curative course, but prophylactic measures should be used, and to us belongs this responsibility.^[94]

Clitoridectomy had the advantage, we assume, of serving both curatively and prophylactically, for Bloch clearly admired the operation. He describes an instance of masturbation in a girl of 2½ years which he successfully treated by excision of the clitoris. After first having

satisfied himself that this, indeed, was the offending organ, the physician recounts that he "dissected up the clitoris and amputated it almost to its attachment to the pubes". The result was a complete cure. "The nervous condition has entirely disappeared, the child eats and sleeps well, the eyes are rarely crossed. She has grown stouter, more playful, and has ceased masturbating entirely." Lest Dr. Bloch be thought precipitate in resorting to such drastic therapy on a patient so young, he points out that "milder methods of treatment would ordinarily be the selective one, but when this proves inadequate, it becomes imperative to resort to the more heroic procedure".^[95]

A somewhat similar case of recourse to "the more heroic procedure" is reported several months later by Dr. Alvin Eyer, surgeon at St. John's Hospital in Cleveland. A girl of 7 was found engaged in habitual masturbation despite "thorough and complete" medical treatment which included blistering and severe cauterization of the clitoris and vagina. The physician decided that a clitoridectomy was indicated, whereupon "the operation was performed, care being taken that the entire organ, with a considerable portion of its two crura, was removed". Both mother and doctor were delighted with the results. "She has shown no signs of returning to her former habits", we are told, "save once."

About six weeks after the operation the mother reported her as having had a very restless night, and that she confessed in the morning having attempted her old habit, but added, "You know there is nothing there now, so, of course, I could do nothing".^[96]

Physicians who were loathe to surgically intervene had at their disposal a host of other methods by which they could cope with female masturbators. These ran the gamut from simply tying the hands at night to more medieval contraptions such as the "girdle of chastity", developed by Dr. John Moodie of Edinburgh in 1848. Dr. Moodie's girdle was devised mainly as a preventative to masturbation among girls, a habit he found shockingly prevalent in mid-century Scotland. The instrument is described in Dingwall's excellent history of the chastity belt:

The Moodie girdle of chastity consisted of a cushion made out of rubber or some other soft material and

suitably covered with silk, linen or soft leather. This cushion or pad formed the base into which was fixed a kind of grating, and this part of the apparatus rested upon the vulva, the pad being large enough to press upon the mons veneris. The lower part of the pad rested upon the perineum, being curved so as to fit the parts enclosed. The bars of the grating were to be made of ivory or bone and were so arranged in the pad that when in position they pressed up against the labia majora opposite the vagina. The whole apparatus was affixed by means of belts to a pair of tight-fitting drawers and secured by a padlock, a secret flap being made so as to close over the key hole.^[97]

The device, Moodie contended, was a most effectual remedy against the vice of masturbation and had the further benefit of preventing seduction.^[98]

In the United States, girdles of this sort, albeit less elaborate, were easily available from medical supply houses into the 20th century and, for a time, could be found for sale in the Sears-Roebuck catalogues.

Other physicians preferred restraints of their own design, such as that reported by Dr. C. W. Colby in the *Medical Record* in 1897. The patient, a girl of 7, had defied all previous measures aimed at stopping her from masturbating. Dr. Colby recounts:

She had been made to sleep in sheepskin pants and jacket made into one garment, with her hands tied to a collar about her neck; her feet were tied to the footboard and by a strap about her waist she was fastened to the headboard, so that she couldn't slide down in bed and use her heels; she had been reasoned with, scolded, and whipped, and in spite of it all she managed to keep up the habit.^[99]

Finally, the parents refusing to lend their consent to a clitoridectomy, Dr. Colby engineered a harness designed to cover the child from neck to knees. He describes it as being "built of copper wire, the legs and armpits are protected with sheep's wool, and over the whole thing is fitted a stout canvas jacket". When worn, "the child is slide into the 'harness' from the top and the canvas jacket is laced up the back and strapped over the shoulders". The device proved effective in stopping the practice and, we are told, a new and larger one was built a year later to accommodate the girl's growth.

For the older female masturbator and nymphomaniac, suppositories of cocaine were commonly employed to anaesthetize the genital area. One prominent obstetrician, observing the symptoms of advanced nymphomania in a

woman who writhed with pleasure when her clitoris was stimulated, found the use of cocaine totally successful in dealing with the disorder. "We applied muriate of cocaine to the clitoris", he noted, "and I can assure you the effect was wonderful; the vagina at once behaved as well as the most virtuous vagina in the United States."^[100]

Given 19th-century attitudes towards women, it should be noted, the problem which was of paramount concern to the medical profession in the United States was not that of masturbation in the female — who, after all, was only in the most unusual instances capable of any but the barest sexuality — but of the vice when practiced among males. Here a variety of measures were applied to discourage the habitual offender.

Infibulation seems to have been one of the more popular methods of treatment in the United States and Britain in the 1870s. It was a leading topic of discussion at one of the quarterly meetings of the British Medico-Psychological Association in 1876, where the Superintendent of the Glasgow Royal Asylum reported satisfactory results in a dozen instances where the operation was performed.^[101] The operation was suggested by the fact that the prepuce was anatomically necessary for erection of the penis. Infibulation, as described by the Superintendent, consisted of piercing the prepuce at the root of the glans with a silver needle, the ends of which were then tied together. The result, we are informed, was erections so painful as to be practically impossible, and an almost certain end to masturbation among the patients upon whom he had operated.

He felt certain [the report notes] they were for the present, and while the wire remained, absolutely debarred from the habit of masturbation. The sensation amongst the patients themselves was extraordinary. He was struck with the conscience-stricken way in which they submitted to the operation upon their penises. He meant to try it upon a large scale, and go on wiring all masturbators. The moral effect of it in the house was excellent, and one man was seen weeping over his in anticipation of its disablement.^[102]

In 1878, Dr. James Hyde of Chicago joined Dr. Yellowlees of the Glasgow Asylum in championing the procedure. He reported a case of chronic masturbation treated in a similar

manner and its successful issue:

I perforated each side of the upper limb of [the patient's] prepuce with a large triangular perineum needle and inserted a ring made especially for the purpose, of pure silver, leaving it *in situ*. . . . In this instance the ring was made with a peculiar lock, so that it could not only be fastened after its insertion but removed at pleasure afterward. . . . I permitted him to remove it in fifteen days, when these troubles naturally ceased. . . . He wrote that his habit had been broken up, and that he was, in accordance with my suggestions, contemplating matrimony.^[103]

Despite its success, Dr. Hyde was not wedded to infibulation as the only therapeutic technique worthy of consideration. In the same article he makes mention of an instance of habitual onanism in a young man which was effectively treated by leeching. As each attack of masturbation was about to recur, he recounts, leeches, about 15 in number, were applied to the nape of the patient's neck. Repetition of this therapy over the course of 2 months proved successful and the patient is reported to have quit his habit.^[104]

For physicians who found it difficult to acquire silver wire or who did not have ready access to leeches, a large number of mechanical devices were employed to restrain patients from continued self-abuse. One of the more notorious authors of cautionary literature which flooded the United States during the second half of the century mentions a few, by way of warning to the chronic onanist of what can be expected should he persist in his habit; these include being placed in a strait-jacket, having the hands fastened behind one's back, tying the hands to the posts of the bed, or fastening them by ropes or chains to rings in the wall.^[105]

The more inventive physician designed his own appliance; such a one was described in the *Boston Medical and Surgical Journal* of 1888, for use on a 17-year old who had acquired epilepsy from constant masturbation while asleep. The restraint employed to assist the patient is reported by his physician:

The mechanical appliance was a plaster bandage applied as follows: A sheath of oil-silk was first made, to cover the penis and project an inch beyond, the limp organ hanging down straight between the thighs; then a layer of cotton wadding covered in the scrotum and buttocks, leaving a triangular opening, three inches on each side, for defecation. The plaster bandage then covered all, and went down around the penis and up about the waist, making, when hard, a complete casing, so that

the boy's genitals might have been in the next county for all the sensation his hands could communicate.^[106]

We are assured that, encased as he was from waist to thigh in plaster, the patient "surely did not masturbate". After several weeks in the contrivance, during which time urination was accomplished "while standing and holding the vessel under the projecting oil-silk", the boy abandoned the habit and the device was removed.

One of the leading psychiatrists of the period, Dr. Charles Dana, Professor of Nervous and Mental Diseases at the New York Post-Graduate School, reported success using a variety of different measures; including a splint of his own contrivance "by which the legs were kept apart and immovable".^[107] In a more intractable case of a young man suffering from adolescent neurasthenia brought on by nocturnal masturbation, several methods were tried with negative results, including first tying the hands behind him at bed-time and, when this failed, tying the hands to the bed-posts above his head; in both instances the patient managed to untie the knots and free himself. "Finally", Professor Dana continues,

I put him in the masturbation drawers, devised by my colleague, Professor Graeme M. Hammond. These consist of strong canvas drawers, fastened about the waist with steel bands, the sides of which are padlocked. The patient locked himself in the drawers every night, hid the key, and his pollutions ceased.^[108]

Dana also recommends that large doses of camphor, tincture, of opium, and lupulin be administered internally at bedtime. "I once gave this mixture to a sailor", he happily reports,

who like most sailors masturbated and suffered from pollutions. It cured him, and he gave some to the captain who prescribed it to the mates, and before the voyage was over, the whole crew were rejoicing in the efficacy of the combination.^[109]

Each physician seems to have had his own favorite method of dealing with the practice. Dr. Joseph Howe, Professor of Medicine at New York University and author of a widely-read work on masturbation, regarded the use of electricity as the most efficacious remedial agent for combatting the vice. "I have used it invariably in every case which has come under my care", he writes, "and have rarely found it to fail in accomplishing all that is claimed for

it." A typical treatment is described:

The applications of electricity are best made when the patient is in a recumbent posture, though they can readily be given while the patient is sitting or standing. When the battery is ready for use and the patient's hips, back and genitals exposed, the *urethral electrode* insulated to within an inch of its point is attached to the negative pole of the battery. The other electrode with a moistened sponge on its extremity is attached to the positive pole. The urethral electrode well oiled and warmed is slowly introduced through the urethral canal to the neck of the bladder, while the sponge covered electrode is placed over the genito-spinal center at the junction of the dorsal with the lumbar vertebrae, and moved up and down over the vertebral column as far as the tip of the coccyx. While the sponge is being moved over these parts the urethral electrode is slowly withdrawn until its point reaches the bulbous portion of the urethra. There it is allowed to remain until the termination of the *séance*.^[110]

"Séances" were to last some 7 or 8 minutes, enough time to totally desensitize the urethral passage. The reader is assured that these treatments, when applied regularly for about 2 months, invariably produce the desired results. Masturbation ceases, virile power is increased, and the patient's health restored.

In instances where it was found necessary to administer temporary relief for nocturnal emissions, less elaborate measures could sometimes prove effective. Dr. Howe recommends use of an "electric ring", invented by one Dr. Johnson of New York.

The electric ring is an ingenious contrivance for awakening the patient before emission occurs. The ring is placed around the penis at night and connected with an electric belt which is placed around the abdomen, the latter being attached to the poles of a battery. When there is a determination of blood to the genital organs during sleep, the whole tissue of the penis becomes distended, the ring expands and separates the wires which prevent the patient from feeling the electric current while the organ is quiescent. As soon as the separation takes place a violent shock is experienced which awakens the sleeper in time to prevent emission.^[111]

Not all physicians were as confident as was Dr. Howe in the efficacy of electric devices in halting the habit. Silver wires through the foreskin, ropes, splints, plaster casts, canvas drawers, even egg-shaped pessaries inserted into the rectum which pressed on the ejaculatory ducts, all had the overwhelming disadvantage that they could be removed and the habit renewed. There was only one certain road to a masturbation-free, sexually pure life and that was through direct genital mutilation which

physiologically prevented emission. Toward this end, several different approaches were employed, including sectioning the dorsal nerves of the penis,^[112] cauterizing the genitalia,^[113] and tying the spermatic ducts.^[114]

Even these mutilations were not sufficiently severe for some members of the medical profession. In 1894, Dr. F. Hoyt Pilcher, Superintendent of the Kansas State Institution for Feeble-Minded Children at Winfield, instituted the ultimate treatment for the vice by castrating 11 boys consigned to his charge on the ground that they were confirmed masturbators. A howl was raised in several of the Kansas newspapers at the barbarity of the treatment; one unfriendly newspaper account went so far as to carry the story under the banner, "Diabolism at the Imbecile Asylum", and claimed that Dr. Pilcher had treated his patients no better than "the farmer treats his hogs in the Spring of the year".^[115]

The medical and psychiatric professions, however, were quick to rush to the Superintendent's defense. The *Kansas Medical Journal* immediately launched an attack on the lay press for making far too much of the incident. "The political wail", it editorialized, "is amusing when the facts in the case are seen through plain glasses."

Viewed from a humanitarian standpoint, what do these newspaper accounts tell us? That a number of imbecile youth were castrated. They were confirmed masturbators — unless the attendant was with them, and even if his back was turned to them while in his presence they would commit the act. This abuse weakened the already imbecile mind, and destroyed the body. The practice is loathsome, disgusting, humiliating and destructive of all self-respect and decency, and had a bad moral effect on the whole school.^[116]

To the objection raised by another newspaper that Dr. Pilcher's predecessor as Superintendent had employed nothing harsher than moral suasion and the strait-jacket in similar cases,^[117] the *Journal* replied:

Dr. Pilcher, like a brave and capable man, sought something better. There could be much saved from such wrecks. He could give back a restored mind and robust health, a bestial function destroyed, and he did it. He called around him a council of competent medical men; they determined on the operations, for here was cure, and the operations were performed, and for which he should have the profound respect and acknowledgement of the State, humanity, and kindred.^[118]

The prestigious *American Journal of Insanity* added its influential voice and editorially commented that "from a medical point of view the achievements of [Dr. Pilcher] are highly interesting". It added,

We shall hope to hear further from Doctor Pilcher, and we trust the benefits observed in nine of the eleven boys may be permanent: . . . We believe these are appropriate cases for study and operation, and are in sympathy with every effort in which science and humanity combine for discovery of new ways of benefit to the race.^[119]

Even physicians writing in the lay press rushed to support the actions of the Superintendent. Dr. Henry Roby of Topeka, who edited a department titled "The Family Doctor" for the *Kansas Farmer*, held that "the presumption of both law and science is in favor of the doctor. . . . Emasculation is not a crime when done to save a life, or to cure an insanity or an imbecility, as it often is. It is no crime when it is done to restrain a diseased boy from an otherwise incurable tendency to self-destruction, either of suicide or the sure damnation of an unchecked vice."^[120] So vocal and so overwhelming was the support tendered Pilcher by his brethren that by the spring of the following year, an article in the *Pacific Medical Journal* could report that "as was expected the political press raised a great howl . . . but the medical profession sustained him and he has been further supported by his board of trustees".^[121]

Dr. Pilcher's was not the first such surgical intervention employed as a cure for masturbation, but its sensational nature occasioned much professional interest in the operation. The *Texas Medical Journal*, for example, noted that the publicity attending the events at Winfield clearly indicated that there was a growing sentiment among physicians and psychiatrists in favor of castration, "not only for disease, but as a prophylactic against a long train of evils, and particularly against the hereditary transmission of vice, disease, and the propensity to crime." Unfortunately, the *Journal* pointed out, the public was not yet in full agreement with the profession and would have to be educated in this respect.^[122]

Therapeutic castration for masturbation had been employed previously, but with indifferent results.^[123] An instance is reported by Dr.

Robert Preston, Superintendent of the Southwestern Virginia Asylum, where "a young man, at his earnest request, had been castrated in 1885 by his physicians in Bland County, Va., for the cure of masturbation". The patient subsequently came under Dr. Preston's observation at the Southwestern Asylum. At that time, the doctor reports, "he experienced no relief and no diminution in sexual power or desire".^[124] This finding was sustained by Dr. A. E. Osborne, Superintendent of the California Home for Feeble-Minded Children, who recounts a similar instance where a chronic masturbator was castrated. "The operation as a cure", concludes Dr. Osborne, "had been a total failure."^[125]

Why, then, this renewed interest in the procedure in the 1890s? The answer, or a significant part of it, can, I think, be found in a paper delivered before the International Medico-Legal Congress in August, 1893, by Dr. F. E. Daniel. The paper received enormous publicity; it was offered before the American Medico-Legal Society in New York in October of that year, and, in December, was published in no fewer than three medical journals, the *Medico-Legal Journal*, the *Psychological Bulletin*, and the *Texas Medical Journal*, of which Dr. Daniel was editor.^[126] In it, Dr. Daniel was injudicious enough to drop the pretense of employing castration as a therapeutic measure for masturbation. Rather, he suggested the procedure be used primarily as a *punishment* for *all* sexual perverts, including habitual masturbators. "It is not alone in asylums", he holds, "that castration should be done."

Rape, sodomy, bestiality, pederasty and habitual masturbation should be made crimes or misdemeanors, punishable by forfeiture of all rights, including that of procreation; in short by castration, or castration *plus* other penalties, according to the gravity of the offense.^[127]

When Daniel's paper appeared in 1893, American psychiatry was in the midst of undergoing a shift in emphasis away from the view that sexual disorders were occasioned by environmentally determined perversions of the will which were open to successful treatment. The inability of the profession to actually cure masturbators and other sexual deviants, together with the growing proportion of

seemingly hopeless cases filling the asylums, encouraged the conviction that mental diseases, especially those manifested in the form of crime and sexual vice, were in fact hereditary and inherently incurable.^[128] Daniel's paper captured this change in emphasis by suggesting that individual therapeutic procedures and efforts to cure were, for the most part, fruitless,^[129] and that what was needed for the eradication of sexually pathological behavior was an extensive eugenics program. In ringing testimony to the glory of eugenics and the role of medicine in bringing about a world made free of unCalvinist sexual longings, Dr. Daniel writes:

While we can not hope ever to institute a Sanitary Utopia in our day and generation, it would seem within the legitimate scope and sphere of Preventive Medicine, aided by the enactment and enforcement of suitable laws, to eliminate much that is defective in human genesis, and to improve our race mentally, morally and physically; to bring to bear in the breeding of peoples the principles recognized and utilized by every intelligent stock-raiser in the improvement of his cattle; . . . I predict that in twenty years the beneficial results of castration for crimes committed in obedience to a perverted (diseased) sexual impulse will be established and appreciated.^[130]

Although not all physicians and psychiatrists shared the growing skepticism regarding individual treatment in dealing with sexual deviants, most were prepared to support the sentiments put forward by Dr. Daniel. Even before the publication of his essay, Dr. William Hammond had read a paper before the New York Society for Medical Jurisprudence supporting the substitution of castration for capital punishment;^[131] and, in May, 1893, Dr. G. Frank Lydston had called for the castration of sexual perverts — particularly of Negro rapists — "if the operation be supplemented by penile mutilation according to the Oriental method".^[132] The proposal to castrate those guilty of sexual sin caught the imagination of the medical profession. Within two years of the publication of Daniel's article, no fewer than four major papers appeared in the more prominent medical periodicals supporting and enlarging Daniel's recommendations.^[133] By 1900, the eugenics movement had raised asexualization to the first rank among the solutions to mental disorder espoused by the medical profession.^[134]

One of the noblest moments in the history of psychiatry is captured by the painter Robert Fleury, in which he shows Dr. Philippe Pinel ordering the chains removed from the patients at the Salpêtrière in 1795. The Enlightenment spirit from which issued the great humanitarian principle which moved Dr. Pinel and the few other early physicians of the mind to liberate the insane from their fetters is tribute to the highest ideals of the profession — to soothe the perturbations of tortured souls and to resolve the conflicts which made of the lives of the mentally ill an unceasing torment. Yet so perverted had this original ideal become when in the hands of lesser men that a century later the profession in the United States was calling for violent physical mutilation of the unfit in the name of ending defect and degeneracy in society.

By the 20th century, American psychiatry had so altered its nature that it no longer defined its primary role as servitor to the patient in need of help. Instead, it saw itself in the basically anti-individualistic role of protector of a reified social body, to which it was prepared to sacrifice its sick and ailing members. One eminent psychiatrist, calling for the castration of the morally, mentally, and physically unfit, invoked this new alliance between psychiatry and the repressive arm of the State when he wrote:

Is it asking too much, is it requiring more than is due, when the state . . . seeks to protect itself against the degrading influences of the continually flowing stream of transmitted pollution, which saps the mental, moral and physical vitality of its citizens, by asking the parents and guardians of the irresponsible defectives to yield their consent to the performance of an operation which in some instances may prove to be curative and in many to be palliative, by abrogating sexual perversions and thus establishing conditions favorable to mental and moral cultivation, and in all, through its far-reaching result, is able to render them impotent to do harm? Failing to obtain this consent, has not the state the right to adopt such measures in the interest and in the protection of its citizens?

The members of our noble profession are not only the conservators of the public health, but are, or should be, in every sense the promoters of the public good. Equipped through training for the effective performance of their professional duties, with cultured mentality, with courageous convictions, to do the right, they stand at the gateway of civilized conditions, ever able, ever ready, to lend a helping hand in promoting that which is for the public weal. May we

not ask that the study of investigation of this subject [the castration of the unfit] shall be approached with the "open mind", with the judgment unwarpd by an emotional sentimentality. May we not feel assured that, when so studied, there can be but one verdict — that of enlightened approval.^[135]

Sex, throughout the whole of the 19th and on into the 20th centuries, had been the great blind spot of psychiatry. In this area of psychic life the profession had refused to accept its original therapeutic role of helping the sick and, instead, had taken upon itself the theological task of punishing those guilty of moral wrongs. It had, in fact, armed itself with the theological tools of damnation. But, cloaked in the mantle of science, its method was not excommunication from God but rather the use of the strait-jacket, the lunatic asylum, and the scalpel.

Nineteenth-century American psychiatry seems to have blinded itself to one of the more usual aspects of mental disease; that it is within its nature that when an etiologic factor is once accepted by the great mass of people, this alone may make it a cause of mental imbalance irrespective of the original justification for its place in the lexicon of mental ailments. The very fact that masturbation, nymphomania, homosexuality, and so on, as specific forms of psychoneuroses, were given ontological existence in the medical vocabulary and accepted as such by the public, led to their becoming the cause of the disease — for the nature of mental disturbances is that the imaginary, as easily as the real, may bring about mental disorders.

The hypothesis that masturbation as a cause of insanity was ultimately iatrogenic was not examined with any thoroughness until 1932, when a paper by Drs. William Malamud and G. Palmer of the Iowa State Psychopathic Hospital appeared in the *Journal of Nervous and Mental Disease*.^[136] After examining 50 cases of insanity where masturbation was singled out as a significant causative factor, Drs. Malamud and Palmer concluded that "the mental deviations in these cases were due not to the effects of masturbation as such, nor to an organic injury brought about by it, but to a conflict introduced by the erroneous belief of the effects of the practice and its ethical and moral implications . . . The characteristic feelings expressed by most of these patients

[are] that they have 'wasted away' their lives."^[137] There is little doubt that these "wasted lives" would have been saved were it not for the psychiatric and medical professions whose putative functions were to tender such people aid and solace.

Although belief in the notion that masturbation would eventuate in severe psychological disorder was still espoused by a few medical authorities on into the 1930s and after, it had, for all practical purposes, been abandoned by most of the medical profession. True, it lingered in the cautionary literature published for the laity by religionists and moral purifiers, but among the psychiatric profession the theory that masturbation was psychologically harmful continued on only in the much adulterated form that its excessive practice contributed to or was symptomatic of certain sexual neuroses. Yet, as the historian Ronald Walters points out, old myths die hard; a survey taken in 1959 of future doctors graduating from medical schools in the Philadelphia area revealed that almost half of those questioned still held that masturbation was a common cause of insanity.^[138]

A far more significant and enduring legacy left by the medical profession's theory of sexuality was its effect on the content of American criminal law respecting sexual conduct. Beginning in the 1880s, psychiatrists and physicians in ever increasing numbers seized upon the criminal prohibitions of the law as one method of circumscribing vice and immorality. In their campaign against untrained licentiousness, doctors increasingly viewed individual treatment as only secondary in importance to "that wholesome and definite dread of legal punishment which is at present the chief protection of society".^[139] Even where the causes of crime and immorality were discovered to be the product of hereditary predisposition, the fear of criminal sanctions was thought to be an effective deterrent. Thus Dr. Frank Lydston, writing on the hereditary aspects of vice, and particularly of prostitution, notes that even in such cases punishment could still prove efficacious in deterring open manifestations of these morbid physical conditions, "for even insane persons . . . may restrain their morbid impulses where they have such a powerful

incentive as the dread of commitment to an asylum".^[140] By the end of the 19th century, these sentiments were shared by the bulk of the medical profession; and, by 1920, in part instigated by the propagandizing efforts of physicians and psychiatrists, American criminal law had become an active force in determining the limits of permissible sexual behavior.

II

The contributions of the medical profession to the crimination of sin, particularly in the areas of sexual perversion, prostitution, and sexual contacts with adolescents, is attested to by the prominent role psychiatrists and physicians played in the social hygiene movement which emerged in the Progressive Era.^[141] Medical opinion, taking, as it had, the view that the eradication of vice was an essential ingredient to a healthy society, had quickly championed the reforms espoused by the moral education societies — themselves dominated by female physicians^[142] — which had come into existence in the 1880s and '90s. Calling for the suppression of prostitution and other untoward forms of sexual expression, the banning of obscene and pornographic materials, and the punishment of sexual offenders with castration, positions either implicitly or explicitly suggested by the scientific findings of preventive medicine, these reformist elements developed a close working relationship with physicians. So closely associated did preventive medicine and purity reform become that the reformist elements began to employ the very language of medicine in their campaigns, frequently employing the metaphors of moral contagion in their literature and looking upon themselves as "physicians to society".^[143]

With respect to prostitution, the medical profession had openly allied itself with the suppressive aims of the reform movement as early as 1882, as its journals reflected.^[144] Physicians, noting the grave danger of venereal disease, argued that this could best be brought under control by first eliminating prostitution and, eventually, by eradicating all promiscuity. In the same vein, it was observed that obscene literature was an important factor in encouraging

licentiousness and commercialized vice. The medical profession, influenced, among others, by the work of Dr. William Sanger on prostitution, held that an intimate connection existed between pornography and sexual lust; the result of reading books and seeing pictures suggestive of sexuality drove the victim to seek sexual thrills either through frequenting brothels or in some more violent and perverted manner.^[145]

The social purity movement, which physicians had enthusiastically endorsed, quickly became a mass movement with a national organization. In 1895, at the National Purity Congress in Baltimore, the American Purity Alliance was formed. It listed a number of prominent reformers from the major national reform groups on its executive board, including representatives of temperance unions, societies for the suppression of impure literature, anti-vice organizations, law and order societies, and women's suffrage groups.^[146] Its New York Congress, held soon after, won the unreserved support of the New York medical profession. As David Pivar reports, signatures were there collected for a Medical Declaration of Chastity.

This 1895 Declaration was a milestone for purity reformers in social medicine. They had convinced the medical profession of New York that regulation was inadequate for combatting social diseases and conserving morality; and had further proved to the satisfaction of physicians the efficacy of purity reform for social medicine.^[147]

Indeed the physicians in New York did not need much convincing. So firmly were they wedded to the aims of the reform movement as a result of their own investigations that in 1905 they formed their own organization, the American Society for Sanitary and Moral Prophylaxis.

The object of the Society, as announced by its first president, Dr. Prince A. Morrow, comprised "the study of the means of every order — sanitary, moral, and legislative — (the legalization of prostitution excepted) — which promise to be the most effective in preventing or diminishing the spread of diseases which have their origin in the Social Evil".^[148] Dr. Morrow recognized the broader implications of this mandate and its relation to social reform generally. "In their essential nature", he

remarks of venereal diseases,

they are not merely diseases of human body, but diseases of the social organism. The problem of their prevention or control involves not only questions of hygiene, but questions of morality — questions affecting the most intimate relations of our social life To correct these evil conditions there should be a union of all the social forces which work for the good in the community.^[149]

The intimate connection between preventive medicine as dictated by science and advances in sexual morality — enforced advances, if need be — are spelled out in a paper Dr. Morrow delivered before the Society 2 years after its founding.

Recognizing that the irregular exercise of the sex function, whether it is termed "incontinence" or "immorality", is the most prolific cause of venereal diseases, we recommend pre-marital continence as the safest and only sure preservative against infection. Recognizing that the most powerful predisposing cause of licentiousness in men is the physiological fallacy of the "sexual necessity", we repudiate this counterfeit presentment of physiological truth. . . . The teaching of continence does not imply a Pharasaical assumption of superior virtue, but is simply an impersonal interpretation of the physiological laws of man's nature as developed by science and confirmed by human experience. If the hygienic precepts formulated by this Society conduce to moral living, if the moral grows out of the scientific, so much the better for the interests of morality.^[150]

In keeping with the position outlined by Dr. Morrow, the Society joined its sister organizations in the reform movement in calling for an extensive system of sexual instruction for the young and for legislation making all aspects of sexuality outside the marriage bond illegal. In addition, it supported the suppression of obscene materials and the raising of the female age of consent, i.e. raising the age below which a male could be indicted on a charge of rape.^[151]

So successful was the Society in expanding its membership beyond the New York area that, by 1910, it had established branches and sister societies among physicians in Philadelphia, Milwaukee, Baltimore, Chicago, Indiana, St. Louis, Denver, Portland, Spokane, California, West Virginia, Jacksonville, and Mexico City; in addition, locals were in the process of formation in Georgia, Connecticut, Texas, and New Jersey.^[152] The Chicago society — established by the respected urologist Dr. William T. Belfield in October, 1906 —

brought forth the terms "social hygiene" and "sex hygiene" to describe their work.^[153] These terms served the dual purpose of relieving the more timid from having to employ words like "venereal" or "prostitution", while at the same time underscoring the medical orientation of the organization's interests. So popular did the terms become that both old and new societies commonly adopted them in their titles. In June, 1910, the central organization changed its name from the cumbersome American Society for Sanitary and Moral Prophylaxis to the American Federation for Sex Hygiene.^[154]

Finally, in December, 1913, the physicians' groups, organized into the American Federation for Sex Hygiene, and the National Vigilance Association, successor to the American Purity Alliance and comprised mainly of social workers and clergymen, joined into one massive association for the promotion of their common ends. At a meeting in Buffalo attended by the leaders of the two federations, the American Social Hygiene Association was founded, with Charles Eliot, President of Harvard University, as its first president, and Dr. William Snow of the California Board of Health as its first general secretary.^[155]

The merger originally led to some internal bickering. Charles W. Clarke, at one time Medical Director of the newly formed association, recounts the mutual suspicion that early emerged between, on the one hand, those primarily interested in the medical aspects of sex and, on the other, those who were particularly concerned with its moral implications.

The clergy and social workers in the abolitionist organizations suspected that the medical men were "materialists" who cared nothing for spiritual values and social justice. The physicians and sanitarians were often impatient at the preoccupation of the abolitionists with the protection of the civil rights of prostitutes. As one doctor remarked, "They don't give a damn how many babies die of syphilis so long as streetwalkers are not molested by policemen."^[156]

In this struggle, the more repressive policy prevailed when the membership was convinced that "there is no fundamental conflict between the highest moral and social concepts of what sex conduct ought to be and the most scientific medical and sanitary plans for eradicating the venereal diseases".^[157] Thus, in the controversies over whether to support

medical inspection of prostitutes and whether to make chemical prophylaxis available to the public, the Association ultimately agreed that both policies were of questionable medical benefit and would only encourage illicit sexual relations.^[158]

Perhaps the best statement of the goals of the new organization is that put forward by its first president, Charles W. Eliot, in an address to the first annual meeting of the Association.

An . . . important object of the Association is to devise and advocate effective police procedure and effective legislation with regard to vice. In some American communities improved laws, courts, or police administration have already been secured. The Association should try to make the best experience of any state, city, or town available, as lesson or example, to all other cities or towns. . . .

Part of the work of the Association should be contributory to the work of other organizations — such as those that advocate the suppression of disorderly houses and disreputable hotels, . . . the substitution of weak alcoholic drinks for strong, the promotion of total abstinence, and the provision of wholesome pleasures, both out-of-doors and indoors. The Association should always be ready to take part in the prosecution of men or women who make a profit out of obscene publications, indecent shows, immoral plays, and prostitution.

The Association ought to advocate actively the common use of the recognized safeguards against sexual perversions — such as bodily exercises, moderation in eating, abstinence in youth from alcohol, tobacco, hot spices, and all other drugs which impair self-control, even momentarily. Social hygiene would be effectively promoted by reduction or rejection of the drinking and smoking habits in American communities. In the white race the connection between drinking alcohol and prostitution is intimate.^[159]

The reforms advocated by the American Social Hygiene Association and by its predecessor organizations in the social purity movement had as their aim nothing short of a fundamental transformation in the value system manifested by American law. The comparatively limited intrusions into private sexual matters which had characterized the criminal law throughout most of the 19th century were, between 1880 and 1920, augmented by statutes regulating every aspect of sexual conduct, both public and private, and this inflation of the statutory law in this area came about largely through the propagandizing efforts of the sex hygiene societies. The theoretical foundation for the attacks levelled by these groups on vice, sexual perversion, and obscene literature were laid by the medical profession's earlier investi-

gations into sexuality and particularly by the profession's conclusions respecting the pernicious effects of masturbation, incontinence, and the other perversions which stemmed from them. Not one reform in the area of sexuality advocated by these groups was at odds with accepted medical canon; no piece of legislation regulating sexual conduct could not be supported by substantial medical and psychiatric evidence.

Backed by the weight of scientific testimony, reformist elements in the United States were successful in convincing the state legislatures that stamping out vice was a primary desideratum of law. Criminal codes in each of the states, already in the process of undergoing a marked expansion,^[160] were further swollen to encompass a host of new laws dealing with sexual behavior. As an example, in 1915 alone — not an atypical year with respect to this kind of legislation — over 80 bills concerning the regulation of sexual behavior were introduced into the state legislatures, of which over half were passed into law.^[161] These included statutes dealing with the age of consent, indecent exposure, obscene publications, sexual perversion, adultery, fornication, and various aspects of prostitution — including pandering, pimping, keeping a house of prostitution, soliciting, and transporting for the purpose of prostitution. The rationale, eagerly adopted by the state legislatures, which excused such wholesale incursions into the private lives of citizens was that provided by medical science, namely that these new laws did not issue from any attempt to enforce a particular value system but were scientifically grounded in the conclusions reached by preventive medicine and sexual hygiene. Their aim was not to make Americans moral, but to prevent them from becoming sick.

It is beyond the scope of this essay to attempt anything like a complete catalogue of the successes which the sex hygiene associations had in their lobbying efforts. Between 1880 and 1920 many hundreds of statutes were either passed into law or amended, to bring the states' penal codes into line with the reforms advocated by physicians and other moral reformers. The following categories are,

however, indicative of the scope and direction of statutory enactments during the period and are briefly discussed: (1) changes in age of consent legislation; (2) the expansion of the sodomy statutes to include perversions other than coitus *per anum*; and (3) legislation aimed at stamping out prostitution.

(1) *Age of consent legislation*

"Age of consent" in the sense in which I here employ the term, refers to that age below which a female is held by law to be incapable of agreeing to sexual intercourse, so that any male who has sexual relations with a girl below the stipulated age is indictable on a charge of rape. It might also be taken to refer to the maximum age at which a female may be seduced or abducted, since in most jurisdictions a male is deemed innocent of these offenses unless the female was under a certain age. Although the age of consent in both these instances was often the same, it is specifically to the former that the reformist groups turned their attention.

At the beginning of 1886 the age of consent to sexual intercourse remained at 10 years throughout most of the country. Several states had statutorily increased the age to 12 years, but the great majority continued to adhere to the traditional age of 10 — either via statute or by relying on the common law. Under intense pressure from the social hygiene movement this situation was substantially altered over the succeeding three decades. By the time of America's entry into World War I, only Georgia remained with an age of consent of 10, and it raised the age to 14 in the following year. All the other jurisdictions, by 1917, had statutorily raised the age to 14 or above. Twenty-two states had set 16 as the age of consent; seventeen states had raised the age to 18; and two states, Tennessee and Wisconsin, had raised the age to 21.^[162]

(2) *Sexual perversion*

Throughout most of the 19th century, the law against sodomy stood alone as the only legal prohibition against sexual deviance. The common law had limited the crime of sodomy solely to sexual intercourse *per anum* by a man, with a man or woman, and when the state

initially enacted sodomy statutes no other sexual behavior was interpreted as being proscribed — excepting bestiality or necrophilia in those states explicitly including such conduct in their statutes. However, beginning in 1879, the various state legislatures were encouraged to expand their statutory prohibitions to cover fellatio, cunnilingus, and other "unnatural" acts, which medical science had shown to be the product of diseased and perverted minds. The intervention of the law was necessary, it was argued, both to discourage the spread of these vices and to bring to the attention of the legal authorities sexual pervers in need of psychiatric treatment. In addition, in 1907 Indiana became the first of a number of states to pass a compulsory sterilization law.^[163] It thus became legally possible to include sex pervers in the far-reaching asexualization plans which physicians so strongly supported.^[164] A comprehensive eugenics program, however, would first require that sex pervers be identified and committed to state institutions. As a result, a number of states which expanded their criminal codes to include perversions other than *coitus per anum* also made statutory provision for the hospitalization, treatment, and — in some cases — castration of pervers.

Not all the states found it necessary to amend their sodomy laws in order to prohibit acts not covered by the common law. The original statutes — all of which prohibited "sodomy", "buggery", "the crime against nature", or a combination of these terms — did not explicitly specify which acts were included within the meaning of the law. Traditionally the common-law interpretation prevailed, thus limiting the prohibition to anal intercourse. However, because of the vagueness of the language, when a particular "unnatural" act was charged as being in violation of the statute, the courts had the option of extending the sense of the statute by construing it as covering the particular act before it. Between 1904 and 1925 the courts in eleven states adopted this approach and broadened the area covered by the sodomy laws sufficiently to make unnecessary legislative action.

From 1879, when Pennsylvania added a

section to its sodomy statute covering fellatio and cunnilingus, until 1925, thirty-six states had either expanded their prohibitions against sexual aberrance by statute or through the state courts.^[165] Doubtless physicians viewed with particular pride the Indiana and Wyoming statutes, passed in 1881 and 1890. In both states the legislatures included the following language in their criminal codes:

Whoever entices, allures, instigates or aids any person under the age of twenty-one years to commit masturbation or self-pollution shall be deemed guilty of sodomy.

(3) *Legislation aimed at prostitution*

Undoubtedly the major thrust of the social purity groups and their successor organizations was directed at stamping out prostitution. Throughout the 19th century almost no laws dealt with the practice and those that did were only nominally enforced. Prostitution was not an offense at common law and, prior to World War I, to be a prostitute was in itself not a crime.^[166] No laws existed prohibited pandering, pimping, procuring, soliciting, or transporting, nor was patronizing a prostitute an offense.^[167] This absence of legal restraint, combined with a general sentiment among Americans that the repression of commercialized vice was not particularly desirable, permitted the practice to flourish.^[168] During the 19th century, prostitution appears to have been so acceptable a part of American life that several attempts were made to license the profession in the 1870s and '80s. These efforts were ultimately defeated, largely through the agency of the purity groups and a substantial proportion of the medical profession.^[169] Yet so rampant was prostitution up to World War I that it was conservatively estimated that the number of prostitutes residing in brothels in the United States in 1912 was no less than 200,000.^[170]

In no other area of sexuality did the social hygiene movement eventually prove as effective in its legislative lobbying efforts as in the area of commercialized vice. Beginning in the 1880s and reaching a peak during the war years, each state passed more than a dozen pieces of legislation, prohibiting every aspect of the practice. World War I was of enormous help to the social hygiene crusade against immorality;

the suppression of vice became associated in the public mind with the campaign against venereal disease and, hence, with the war effort. Discussing developments in social hygiene legislation during the war years, George Worthington notes that

when the government was suddenly confronted with the necessity of mobilizing for war, it realized at once that to be efficient, its armed forces must be clean. The government's program was based on the realization that the venereal diseases are the greatest scourge to the military forces and that prostitution is the greatest source for their spread.^[171]

The government was, of course, confronted with two alternate approaches in its battle against venereal infection. It could choose either to medically inspect prostitutes and the men with whom they came in contact or it could prohibit commercialized vice. Under prodding from the medical profession, it opted for suppression.

The result of identifying prostitution with aiding the enemy concluded a process already begun to legislate against almost every element of the prostitute's trade. The publicity attending the reports of the numerous vice commissions established after 1910^[172] had already resulted in the passage of the so-called White Slavery Laws, prohibiting enticing females into prostitution, pandering, and pimping. Perhaps the most famous of these was the Mann Act, a federal statute enacted in 1910, which makes it a crime for any person to transport in interstate or foreign commerce any female for immoral purposes.^[173] The individual states quickly followed the lead of the federal government. Between 1910 and 1915, practically every state in the Union had passed laws against these classes of offenses. Forty-four states made enticing, soliciting, forcing, or transporting a woman into prostitution a crime; forty-five states had forbidden pandering; and thirty-six states had made pimping and living off the earning of a prostitute unlawful. Only Georgia, Mississippi, and South Carolina had prohibited none of these acts by 1920.^[174]

Keeping a disorderly house — or a house of ill-fame, as some laws stated — had been indictable as a misdemeanor under common law.^[175] During the course of the 19th century, however, the concept of the common-law crime

had weakened considerably and the criminal law in the various states had become almost exclusively a matter of statute.^[176] Yet, before 1890, only twenty-four states had included the offense of keeping a house of ill-fame in their criminal codes.^[177] Because of the promotional work of the reform movement, however, an additional twenty-two states and the District of Columbia added the crime to their penal codes between 1891 and 1913.^[178]

A far more effective weapon for closing houses of ill-fame was the Red Light Injunction and Abatement Law, first passed by Iowa in 1909. The law did not involve a criminal action and therefore did not suffer from the restrictions imposed on a prosecution under the criminal code. The Injunction and Abatement Law declared houses of prostitution to be common nuisances and permitted a civil action in a court of equity to be brought in the name of the state by any private citizen to abate the nuisance. A civil action, as opposed to a criminal proceeding, had the advantage of allowing the court to issue an injunction, including a temporary injunction during the period of the trial, thus closing the house. Further, relief was secured much more rapidly than in a criminal action and the trial was before a single judge rather than a jury.^[179] The Law proved so successful in reducing the number of brothels in Iowa that, by 1921, thirty-nine states and the District of Columbia had enacted similar statutes.^[180] It is largely through exploiting the Injunction and Abatement Laws that prostitution as a functioning commercial enterprise was eventually abolished in the major American cities.^[181]

In addition to the White Slavery Laws, Injunction and Abatement Acts, and prohibitions against keeping a house of ill-fame, a number of states passed statutes prohibiting soliciting for purposes of prostitution or lewdness. The prohibitions against soliciting not only made criminal an important aspect of the business of prostitution but, in time, also served the purpose of criminalizing casual homosexual encounters. A large percentage of homosexual offenses have not fallen under the statutes for sodomy but under the more prosecutable one of soliciting — originally a

prostitution offense.^[182] By 1920 twenty-seven states had added soliciting to their criminal codes.^[183]

Finally, the various states and municipalities passed into law a variety of laws and ordinances touching on other aspects of commercialized vice; permitting one's place or conveyance to be used for immoral purposes; receiving or offering to receive another into a place or conveyance for purposes of prostitution; knowingly transporting another to a place of prostitution; acting as a go-between between a prostitute and her patrons; frequenting, residing in, or occupying a disorderly house; and so on. Perhaps the most far-reaching law enacted by the states was that drafted by the law enforcement division of the Commission on Training Camp Activities of the federal government, for submission to the various state legislatures. Known as the Vice Repressive Law, it prohibited both "giving or receiving of the body for sexual intercourse for hire", and "giving or receiving of the body for indiscriminate sexual intercourse without hire". In addition, solicitation on the part of either party was proscribed by its provisions. The law was so extensive in its coverage that it penalized all commercialized aspects of prostitution, including the activities of the go-between, the disorderly house-keeper, and so on. The Vice Repressive Law, effectively classifying all sexual intercourse as a species of prostitution, was enacted by ten states by 1920.^[184]

If one were to examine the status of the legal regulation of sexual conduct which obtained in the United States in 1948 — the year of the publication of Alfred Kinsey's first monumental study of American sexual behavior — he would be confronted with laws prohibiting almost all sexual conduct other than normal sexual intercourse between husband and wife and solitary acts of masturbation. These laws, Morris Ploscowe observed, "make potential criminals of most of the adolescent and adult population".^[185] So sweeping are the restrictions on sexual activity contained in the various criminal codes and so out of keeping are they with the realities of actual behavior that Dr. Kinsey estimated that "the persons involved in these activities [which contravene the law], taken as

a whole, constitute more than 95 per cent of the total male population".^[186]

Although it is true that some of these sexual offenses have their roots in the English common law and in the early American Puritan tradition, it is significant that the majority of these prohibitions date from a period no earlier than the last two decades of the 19th century. Only a fraction of the sexual behavior which in 1948 was proscribed by law had been prohibited in the United States 70 years earlier. Thus, mutual masturbation, fellatio, cunnilingus — all manner of "lewd and indecent" acts when committed in private — single acts of fornication (in all but a handful of states), relations with prostitutes, consensual intercourse with females over the age of 10 or 12, soliciting another for a sexual act, all were beyond the reach of the law as late as 1880.

The shift in American criminal law at the end of the 19th century which subjected so much sexual conduct to legal restraint was occasioned not by a reawakening of religious zeal but by the intrusion of medicine and psychiatry into the legislative process. When, during the 19th century, doctors and psychiatrists had scientifically established the medical necessity of a life of sexual restraint, they had confined the implementation of their findings to their patients and to the unfortunates committed to their care in hospitals and asylums. By the 1880s, however, the profession was prepared to forcibly remold the entire society in the interests of mental health. In this respect physicians, and particularly psychiatrists, exhibited the same presumptuousness in meddling in the private affairs of people as was shown by others active in the reform movements of the period. Their meddlesomeness came comparatively easily, however. As John Burnham observes, since "as doctors they dealt with matters of life and death, and as psychotherapists in daily practice they undertook to interfere in and change the attitudes and ways of life of their patients, . . . they were accustomed to the responsibilities of leadership".^[187] Moreover, the role of leadership for the morals of the nation had been a traditional one for physicians.

When, in 1917, the General Medical Board of the Council of National Defense declared that

"continence is not incompatible with health" and the House of Delegates of the American Medical Association unanimously approved the sentiment,^[188] doctors in the United States were only affirming a principle that lay at the root of their investigations into sexuality begun a century earlier by Benjamin Rush. Incontinence — and its solitary manifestation, masturbation — were found to be the spring from which issued a spectacular array of diseases, both of the mind and of the body. With respect to the social organism, a wanton and lascivious population, given to unbridled sexuality, undermined the moral fiber of a nation, perverted its character, and destroyed its sense of manliness, womanliness, purity, love, honor, marriage, the home, the family, and the state. Physicians, throughout the whole of the 19th century, had been alone in asserting the scientific truth of these observations. Psychiatrists, experts in the area of mental disorder, had proven with cold and detached objectivity that unrestrained sexuality would bring in its wake the decay, first of the mind, and finally of the body. On a national scale, it would, if unchecked, lead to nothing less than the collapse of organized society. The medical profession saw with pristine clarity the necessity of keeping licentiousness in check if mental disease were not to become rampant.

By the end of the century, physicians and psychiatrists had proved their sexual theories to a receptive public. It was no longer necessary to rely on the unverifiable conclusions of moralists and theologians respecting the propriety of inhibiting one's sexual appetite. Science had proven beyond all shadow of doubt that masturbation, incontinence, oral-genital contacts, homosexual encounters, even prostitution, were mental perversities, brought about through disobedience to nature's inexorable laws as uncovered by medical science. "The laws of society and physical hygiene are immutable", wrote one psychiatrist,

and any infringement of them is followed by penalties that must be paid for. The person that does aught to improve the morals of our race and inculcate and secure obedience to nature's immutable laws adds a bulwark to the nation's safety and the nation's greatness; but he that does aught to degrade the morals of our generation and breaks nature's laws commits a

crime against the whole nation, because he throws poison into a stream from which we all must drink.

Greece, exalted with her matchless learning and art, and Rome — imperial Rome — with the wealth and power of empires within her grasp, crumbled and went down in ruin when the morality of those nations was eclipsed by sensuality and vice.^[189]

The task of sparing America the fate of Greece and Rome belonged to men of vision and dedication such as comprised the medical profession, men who saw that American society, for too long, had disregarded nature's laws and had permitted sensuality and vice to flourish. Armed with new laws to protect the sexual purity of the nation, they joined hands with an emerging bureaucracy^[190] to build that bulwark against iniquity and lust of which physicians and psychiatrists wrote. They had discovered that the penitentiary was as viable a therapeutic weapon for sexual disorder as was the asylum.^[191]

NOTES

1. The argument that law and morality are, in most significant respects, co-extensive impresses me as the result more of a confusion in terminology than of analytic insight. In any case, the sense in which I mean to distinguish the two is, I trust, made clear by Mr. St. John-Stevas.
2. Norman St. John-Stevas, *Life, Death and the Law* (London: Eyre & Spottiswoode, 1961), pp. 14–15.
3. *Ibid.*, pp. 18–25. Historical discussions are also contained in H. L. A. Hart, *Law, Liberty and Morality* (Stanford, Cal.: Stanford University Press, 1963), *passim*; *idem.*, *The Morality of the Criminal Law* (Jerusalem: The Magnes Press, Hebrew University, 1964), pp. 31–54; and Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965), *passim*.
4. See, for example, F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp. 145–147.
5. In discussing the relation between government and the legal enforcement of virtue in the United States, Walter Berns remarks that “in a real sense it is against the American tradition to suggest that political conflicts do not always lie between government and the citizen, and more specifically, that the basic political conflict is not one of man versus the state — or freedom versus authority, as it is frequently referred to. Both the Declaration of Independence and the Bill of Rights share this view. The very notion that the citizen possesses rights against the government, rights that he enjoys from some non-governmental source, is not only a modern idea, but is one that makes no sense unless government is viewed as some hostile force, or at least some necessary evil, which constantly threatens to prey on its subjects.” Walter Berns, *Freedom, Virtue, and the First Amendment* (Baton Rouge, La.: Louisiana State University Press, 1957), p. 67. Even Massachusetts law reflected a shift in emphasis from “enforcer and guardian of Christian society” to “preserver of individual liberty” after the Revolution. This change in direction is ably discussed by William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass.: Harvard University Press, 1975), *passim*, esp. pp. 89–110.
6. Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), pp. 62–63. Professor Friedman notes that “in colonial times, laws of morality were taken quite seriously”. For example, “fornication and drunkenness were the most commonly punished crimes in 17th-century Massachusetts”. *Ibid.* Nelson notes that of the 2784 prosecutions in the Superior and General Sessions courts of Massachusetts between 1770 and 1774, 38% of these prosecutions were for sexual crimes. Yet the punishment of immoral conduct during these few years immediately prior to the Revolution cannot have been the sole, perhaps not even the primary motive behind the enforcement of statutes concerned with sexual behavior since, as Nelson points out, 95% of these sexual offenses were for fornication and, with but one exception, only mothers of illegitimate children were prosecuted. (*Ibid.*, p. 37.) Figures offered by Michael S. Hindus confirm Nelson's findings. Of all criminal prosecutions in Middlesex County, Massachusetts, between 1760 and 1774, those relating to bastardy and fornication accounted for 63% and all but ten of the 210 fornication prosecutions during this period involved illegitimate births. (“The Contours of Crime and Justice in Massachusetts and South Carolina, 1767–1878”, [unpublished manuscript, 1977; forthcoming in the *American Journal of Legal History*, July, 1977], pp. 9, 14.) See also Daniel Scott Smith and Michael S. Hindus, “Premarital Pregnancy in America, 1640–1971: An Overview and Interpretation”, *Journal of Interdisciplinary History*, V (1975): 537–570.
7. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wis.: University of Wisconsin Press, 1956), p. 18.
8. Friedman, *op. cit.*, pp. 256–257. This was true even of Massachusetts, consistently the state most repressive in its laws governing sexual behavior. Nelson notes that, beginning in the 1780s, there was a “virtual cessation of criminal prosecutions for various sorts of immorality”. By 1800, only 7% of all prosecutions were for conduct offensive to morality as compared with 38% 30 years earlier. (*op. cit.*, pp. 110, 118.) Hindus, although agreeing in the main with Nelson's conclusions, argues that the shift from “crime as sin” to “crime as theft” in Massachusetts took, not several decades, but 200 years! Hindus maintains that “crimes against morality” never ceased to be a major concern of Massachusetts law; rather, the 19th century witnessed a shift in what constituted immoral behavior away from sexual offenses to liquor-related crimes such as drunkenness and violations of the licensing laws. His inclusion of violations of the liquor-license laws under the broader category of “crimes against morality, order and chastity,” however, serves only to obscure a highly significant downward trend in prosecutions and correctional commitments for sexual offenses and, indeed, for all real offenses against morality which took place throughout the first 70 years of the 19th century. Figures which Hindus presents elsewhere in

his monograph indicate that during the period 1833–1858 no less than 35% of *all* criminal prosecutions in Massachusetts were for license law violations, and that of the category “drunkenness and license law violations,” prosecutions for drunkenness accounted for only 4.37% of the total during this period, violations of the licensing laws accounting for the remaining 95.63%. During this same period, prosecutions for sexual offenses represented only 5.7% of the total of all prosecutions.

With respect specifically to sexual offenses, Hindus’ data clearly confirm a secular decline in correctional commitments for sexual crimes as a proportion of commitments for all crimes throughout the period he covers. In Suffolk County (the cities of Boston and Chelsea), where the commitment rate was significantly higher for sexual offenses than was the rate for Massachusetts as a whole, commitments for sexual offenses accounted for 6.96% of all commitments during the period 1839–1841; 3.98% during the period 1848–1851; 2.39% during the period 1859–1861; and 2.31% during the period 1869–1870.

Additionally, Hindus’ graphic summary of the commitment rate for “crimes against morality, order and chastity”, showing a peak in 1855, is deceptive. This category — consisting of breaches of the licensing laws and drunkenness as well as sexual offenses — does not speak to the particular question of commitments for sexual crimes, nor, because of the inclusion of license law violations, can it offer much insight into the trend with respect to commitments for true moral offenses. Employing the tabulated data for Suffolk County, however, specifically sexual offenses represent a decreasing proportion of the larger category: 18.46% of the commitments for “crimes against morality, order and chastity”, were for sexual offenses in the period 1839–1841; this drops to 11.73% in the period 1849–1851, 5.31% in the period 1859–1861, and 4.48% in the period 1869–1870. Moreover, the *absolute rate* decreased markedly between 1851 and 1859 by these same data, from 137.5 to 39.3 commitments per 100,000 population. (M. S. Hindus, “The Contours of Crime and Justice in Massachusetts and South Carolina, 1767–1878”, *op. cit.*, *passim*).

9. With respect to a judicial criminal code, Francis Wharton had this to say in the 1846 edition of his classic treatise: “The colonies, leaving behind them the penal code of the country whose common law they adopted, found themselves obliged, as the passage of statutes under the colonial establishment was no easy matter, to establish, each by itself, a system of criminal jurisprudence, which depended much more on the adjudication of the courts than the enactments of the legislature. . . A judicial criminal code has been thus created, which, though in many cases modified by the several legislatures, constitutes, in part, the law of the land.” Francis Wharton, *A Treatise on the Criminal Law of the United States* (Philadelphia: Kay, J., 1846), p. 3.
10. *Ibid.*, pp. 1, 5.
11. *Ibid.*, p. 507. See also Wharton’s *Criminal Law*, 12th edition (3 vols. Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1932), II: 2004 (section 1719).
12. Wharton, *op. cit.* (12th edition), II: 1988 (section 1703); Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes*, 2nd edition (Boston: Little-Brown, 1883), p. 438 (section 714); Sir William Blackstone,

Commentaries on the Laws of England, William G. Hammond, ed. (4 vols.; San Francisco: Bancroft-Whitney, 1890), IV: 85.

13. Wharton, *op. cit.* (12th edition), II: 1990 (section 1703).
 14. “Note: Private Consensual Homosexual Behavior: The Crime and its Enforcement”, *Yale Law Journal*, LXX (1961): 624n.
 15. By 1920, forty-three states had legislated against adultery, the exceptions being Arkansas, Louisiana, Nevada, New Mexico, and Tennessee. Although most adultery statutes date back to the earliest criminal codes enacted by the state, several state legislatures waited quite some time before prohibiting the act. For example, Florida did not proscribe adultery until 1874. South Carolina enacted its first adultery statute in 1880; California, in 1901; and New York, in 1907.
 16. Alabama, California, Colorado, Florida, Illinois, Indiana, Kansas, Mississippi, Missouri, Montana, Ohio, South Carolina, North Carolina, Texas, and Wyoming.
 17. Connecticut, Florida, Georgia, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, Utah, Virginia, and West Virginia. Even in those states prohibiting single acts of fornication, enforcement was often feeble. For example, the Massachusetts statute, forcefully administered in the period before the Revolution, underwent revision in 1786. As William E. Nelson points out in his excellent survey of Massachusetts law, “in 1786 the General Court enacted a new statute for the punishment of fornication, permitting a woman guilty of the crime to confess her guilt before a justice of the peace, pay an appropriate fine, and thereby avoid prosecution by way of indictment in the court of sessions. The number of prosecutions for sexual offenses immediately declined to an average of 11 per year during 1786–1790 and to less than five per year during the four decades thereafter. It appears that after 1790 women simply stopped confessing their guilt of fornication, apparently aware that even though they did not confess it was most unlikely that they would be indicted. Indeed, only four indictments for fornication were returned in the entire Commonwealth after 1790.” (*op. cit.*, p. 110).
 18. Alabama, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, Oregon, South Carolina, Washington, and Wyoming.
 19. Wharton, *op. cit.* (12th edition), I: 910 (section 682); Bishop, *op. cit.*, pp. 357–358 (section 482); Blackstone, *op. cit.*, IV: 270.
 20. Francis Wharton, *A Treatise on Criminal Law*, 8th edition (2 vols; Philadelphia: Kay, 1880), I: 512 (section 579).
 21. *Ibid.* (section 580).
 22. Vern L. Bullough, *Sexual Variance in Society and History* (New York: John Wiley, 1976), p. 578.
- The case of Horatio Alger is testament to the limitations of 19th century sodomy statutes. When Alger was found to have engaged in homosexual relations with a number of his young charges while Minister of the Unitarian Church at Brewster, Mass. during 1864 and 1865, the strongest action taken against him was his dismissal from the parish. His sexual proclivities — which Alger did little to hide — did nothing to diminish his growing reputation as a man of letters and defender of working-class boys. See Edwin P. Hoyt, *Horatio’s*

- Boys: The Life and Works of Horatio Alger, Jr.* (Radnor, Pa.: Chilton, 1974), esp. pp. 3–6.
23. Morris Ploscowe, "Sex Offenses: The American Legal Context", *Law and Contemporary Problems*, XXV (1960): 218.
 24. Arthur B. Spingarn, *Laws Relating to Sex Morality in New York City* (New York: Century, 1916), pp. x–xi.
One historian has offered the following analysis of why the Puritan tradition had not permeated the laws governing voluntary sexual conduct to any greater degree than it had during the 19th century. "In an integrated Puritan community", he writes, "the legal control of sex expression was merely evidence of the social control. The laws expressed a social conviction." The American communities of the 19th and early 20th centuries, however, were neither Puritan nor integrated. "The influx of a vast and racially confused population has brought a diversity in social background and in sexual practices. The rapid development of urbanization which followed in consequence of the immigration has increased the confusion." Geoffrey May, *Social Control of Sex Expression* (New York: William Morrow, 1931), p. 259.
 25. In addition to the traditional bases of commitment — danger to one's self or to others — a new consideration was added in 1845. In that year, the Massachusetts Supreme Judicial Court denied a habeas corpus petition of Josiah Oakes, who sought his discharge from the McLean Asylum on the grounds that he had been illegally committed by his family. Affirming a lower court denial of Oakes' petition, the Court ruled the standard of commitment to be "whether a patient's own safety, or that of others, requires that he should be restrained for a certain time, and *whether restraint is necessary for his restoration, or will be conducive thereto*". To this the Court added that "the restraint can continue as long as the necessity continues". Italics added. *Matter of Oakes*, 8 Law Rep. 122, at 125 (Mass. 1845).
A commentator on the law of civil commitment has noted that since the Oakes case "statutes and cases have increasingly focused on the patient's need for care and treatment as one criterion for commitment". "Civil Commitment of the Mentally Ill: Theories and Procedures", *Harvard Law Review*, LXXIX (1966): 1295.
An extensive discussion of the history of American commitment laws is contained in Albert Deutsch, *The Mentally Ill in America: A History of Their Care and Treatment from Colonial Times* (Garden City, N.Y.: Doubleday-Doran, 1937), pp. 417–439. For an account of the public controversy which erupted in the 1870s over abuses of the commitment procedure and the professional reaction to the criticism, see Ruth B. Caplan, *Psychiatry and the Community in Nineteenth-Century America* (New York: Basic Books, 1969), pp. 190–198.
 26. Vern L. Bullough and Martha Voght, "Homosexuality and Its Confusion with the 'Secret Sin' in Pre-Freudian America", *Journal of the History of Medicine*, XXVIII (1973): 143–155.
 27. For an account of the American public's reception of Freud's psychoanalytic system, see Nathan G. Hale, Jr., *Freud and the Americans: The Beginnings of Psychoanalysis in the United States, 1876–1917* (New York: Oxford University Press, 1971), *passim*, esp. pp. 417–421.
 28. The following accounts of the history of masturbation in 19th century medicine and psychiatry have proved most helpful: E. H. Hare, "Masturbatory Insanity: The History of an Idea", *Journal of Mental Science*, CVIII (1962): 1–25; René A. Spitz, "Authority and Masturbation: Some Remarks on a Bibliographical Investigation", *The Yearbook of Psychoanalysis*, IX (1953): 113–145; John Duffy, "Masturbation and Clitoridectomy: A Nineteenth-Century View", *Journal of the American Medical Association*, CLXXXVI (1963): 166–168; John S. Haller, Jr., and Robin M. Haller, *The Physician and Sexuality in Victorian America* (Urbana, Ill.: University of Illinois Press, 1974), pp. 191–234; Alex Comfort, *The Anxiety Makers: Some Curious Preoccupations of the Medical Profession* (London: Thomas Nelson, 1967), pp. 69–113; Thomas S. Szasz, *The Manufacture of Madness* (London: Routledge & Kegan Paul, 1971), pp. 180–206. See also Robert H. MacDonald, "The Frightful Consequences of Onanism: Notes on the History of a Delusion", *Journal of the History of Ideas*, XXVIII (1967): 423–431; and R. P. Neuman, "Masturbation, Madness, and the Modern Concepts of Childhood and Adolescence", *Journal of Social History*, VIII (1975): 1–27.
 29. Hare, *op. cit.*, p. 4.
 30. Szasz, *op. cit.*, p. 139.
 31. Benjamin Rush, *Medical Inquiries and Observations upon the Diseases of the Mind* (Philadelphia: Kimber & Richardson, 1812; reprint ed., New York: Hafner, 1962), p. 347.
 32. *Ibid.*, p. 349.
 33. *Ibid.*, p. 33.
 34. Hare, *loc. cit.*
 35. *Ibid.*, p. 6.
 36. Sir William Ellis, *A Treatise on the Nature, Symptoms, Causes and Treatment of Insanity* (London: Samuel Holdsworth, 1838), p. 336.
The commonly accepted physiological theory by which masturbation was linked to insanity up to the time Ellis put forward his hypothesis was that supplied by the Swiss physician Tissot. In 1758, Tissot published a Latin version of a work translated into French two years later under the title *l'Onanisme, ou dissertation physique sur les maladies produites par la masturbation*; German, English, and Italian translations quickly followed. In it, Tissot argues that the pernicious effects of masturbation on the nervous system are attributable to the discharge of semen — "la liqueur séminale" — causing an *increased* flow of blood to the brain. "This increase of blood explains how these excesses produce insanity. The quality of blood distending the nerves weakens them; and they are less able to resist impressions, whereby they are enfeebled." Samuel Tissot, *Onanisme; or a Treatise upon the Disorders produced by Masturbation: or the Dangerous Effects of Secret and Excessive Venery*, A. Hume, trans. (London: 1766), p. 61; quoted by Hare, *op. cit.*, p. 3.
R. P. Neuman quotes Tissot as claiming that semen was so essential to the human physiology that the loss of so much as an ounce of it would weaken the body more than the loss of forty ounces of blood (Neuman, *op. cit.*, p. 2).
 37. Alfred Hitchcock, "Insanity and Death from Masturbation", *Boston Medical and Surgical Journal*, XXVI (June 8, 1842): 285.

The belief that masturbation resulted in premature death persisted throughout the whole of the 19th century. As late as 1893, one physician writing on the subject recounted several instances of masturbators descending into slow and hideous deaths brought on by the vice. "Not all offenders are visited so severely", he notes. "Perhaps even a small proportion of the whole number [of onanists] die in this manner; yet, in this comparatively small minority, *those who persist in the practice will sooner or later surely be included*. Let no one delude himself with the false assumption that he can be exempt from this universal law. *There can be no possible exemption!* Those who persist will surely die the death most horrible of all deaths; and those who practice the most limited and occasional acts of onanism will surely be punished in proportion to their crimes; while the very individuals who seem to escape, are those who most surely carry the punishment for the remainder of their lives, never live to attain old age, and most frequently fall victims to some grave chronic disease, the germs of which they owe to this detestable vice. Or an acute malady, which they resist far less readily than others, cuts the thread of their existence in the prime of their manhood." Nicholas Francis Cooke, *Satan in Society: A Plea for Social Purity* (Chicago: N. C. Smith, 1893), pp. 96-97.

38. Hare, *op. cit.*, p. 6.

39. David Skae, *The Classification of the Various Forms of Insanity on a Rational and Practical Basis* (Address delivered at the Royal College of Physicians, London, 9th July, 1863 [London: 1863]).

40. Gregory Zilboorg, *A History of Medical Psychology* (New York: W. W. Norton, 1941), pp. 420-421.

41. David Skae and T. S. Clouston, "The Morisonian Lectures on Insanity for 1873", *Journal of Mental Science*, Lecture I: XIX (October, 1873): 340-355; Lecture II: XIX (January, 1874): 491-507. Dr. Skae died before the lectures could be delivered and this task, together with that of completing and editing the manuscript, was taken up by Dr. Clouston, later President of the Medico-Psychological Association. Clouston appends a note to the Lectures indicating his concurrence with the opinions expressed by Skae and, indeed, the lectures can legitimately be regarded as the joint effort of both physicians.

42. *Ibid.*, p. 348.

43. *Ibid.*, pp. 498-499.

44. *Ibid.*, p. 499.

45. Henry Maudsley, "Illustrations of a Variety of Insanity", *Journal of Mental Science*, XIV (July, 1868): 149-162.

46. *Ibid.*, pp. 153-154.

47. *Ibid.*, p. 154. Insanity due to masturbation at or soon after the age of puberty was, in the 1880s, subsumed under the broader category of *hebephrenia*, the mental derangement of adolescence. This classification originated with the German psychiatrist Ewald Hecker in 1871; its first systematic description in the United States was given by William A. Hammond, Surgeon-General of the Union Army during the Civil War and later President of the American Neurological Society, in his *Treatise on Insanity in Its Medical Relations* (New York: Appleton, 1883). In an article on the subject which appeared some years later, Hammond notes that hebephrenia "appears to be induced by any cause capable of lessening the vital powers of the individual,

among which masturbation and also the inception of the menstrual function are pre-eminent". He adds, "one of the worst cases I ever saw occurred in a boy of sixteen from South America and was the result of excessive masturbation". Although cognizant of the pernicious effects of masturbation, Hammond rejects the category of masturbatory insanity in favor of the more inclusive hebephrenia. "Undoubtedly", he points out, "masturbation, when practiced to excess, may modify to a greater or lesser degree the symptoms of hebephrenia, but the product is not entitled to be considered a separate form of mental derangement. The *insanity of masturbation* is simply hebephrenia with the additional phenomena due to excessive onanism." "Hebephrenia — Mental Derangement of Puberty", *Virginia Medical Monthly*, XIX (April, 1892): 6-7.

48. Maudsley, *op. cit.*, pp. 156-161.

49. *Ibid.*, p. 161.

50. Hare, *op. cit.*, p. 7.

51. H. Tristram Engelhart, Jr., "The Disease of Masturbation: Values and the Concept of Disease", *Bulletin of the History of Medicine*, XLVIII (1974): 247-248.

52. "Aberrations of the Sexual Instinct", *The Quarterly Journal of Psychological Medicine and Medical Jurisprudence*, I (July, 1867): 67.

53. *Ibid.*, pp. 66-67. Sentiments of this sort were by no means rare in the psychiatric literature of the period; it is a simple task to find evidence sufficient to support the thesis put forward by the historian Gerald Grob that "while the behavioral norms of psychiatrists were no different from those of most native Protestant Americans, they were clothed with a scientific mantle — a fact made possible by the vagueness of contemporary etiological theory and the ardent desire to prevent disease and to promote health". *Mental Institutions in America* (New York: The Free Press, 1973), p. 161.

54. Many psychiatrists were quite open in their use of theological language while claiming the disinterested objectivity of science. Grob notes that the following sentiments respecting mental disease, made by an influential member of the profession, were characteristic of American psychiatry: "God has put our lives, partially at least, into our hands. Whether we shall live to the fulness of our years, and give to each day its fulness of strength and pleasure, or whether we shall be miserable invalids, ever moving toward the grave and cut off in the morn, noon, or eve of life; these depend upon our obedience to those laws which God has stamped upon our frames." Edward Jarvis, "Law of Physical Life", *Christian Examiner*, XXXV (September, 1843): 4; quoted in Grob, *op. cit.*, p. 160.

55. A. Jacobi, "On Masturbation and Hysteria in Young Children", *The American Journal of Obstetrics and Diseases of Women and Children*, VIII (February, 1876): 595-606; IX (June, 1876): 218-238.

56. *Ibid.*, VIII (February, 1876): 606.

57. Allen Hagenbach, "Masturbation as a Cause of Insanity", *Journal of Nervous and Mental Disease*, VI (October, 1879): 603. Dr. Hagenbach puts the total number of admissions between 1860 and 1879 at 800 males and 700 females, of which 49 males were committed for masturbation. Should the admissions to the Cook County Asylum be typical of the national asylum population, both for gender and disease, Hagenbach's figures suggest that of the 41,000 patients enumerated in mental hospitals and asylums

- in 1880, about 22,000 were males and approximately 1350 of these were committed for masturbation. The figures for the asylum population of the United States in 1880 are taken from Samuel W. Hamilton, "The History of American Mental Hospitals", in *One Hundred Years of American Psychiatry* (Published for the American Psychiatric Associations, (New York: Columbia University Press, 1944), p. 86.
58. Hagenbach, *op. cit.*, pp. 607–608.
 59. *Ibid.*, p. 606.
 60. It became increasingly common in the late 19th century to link masturbation with deviant sexual behavior, especially homosexuality. This had led Bullough and Voght to the rather sweeping and only partly warranted conclusion that "during most of the nineteenth century homosexuality was often classified under the term *onanism* or *masturbation*". (Vern L. Bullough and Martha Voght, *op. cit.*, p. 145.)
 61. E. R. Palmer, "A Contribution to the Physiology of Sexual Impotence", *New York Medical Journal*, LVI (July 2, 1892): 5–6.
 62. Theophilus Parvin, "Nymphomania and Masturbation", *Medical Age*, IV (February 10, 1886): 49.
 American physicians, including Dr. Parvin, were heavily influenced by the work of Dr. William Acton, a respected British venereologist and author of one of the most influential texts on the proper functioning and disorders of the reproductive organs. First published in 1857, the book went through eight American editions by 1895. With respect to female sexuality Acton noted that "the majority of women (happily for society) are not very much troubled with sexual feeling of any kind". Scientific observation leads one to conclude, he continues, that "there are many females who never feel any sexual excitement whatever. Others, again, immediately after each period, do become, to a limited degree, capable of experiencing it; but this capacity is often temporary, and may entirely cease till the next menstrual period. Many of the best mothers, wives, and managers of households, know little of or are careless about sexual indulgences. Love of home, of children, and of domestic duties, are the only passions they feel. As a general rule, a modest woman seldom desires any sexual gratification for herself. She submits to her husband's embraces, but principally to gratify him; and, were it not for the desire of maternity, would far rather be relieved from his attentions." William Acton, *The Functions and Disorders of the Reproductive Organs*, (7th edition Philadelphia: P. Blakiston, 1888), pp. 208–210. Acton's conclusions on this and a variety of other sexual subjects are extensively discussed in Steven Marcus, *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth Century England* (New York: Basic Books, 1966), and Alex Comfort, *op. cit.*, pp. 38–60.
 63. E. C. Spitzka, "Cases of Masturbation (Masturbatic Insanity)", *Journal of Mental Science*, XXXIII (April, 1887): 61.
 64. "Neurasthenia, or Nervous Exhaustion", *Boston Medical and Surgical Journal*, LXXX (April 29, 1869): 217–221.
 65. "American Nervousness: Its Philosophy and Treatment", *Virginia Medical Monthly*, VI (July, 1879): 253–276.
 66. *A Practical Treatise on Nervous Exhaustion (Neurasthenia)* (New York: William Wood, 1880). I have consulted a later edition, edited, and with notes and additions by A. D. Rockwell (New York: E. B. Treat, 1892).
 67. *Ibid.*, p. 23.
 68. *Ibid.*, pp. 34–107.
 69. "American Nervousness: Its Philosophy and Treatment", *op. cit.*, p. 256.
 70. *Sexual Neurasthenia (Nervous Exhaustion)*, ed. A. D. Rockwell (New York: E. B. Treat, 1891), p. 93. One of Beard's followers went so far as to link neurasthenia caused by masturbation with the general paresis of tertiary syphilis. "The irritation of masturbation or excessive coition", he writes, "re-acting upon the brain for many years, has eventually, in the very prime of life and apparent physical development, produced something more than a mere functional disease. The patient wanders, and lingers, perhaps for years, on the border of mental rapture and moral responsibility, during which time his actions and speech become what is termed by his friends peculiar, this peculiarity increasing with time, marked by great extravagance of word and action. He eventually passes that imaginary line, and through a portal which has for its motto that which is said to have greeted the eyes of Dante, as he passed the entrance to the infernal region, 'Abandon hope, all ye who enter here', for I know no well authenticated case of cure of general paralysis of the insane." F. B. Bishop, "Sexual Neurasthenia as it Stands in Relation to the Border-Land of Insanity, and Insanity in General", *Virginia Medical Monthly*, XVIII (December, 1891): 754.
 71. Beard, *Sexual Neurasthenia*, *op. cit.*, p. 98.
 72. *Ibid.*, pp. 106–107.
 73. "Within a decade of Beard's death in 1883", an historian of medicine observed, "the diagnosis of nervous exhaustion had become part of the office furniture of most physicians. Few textbooks and systems of medicine failed to discuss it, and in 1893 neurasthenia received its ultimate legitimization — the publication of a German *Handbuch der Neurasthenie*." Charles E. Rosenberg, "The Place of George M. Beard in Nineteenth-Century Psychiatry", *Bulletin of the History of Medicine*, XXXVI (1962): 258.
 74. "Cases of Masturbation (Masturbatic Insanity)", *Journal of Mental Science*, XXXIII (April, 1887): 57–73; XXXIII (July, 1887): 238–254; XXXIII (October, 1887): 395–401; XXXIV (April, 1888): 52–61; XXXIV (July, 1888): 216–225.
 75. *Ibid.*, XXXIII (April, 1887): foldout between 62 and 63.
 76. Quoted in James G. Kiernan, "Psychological Aspects of the Sexual Appetite", *Alienist and Neurologist*, XII (April, 1891): 199.
 77. Letter to the editor, *Detroit Lancet*, VIII (September, 1884): 121. Kiernan explains: "It should be remembered that repeated stimulation tends to exhaust the power of nerves to respond to the normal stimulation; for this reason the sated voluptuary seeks to arouse his flagging sexual system by unwonted stimuli." (*Ibid.*) The author offers a lengthier analysis of this view in two subsequent essays. See his "Psychological Aspects of the Sexual Appetite", *op. cit.*, pp. 188–219; and, "Psychical Treatment of Congenital Sexual Inversion", *Review of Insanity and Nervous Disease*, IV (June, 1894): 293–295.
 78. *Medical Record*, XXVI (July 19, 1884): 71.
 79. G. Frank Lydston, "Sexual Perversion, Satyriasis and

- Nymphomania", *Medical and Surgical Reporter*, LXI (September 7, 1889): 254.
80. *Ibid.*, LXI (September 7, 1889): 253-258; LXI (September 14, 1889): 281-285.
81. Editorial, *Medical Standard*, XI (March, 1892): 79-80.
82. Elliott T. Brady, "Perversion of Sexual Instinct — Sadism in Southern Negroes — Its Remedy, Castration", *Virginia Medical Monthly*, XX (June, 1893): 277-282.
83. Hamilton D. Wey, "Morbidity Sensuality in a Reformatory", *Chicago Medical Recorder*, X (February, 1896): 143-145.
84. William Lee Howard, "Masturbation in the Young Girl the Cause of Acquired Sexual Perversion", *Buffalo Medical Journal*, LXI (December, 1905): 291-292.
85. G. Stanley Hall, *Adolescence: Its Psychology*, (2 vols.; New York: Appleton, 1907), I: 441-442.
86. *Ibid.*, I: 444.
87. *Ibid.*, I: 435-436.
88. Comfort, *op. cit.*, pp. 95-110.
89. René Spitz, *op. cit.*, p. 122.
90. *Ibid.*, and Comfort, *op. cit.*, p. 101.
91. Comfort reports that "part of the gravamen of the charge [against Baker Brown] appeared to stem from the suspicion of advertising and blackmail rather than the unwarrantable character of the operation, as well as from his practice of operating on patients, including old ladies of seventy, without prior permission." *Ibid.*
92. C. B. Miller, "Masturbation", *American Practitioner*, XV (May, 1877): 285-286.
93. Joseph W. Howe, *Excessive Venery, Masturbation, and Continence* (New York: Bermingham, 1883), pp. 110-111.
94. A. J. Bloch, "Sexual Perversion in the Female", *New Orleans Medical and Surgical Journal*, XXII (July, 1894): 1.
95. *Ibid.*, p. 4.
96. Alvin Eyer, "Clitoridectomy for the Cure of Certain Cases of Masturbation in Young Girls", *International Medical Magazine*, III (November, 1894): 261.
97. Eric John Dingwall, *The Girdle of Chastity: A Medico-Historical Study* (London: Routledge, 1931), pp. 126-127.
98. *Ibid.*, p. 127.
99. C. D. W. Colby, "Mechanical Restraint of Masturbation in a Young Girl", *Medical Record*, LII (August 7, 1897): 206.
100. Theophilus Parvin, "Nymphomania and Masturbation", *op. cit.*, p. 51.
101. D. Yellowlees, "Masturbation", *Journal of Mental Science*, XXII (July, 1876), 336-337.
102. *Ibid.*, p. 337.
103. James Hyde, "Precocious and Other Phenomena of Sexual Orgasm", *Chicago Medical Journal and Examiner*, XXXVI (June, 1878): 582. Professor Jacobi of the College of Physicians and Surgeons and a contemporary of Dr. Hyde's, held that infibulation could well "be replaced by an artificial sore of the surface of the penis" with equal success. A. Jacobi, *op. cit.*, VIII (February, 1876): 606.
104. Hyde, *op. cit.*, p. 585.
105. Sylvanus Stall, *What a Young Boy Ought to Know* (Philadelphia: Vir Publishing Company, 1887), p. 117. "The kind of restraint which is necessary", cautions Professor L. Emmett Holt in the standard text on diseases of childhood, "will depend upon the manner of masturbating. If by the hands, these must be tied during sleep, so that the child can not reach the genitals; if by thigh-friction, the thighs must be separated by tying one to either side of the crib. In inveterate cases, a double side-splint, such as is used in fracture of the femur, may be applied . . . Corporal punishment is often useful in very young children." *The Diseases of Infancy and Childhood* (New York: Appleton, 1897), p. 698. Much the same advice is contained in the 1933 edition of the same work. L. Emmett Holt, Jr., and Rustin McIntosh, *Holt's Disease of Infancy and Childhood*, 10th ed. (New York: Appleton-Century, 1933), p. 780.
106. Everett Flood, "An Appliance to Prevent Masturbation", *Boston Medical and Surgical Journal*, CXIX (July 12, 1888): 34.
107. Charles L. Dana, "On Certain Sexual Neuroses", *Medical and Surgical Reporter*, LXV (August 15, 1891): 244. The medical profession does not appear to have been above intellectual theft, for the same article appears in plagiarized form in the *Massachusetts Medical Journal*, XXIV (September, 1904): 385-393, as an "original communication", under the title "Sexual Psychoses", by one Joseph P. Bolton, M.D., of Hartford, Connecticut. Several other instances of plagiarism were found in the *Massachusetts Medical Journal* during this period; the journal seems to have subsisted in the first decades of this century on material stolen from other medical periodicals. Its circulation was approximately 8500 in 1905, quite respectable for a medical monthly.
108. Dana, *op. cit.*, p. 244.
109. *Ibid.*, p. 245.
110. Joseph W. Howe, *op. cit.*, p. 254.
111. *Ibid.*, p. 264. Equally effective were steel rings armed with sharp teeth on the inner surface, or leather rings furnished with teeth or pins. When placed on the penis at bedtime they served to awaken the sleeper should erection occur.
112. See, for example, Edgar J. Spratling, "Masturbation in the Adult", *Medical Record*, XLVIII (September 28, 1895): 442-443. Spratling contends that, although sectioning the dorsal nerves is a rational procedure in the treatment of masturbation, it is somewhat too radical for constant routine practice.
- The same operation was also employed as a therapeutic technique for homosexuality. See "The Gentlemen Degenerate: A Homosexualist's Self Description and Self-Applied Title", *Alienist and Neurologist*, XXV (February, 1904): 68.
113. The favored method of cauterizing the genitalia apparently involved catheterization of the urethra with silver nitrate, the effect of which would be to burn it and thus make it insensible. It is highly recommended by certain physicians who observed that even chronic masturbators halted the habit once treatments began. See L. L. Hale, and others, letters to the editor under the title "Involuntary Seminal Emissions", *Medical World*, IV (August, 1886): 274-276; and, Charles Dana, "On Certain Sexual Neuroses", *op. cit.*, pp. 244-245. Bernard Sachs, onetime President of the American Neurological Association and Professor of Mental and Nervous Diseases at the New York Polyclinic, writes that "actual cautery to the spine and even to the genitals are the only possible means of effecting a cure" for masturbation. *A Treatise on the Nervous Diseases of*

- Children* (New York: William Wood, 1905), p. 540.
114. The technique was used successfully in a case dating back to 1869. Some two decades later the method had been perfected and involved sectioning the ducts midway between the external inguinal ring and the testes. See Robert J. Preston, "Sexual Vices — Their Relation to Insanity — Causative or Consequent", *Virginia Medical Monthly*, XIX (June, 1892): 201.
 115. *Topeka Capital*, Sunday, August 26, 1894. See, also, the *Winfield* (Kansas) *Courier*, Friday, August 24, 1894.
 116. Editorial, *Kansas Medical Journal*, VI (September 1, 1894): 455–456.
 117. *Topeka Lance*, Saturday, September 1, 1894.
 118. Editorial, *Kansas Medical Journal*, VI (September 8, 1894): 471.
 119. Editorial, *American Journal of Insanity*, LI (April, 1895): 581. In July, 1921, the *American Journal of Insanity* was renamed the *American Journal of Psychiatry*.
 120. Quoted in the *Texas Medical Journal*, X (November, 1894): 239.
 121. A. E. Osborne, "Castrating to Cure Masturbation", *Pacific Medical Journal*, XXXVIII (March, 1895): 151.
 122. "Emasculation of Masturbators — Is It Justifiable?" *Texas Medical Journal*, X (November, 1894): 239.
 123. This, despite the *Kansas Medical Journal's* insistence that "these operations are old as the profession, are the remedy, and only remedy, for extreme and reprobate cases [of onanism], recognized as legitimate in the profession, and constantly practiced by men eminent in standing and learning". Editorial, VI (September 8, 1894): 471.
 124. Robert Preston, "Sexual Vices — Their Relation to Insanity — Causative or Consequent", *op. cit.*, p. 200. With such horror was masturbation looked upon by the psychiatric profession and so successful had physicians been in communicating the monstrosity of these acts to an ignorant laity that it is not surprising that some people surrendered themselves to mutilation rather than persist in the habit.
A tragic case of "self-treatment" by a guilt-ridden 15 year old boy is reported in 1886. The barbarity of the medical profession when it came to sexual matters is typified by the fact that the following account was carried more for the amusement of readers of the *Medical Record* than for any other purpose.
"The patient, being discouraged by his fruitless endeavors to free himself from the worst of all habits, deliberately selected the privy as the theatre of his operations, and, holding the offending organ by the prepuce with one hand, took aim with a small pistol, and shot it, with the other. The ball (22 calibre) entered the dorsal surface; running beneath the skin it entered the glans behind the corona, emerged on its dorsal surface, and again penetrated the prepuce before making its final exit." J. C. Pennington, "A Radical Treatment for Masturbation", *Medical Record*, XXIX (May 29, 1886): 640.
 125. A. E. Osborne, *op. cit.*, p. 152.
 126. F. E. Daniel, "Castration of Sexual Perverts", *Texas Medical Journal*, IX (December, 1893): 255–268. In April, 1894, a two-page précis of the article was carried in the *Medical Record*. Daniel's sentiments were of such long-standing interest to the profession that the *Texas Medical Journal* reprinted the article 20 years later. XXVII (April, 1912): 369–385.
 127. *Ibid.* (December, 1893), p. 267.
 128. See Norman Dain, *Concepts of Insanity in the United States, 1789–1865* (New Brunswick, N.J.: Rutgers University Press, 1964), pp. 205–206, and, David J. Rothman, *The Discovery of the Asylum* (Boston: Little-Brown, 1971), pp. 265–269.
Pessimism regarding the curability of mental disorders, particularly those occasioned by or manifested in sexual aberrations, was early given impetus by several investigations into the conditions of the insane in American asylums. For example, Edward Jarvis noted, in 1855, that, although the curability rate at the Worcester Hospital was as high as 72 per cent for those patients whose insanity sprang from "religious excitement and emotions" or ill health, it dropped to 11 per cent of those whose mental disorders were caused by "the lowest sensuality". Edward Jarvis, *Report on Insanity and Idiocy in Massachusetts by the Commission on Lunacy* (Boston: William White, 1855; reprint ed., with an introduction by Gerald N. Grob, Cambridge, Mass.: Harvard University Press, 1971), p. 75.
 129. In fairness to Dr. Daniel's position it should be remarked that he does not totally dismiss the therapeutic aspects of castration. With respect to masturbation he writes:
"Reasoning *a priori*, if a perverted sexual sense be the cause of mental disturbance and unsoundness — and there can be no doubt that habitual masturbation frequently is, both cause and effect — the removal of the glands should restore the equilibrium, on the fundamental principles on which we practice medicine; if it be an expression of diseased mind [*sic*], the operation may exert a beneficial influence on the mind; as we know that asexualization often completely changes the character of the individual, and that too, without detriment to the mere physical man. Reasoning by analogy, if the removal of the ovaries will cure hysteria or hystero-epilepsy, as is extensively claimed for properly selected cases, surely we should be warranted in hoping that castration will, by obliterating the sense, relieve some, if not all of the disturbances of the mind. It would be an advisable hygienic measure in habitual masturbation, whether the practice be cause or effect, by arresting the wasting of vital force by seminal losses, and consequent impairment of physical health." *Op. cit.*, p. 265.
 130. *Ibid.*, p. 267.
 131. William A. Hammond, "Castration as a Substitute for Capital Punishment", *Medical News*, LX (April 2, 1892): 390–391.
 132. Hunter McGuire and G. Frank Lydston, "Sexual Crimes Among the Southern Negroes — Scientifically Considered — An Open Correspondence", *Virginia Medical Monthly*, XX (May, 1893): 122.
 133. F. L. Sim, "Asexualization for the Prevention of Crime and the Curtailment of the Propagation of Criminals", *Journal of the American Medical Association*, XXII (May 19, 1894): 753; Robert Boal, "Emasculation and Ovariectomy as a Penalty for Crime and the Reformation of Criminals", *Journal of the American Medical Association*, XXIII (September 15, 1894): 429–432; B. A. Arbogast, "Castration the Remedy for Crime", *Denver Medical Times*, XV (August, 1895): 55–58; and; J. W.

- Frazier, "Castration for Crime as Preventive and Curative Treatment", *Texas Medical Journal*, XI (March, 1896): 498-503. Dr. James Weir of Owensboro, Kentucky, published an article in 1895 taking the somewhat unusual position of supporting the lynching of rapists as an effective deterrent against sexual crimes. "The Sexual Criminal", *Medical Record*, XLVII (May 11, 1895): 581-585.
134. See Deutsch, *op. cit.*, pp. 353-385.
 135. J. Ewing Mears, "Asexualization as a Remedial Measure in the Relief of Certain Forms of Mental, Moral and Physical Degeneration", *Boston Medical and Surgical Journal*, CLXI (October 21, 1909): 585-586.

Professor Lydston went even further. He writes that "consumptives, epileptics, insane, incurable inebriates, and criminals at least should not be allowed to marry unless they consent to sterilization. This would prevent the crime of permitting a degenerate child to be born.

"The State would stand in a parental relation to the children of the poor and orphans. It should see that all children are physically and morally trained. Australia has proved the practicality of this system.

"I would make every school a military school and gymnasium in modified form. Manual training of children should replace some of our modern educational fads and fancies. The brain is developed and trained through muscle building and manual training as well as through special senses.

"All criminals and insane, epileptics, prostitutes, and confirmed inebriates should be regarded as culls until they have established their right to be considered 'cured' and worthy of replacement as social integers. If incurable, they are social excreta, and should be placed beyond the possibility of contaminating the body social." G. Frank Lydston, "Sex Mutilations in Social Therapeutics", *New York Medical Journal*, XCV (April 6, 1912): 684.
 136. William Malamud and G. Palmer, "The Role Played by Masturbation in the Causation of Mental Disturbance", *Journal of Nervous and Mental Disease*, LXXVI (September, 1932): 220-233; LXXVI (October, 1932): 366-379.
 137. *Ibid.*, p. 377.
 138. Ronald Walters, "Introduction", *Primers for Prudery: Sexual Advice to Victorian America*, Ronald Walters, ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1974), p. 15.
 139. G. Frank Lydston, "A Contribution to the Hereditary and Pathological Aspects of Vice", *Chicago Medical Journal and Examiner*, XLVI (February, 1883): 147.
 140. *Ibid.*
 141. See David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Conn.: Greenwood, 1973), *passim*; John C. Burnham, "Psychiatry, Psychology and the Progressive Movement", *American Quarterly*, XII (1960): 457-465; *idem*, "The Medical Inspection of Prostitutes in America in the Nineteenth Century: The St. Louis Experiment and its Sequel", *Bulletin of the History of Medicine*, XLV (1971): 203-218; *idem*, "Medical Specialists and Movements Towards Social Control in the Progressive Era: Three Examples", in Jerry Israel, ed., *Building the Organizational Society* (New York: Free Press, 1971), pp. 19-30.
 142. Pivar, *op. cit.*, p. 80.
 143. *Ibid.*, p. 150.
 144. *Ibid.*, p. 92.
 145. Paul S. Boyer touches on the role the medical profession and the social hygiene movement played in the anti-pornography campaign at the end of the 19th century. See his *Purity in Print: The Vice-Society Movement and Censorship in America* (New York: Scribner, 1968), pp. 23-30.
 146. Pivar, *op. cit.*, pp. 187, 283-284.
 147. *Ibid.*, p. 189.
 148. Prince A. Morrow, "A Plea for the Organization of a 'Society of Sanitary and Moral Prophylaxis'", (Read before the Medical Society of the County of New York, May 23, 1904), *Transactions of the American Society of Sanitary and Moral Prophylaxis*, I (1906): 17
 149. *Ibid.*
 150. Prince A. Morrow, "Results of the Work Accomplished by the Society of Sanitary and Moral Prophylaxis", *Transactions of the American Society of Sanitary and Moral Prophylaxis*, II (1908): 117.
 151. Reference to these reforms are scattered throughout the *Transactions*. On changes in legislation, see especially Mrs. William H. Baldwin, Jr., "The Social Evil in New York City, with Reference to Law Enforcement", *Transactions of the American Society of Sanitary and Moral Prophylaxis*, III (1910): 186-211.
 152. Prince A. Morrow, "Results Achieved by the Movement for Sanitary and Moral Prophylaxis — Outlook for the Future", *Transactions of the American Society of Sanitary and Moral Prophylaxis*, III (1910): 94.
 153. Charles Walter Clarke, *Taboo: The Story of the Pioneers of Social Hygiene* (Washington, D.C.: Public Affairs Press, 1961), p. 58.
 154. *Ibid.*, p. 61.
 155. *Ibid.*, p. 62; Pivar, *op. cit.*, pp. 243-244; and, "The American Social Hygiene Association", *Vigilance*, XXVI (December, 1913): 1.
 156. Clarke, *op. cit.*, p. 75.
 157. *Ibid.*, p. 76.
 158. *Ibid.*, p. 75.
 159. Charles W. Eliot, "The American Social Hygiene Association", *Social Hygiene*, I (December, 1914): 3-4.
 160. Friedman, *op. cit.*, pp. 508-512.
 161. "Social Hygiene Legislation in 1915", *Social Hygiene*, II (April, 1916): 245-256.

The following are among the bills introduced in the California legislature during its 1915 session: (1) A. B. 287, increasing the penalty for rape to from 20 to 50 years; (2) A. B. 288, raising the age of consent to 20 years; (3) A. B. 78, making single acts of adultery or fornication misdemeanors; (4) A. B. 1, prohibiting intercourse between Caucasians and Japanese and Chinese; (5) A. B. 496, prohibiting advertisements purporting to cure venereal diseases; (6) S. B. 1018, providing for mandatory asexualization of sex perverts; (7) A. B. 274, increasing the penalty for seduction to from 5 to 10 years; (8) S. B. 76, making illegal the use of a tenement house for purposes of prostitution [enacted as Ch. 572]; (9) A. B. 1262, allowing the courts to commit sex perverts to a state hospital for treatment [enacted as Ch. 510]; (10) A. B. 219, making "sexual perversion" a felony [enacted as

- Ch. 586]; (11) S. B. 983, prohibiting employment agencies from sending women to places of known immorality [enacted as Ch. 551].
- The Wisconsin legislature was no less zealous in caring for the sexual morals of its citizens. A dozen bills were brought forward in 1915, of which four were passed and signed into law: (1) A. B. 410, holding it a felony if a man commits fornication which results in a pregnancy with a single female and subsequently leaves the state; (2) A. B. 436 and S. B. 286, prohibiting single acts of fornication; (3) S. B. 29, prohibiting taxi drivers and others from transporting a person to a place of prostitution; (4) S. B. 156, making illegal soliciting in restaurants and saloons; (5) S. B. 147 and H. B. 543, prohibiting sexual relations between persons afflicted with venereal diseases; (6) A. B. 562, prohibiting the marriage of epileptics; (7) A. B. 599, prohibiting women from being in dance halls where liquor is sold; (8) S. B. 30, prohibiting indecent exhibitions; (9) S. B. 26, prohibiting hotel clerks, livery men, bell boys, etc., from sending or taking a person to a prostitute [enacted as Ch. 161]; (10) S. B. 150, raising the age of consent to 18 years, and if the female were previously chaste, 21 years [enacted as Ch. 611]; (11) S. B. 154, prohibiting employment agencies from sending females to places of known immorality [enacted as Ch. 115]; (12) A. B. 476, making illegal "improper" liberties with a child [enacted as Ch. 199].
162. See Appendix I.
 163. Between 1907 and 1937, thirty-three states had enacted sterilization laws of one sort or another. They are, in order of passage: Indiana (1907); California, Connecticut, Washington (1909); Iowa, Nevada, New Jersey (1911); New York (1912); Kansas, Michigan, North Dakota, Wisconsin (1913); Nebraska (1915); New Hampshire, Oregon, South Dakota (1917); Alabama, North Carolina (1919); Colorado (1920); Delaware, Montana (1923); Virginia (1924); Idaho, Maine, Minnesota, Utah (1925); Mississippi (1928); Arizona, West Virginia (1929); Oklahoma, Vermont (1931); South Carolina (1935); and, Georgia (1937).
For a discussion of these laws, see Harry L. Laughlin, "Eugenical Sterilization in the United States", *Social Hygiene*, VI (October, 1920): 499-532; and, Norman St. John-Stevan, *op. cit.*, pp. 160-197, 291-309.
 164. Most states drafted their sterilization statutes in such a way that sex perverts could fall under the provisions of the act although they were not specifically included as subject to sterilization. Several states, however, explicitly included sexual perverts as subject to asexualization. These were: California, Idaho, Iowa, Kansas, Nebraska, North Dakota, Oregon, South Dakota, and Utah. (Laughlin, "Eugenical Sterilization in the United States", *op. cit.*, and Norman St. John-Stevan, *op. cit.*, pp. 296-309.)
Dr. Harry Laughlin, writing in *Social Hygiene*, the journal of the American Social Hygiene Association, concluded that the sterilization statutes were not nearly as comprehensive as medical science could have wished. In the Model Sterilization Statute which he proposes, the following people would be subject to sterilization:
"All persons in the state who, because of degenerate or defective hereditary qualities, are potential parents of socially inadequate offspring, regardless of whether such persons be in the population at large or inmates of custodial institutions, regardless also of the personality, age, sex, marital condition, race, possessions of such persons." A "socially inadequate" person, for purposes of the act, is defined as "one who by his or her own effort, chronically, and regardless of etiology or prognosis, fails in comparison with normal persons, to maintain himself or herself as a useful member of the organized social life of the state." (*Op. cit.*, pp. 519-520.)
 165. See Appendix II.
 166. Howard B. Woolston, *Prostitution in the United States* (New York: Century, 1921; reprint ed., Montclair, N.J.: Patterson Smith, 1969), p. 25.
 167. *Ibid.*, p. 31.
 168. See Vern L. Bullough, *The History of Prostitution* (New Hyde Park, N.Y.: University Books, 1964), pp. 187-195; and, Fernando Henriques, *Prostitution in Europe and the New World* (London: MacGibbon & Kee, 1963), pp. 268-320.
 169. St. Louis had instituted a system of regulation in 1870, but the law was repealed 4 years later after intense pressure was brought to bear on the Missouri legislature by a coalition of purity groups and physicians. Similar measures were defeated in New York in 1871 and 1875; in Chicago, in 1871; in California, in 1871; in Cincinnati, in 1874; in Pennsylvania, in 1874; and in the District of Columbia, in 1876. For a discussion of these attempts at regulation, see Sheldon Amos, *A Comparative Survey of Laws in Force for the Prohibition, Regulation, and Licensing of Vice in England and Other Countries* (London: Stevens, 1877), pp. 417-422; William Burgess, *The World's Social Evil* (Chicago: Saul Bros., 1914), pp. 39-47; *idem*, "Brief History of Regulation of Vice", *Vigilance*, XXV (August, 1912): 2-9; and, Woolston, *op. cit.*, pp. 26-31.
 170. Woolston, *op. cit.*, p. 38.
 171. George E. Worthington, "Developments in Social Hygiene Legislation From 1917 to September 1, 1920", *Social Hygiene*, VI (October, 1920): 557. For a discussion of the contributions of the social hygiene movement to wartime legislation against vice, see, William F. Snow, "Social Hygiene and the War", *Social Hygiene*, III (July, 1917): 417-450; and, Franklin Martin, "Social Hygiene and the War", *Social Hygiene*, III (October, 1917): 605-627.
The anti-vice campaign even extended to American troops overseas. The official position was contained in a bulletin issued to members of the American Expeditionary Forces by General Pershing, in which he declared that "sexual continence is the plain duty of members of the A.E.F., both for the vigorous conduct of the war, and for the clean health of the American people after the war". Toward this end, U.S. military authorities attempted to close all the brothels in areas of France where American troops were stationed and, when this proved unsuccessful, declared them off limits. Fred D. Baldwin, "The Invisible Armor", *American Quarterly*, XVI (1964): 432-444.
 172. Over 30 cities had established commissions to investigate commercialized vice between 1910 and 1915. These included the following (shown with the year in which the investigation was undertaken):

- Atlanta (1912)
 - Baltimore (1913)
 - Chicago (1910)
 - Cleveland (1911)
 - Denver (1913)
 - Grand Rapids (1912)
 - Hartford, Conn. (1912)
 - Honolulu (1913)
 - Kansas City, Mo. (1911)
 - Lexington, Ky. (1915)
 - Little Rock (1912)
 - Louisville (1915)
 - Minneapolis (1911)
 - Newark (1914)
 - New York (1912)
 - Philadelphia (1912)
 - Pittsburgh (1912)
 - Portland, Me. (1915)
 - Portland, Ore. (1912)
 - Richmond (1914)
 - St. Louis (1914)
 - San Francisco (1911)
 - Shreveport, La. (1913)
 - Syracuse (1912)
- (Joseph Mayer, *Regulation of Commercialized Vice* [New York: Klebold Press, 1922] p. 11; and, Burgess, *World's Social Evil*, *op. cit.*, pp. 260–262.)
173. The Mann Act was enforced with a vengeance. Between June, 1910, and January, 1915, more than one thousand "white slavers" were convicted under the law. Roy Lubove, "The Progressives and the Prostitute", *The Historian*, XXIV (1961): 313.
 174. See Appendix III.
 175. Wharton, *op. cit.* (12th edition), II: 2007–2008 (section 1722).
 176. Friedman, *op. cit.*, p. 503. Friedman notes: "As of 1900, most states still *technically* recognized the possibility of a common-law crime. But some states had statutes that specifically abolished the concept. These statutes stated bluntly that all crimes were listed in the penal code, and nothing else was a crime. In some states, the courts *construed* their penal codes as (silently) abolishing common-law crime. Where the concept survived, it was hardly ever used; the penal codes were in fact complete and exclusive".
 177. Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, Wisconsin.
 178. Arkansas (1897), Delaware (1895), District of Columbia (1912), Indiana (1905), Iowa (1907), Kansas (1913), Louisiana (1912), Maryland (1892), Mississippi (1904), Missouri (1899), Montana (1895), Nebraska (1893), New Hampshire (1895), New Mexico (1901), North Carolina (1907), Oklahoma (1903), Rhode Island (1896), South Dakota (1903), Tennessee (1896), Utah (1898), Vermont (1890), West Virginia (1893), Wyoming (1890). Kentucky and South Carolina had not prohibited keeping a house of ill-fame by 1920.
 179. For a fuller analysis of the Red Light Injunction and Abatement Law and its effects in reducing prostitution in Iowa see, Herbert E. Gernert, "Legislation on the Social Evil: The Red Light Injunction Laws of Iowa and Nebraska", *Vigilance*, XXV (August, 1912): 14–29.
 180. See Appendix III.
 181. J. George, Jr., "Prostitution", in, Ralph Slovenko, ed., *Sexual Behavior and the Law* (Springfield, Ill.: Charles C. Thomas, 1965), p. 650. Professor George notes that "so long as the citizen was unable to coerce public officials into enforcement of the laws against prostitution and unable to move against public nuisances in his own right, open prostitution could flourish if the police or public officials so desired; the ballot box was an indirect and usually ineffective way of controlling their activity. It was to meet such a situation that the Red Light Abatement Laws were passed, and it is through their invocation and application that citizens' groups have been able to suppress open and notorious prostitution in almost all cities in the United States."
 182. See, among others, Samuel G. Kling, *Sexual Behavior and the Law* (New York: Bernard Geis Associates, 1965), p. 117; and, Robert G. Fisher, "The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private Consenting Adult Homosexual Behaviour Be Excluded?" *Maryland Law Review*, XXX (1970): 92.
 183. See Appendix III.
 184. A complete draft of the law together with a brief discussion of its provisions is contained in, Worthington, *op. cit.*, pp. 561–564.
 185. Morris Ploscowe, "Sex Offenses: The American Legal Context", *op. cit.*, p. 217.
 186. Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Male* (Philadelphia: Saunders, 1948), p. 392.
 187. John C. Burnham, "Psychiatry, Psychology, and the Progressive Movement", *op. cit.*, p. 462.
 188. William F. Snow, *op. cit.*, pp. 428, 439–440.
 189. J. H. McCassey, "Disobedience as a Cause of Insanity", *Cincinnati Lancet-Clinic*, LXXVI (July 11, 1896): 35.
 190. The bureaucratization of American life during the Progressive period is extensively discussed by Robert H. Wiebe, *The Search for Order: 1877–1920* (New York: Hill & Wang, 1967).
 191. By 1950, the identification of asylum and penitentiary had been completed. A concurrent process had been under way for some years aimed at substituting therapeutic sanctions for the sanctions of the law. This movement culminated in the passage of the sexual psychopath laws in a number of states and marked psychiatry's major inroad into legal doctrine in the area of sexual behavior. The sexual psychopath laws provided for a civil commitment procedure by which two psychiatric experts could commit a "sexual psychopath" — usually defined as one lacking the power to control his sexual impulses — to an asylum for an indefinite period. Criminal conviction of a sexual offense was not, in most states a prerequisite for commitment. These laws are discussed at length in Alan H. Swanson, "Sexual Psychopath Statutes: Summary and Analysis", *Journal of Criminal Law, Criminology and Police Science*, LI (1960): 215–235. See, also, St. John-Stevas, *op. cit.*, pp. 228–230.

APPENDIX I

Age of consent*

State	1886	1895	1917
Alabama	10	10	14
Arizona (a)	10	18	18
Arkansas	"puberty"	16	16
California	10	14	18
Colorado	10	18	18
Delaware	10	7 †	16
District of Columbia	10	16	16
Florida	10	10	18 (chaste) 10 (unchaste)
Georgia	10	10	10
Idaho (b)	12	14	18
Illinois	10	14	16
Iowa	10	13	15
Kansas	10	18	18
Kentucky	12	12	16
Louisiana	12	12	18
Maine	10	14	16
Maryland	10	14	16
Massachusetts	10	16	16
Michigan	10	14	16
Minnesota	10	16	18
Mississippi	10	10	18 (chaste) 12 (unchaste)
Missouri	12	14	18 (chaste) 14 (unchaste)
Montana (c)	10	16	18 (chaste) 15 (unchaste)
Nebraska	12	15	18 (chaste) 15 (unchaste)
Nevada	12	12	16
New Hampshire	10	13	16
New Jersey	10	16	16
New Mexico (d)	10	14	16
New York	10	18	18
North Carolina	10	10	14 (chaste) 10 (unchaste)
North Dakota (e)	10	16	18
Ohio	10	14	16
Oklahoma (f)	10	14	18 (chaste) 16 (unchaste)
Oregon	10	16	16
Pennsylvania	10	16	16 ‡
Rhode Island	10	16	16
South Carolina	10	10	14
South Dakota (e)	10	16	18
Tennessee	10	12	21 (chaste) 12 (unchaste)
Texas	10	15	15
Utah (g)	10	13	18
Vermont	11	14	16
Virginia	10	12	14
Washington§ (h)	12	16	18 (chaste) 15 (unchaste)
West Virginia	12	14	14
Wisconsin	10	14	21 (chaste) 18 (unchaste)
Wyoming (i)	10	18	18

- (a) Arizona Territory until 1912.
 (b) Idaho Territory until 1890.
 (c) Montana Territory until 1889.

- (d) New Mexico Territory until 1912.
 (e) Dakota Territory until 1889.
 (f) Oklahoma Territory until 1907.

- (g) Utah Territory until 1896.
 (h) Washington Territory until 1889.
 (i) Wyoming Territory until 1890.

Sources: Benjamin DeCosta, "Age of Consent Law — 1886", *Philanthropist*, February, 1886, p. 5; Helen Gardner, "Sound Morality", *Arena*, XIV (October, 1895): 410; Herbert E. Gernert, "Legislation on the Social Evil: The 'Age of Consent' Laws", *Vigilance*, XXV (September, 1912): 8-13; Timothy Newell Pfeiffer, "The Matter and Method of Social Hygiene Legislation", *Social Hygiene*, III (January, 1917): 51-73; George E. Worthington, "Developments in Social Hygiene Legislation from 1917 to September 1, 1920", *Social Hygiene*, VI (October, 1920): 557-568. In addition, the statutes themselves have been consulted.

Notes:

* The age set by statute below which consent by a female is not a defense to a prosecution for rape.

The table shows the age of consent as of January 1, 1886; June 30, 1895; and December 31, 1917.

† The 1883 statutes of Delaware do not indicate an age of consent and the courts of that state held that the common-law age of ten prevailed. However, an amendment to the 1883 statutes several years later stipulated an age of consent of seven years. In late 1895 the state legislature changed the age to sixteen.

‡ In Pennsylvania, if a jury found that the female, even though under the age of sixteen, were of previously unchaste character and consented to sexual intercourse, the accused was to be acquitted of the charge of rape and convicted of the lesser crime of fornication.

§ During World War I, Washington established an age of consent for males, making it an offense for a woman to have sexual relations with a boy under the age of eighteen despite his consent. The primary motive for this law seems to have been "to restrain prostitutes and other lewd women from catering to young boys". (Worthington, *op. cit.*, p. 565n.)

APPENDIX II

Legislative enactments and court decisions expanding the sodomy statutes, 1879-1925

1879 Pennsylvania

The following section was added to the Pennsylvania criminal code:

"The terms sodomy and buggery, as and where used in the laws of this commonwealth, shall be understood to be a carnal copulation by human beings with each other against nature, *res veneria in ano*, or with a beast, and shall be taken to cover and include the act or acts where any person shall wilfully and wickedly have carnal knowledge, in a manner against nature, of any other person, by penetrating the mouth of such person; and any person who shall wickedly suffer or permit any person to wickedly and indecently penetrate, in a manner against nature, his or her mouth, by carnal intercourse, he, she and every such person, committing any of the acts aforesaid, or suffering the same to be committed, as aforesaid, shall be guilty of the crime of sodomy or buggery, and upon conviction thereof, shall be liable to the punishment now prescribed by law for the crime of sodomy or buggery." [11 June 1879, P.L. 148, § 1]

1881 Indiana

Indiana did not have a sodomy law before 1881. In that year the Indiana legislature enacted the following statute:

"Whoever commits the abominable and detestable crime against nature by having carnal knowledge with mankind or beast; or who, being a male, carnally knows any man or woman through the *anus*; and whoever entices, allures, instigates or aids any person under the age of twenty-one years to commit masturbation or self-pollution is guilty of sodomy and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen nor less than two years." [Rev. Stats. 1881, § 2005]

In 1913 the Indiana courts held that the statute prohibited fellatio. [Glover v. State, 179 Ind. 459, 101 S.E. 629 (1913)]

1886 New York

New York's original sodomy law prohibited "the crime against nature". In 1886 the New York legislature

decided that the language of the statute was inadequate and substituted the following:

"A person who carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or by or with the mouth; or voluntarily submits to carnal knowledge, or attempts sexual intercourse with a dead body, is guilty of sodomy." [N.Y. Laws 1866, c. 31, § 6]

1887 Massachusetts

The Massachusetts legislature added the following statute to its criminal code to supplement its sodomy law:

"Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than \$100 nor more than \$1,000 or by imprisonment in the State prison for not more than five years, or in jail or the house of correction for not more than two and a half years." [L. 1887, c. 436, § 1]

1889 Ohio

Ohio did not have a sodomy law until 1885. Four years later, the law was revised to read as follows:

"Whoever shall have carnal copulation in any opening of the body, except sexual parts, with another human being, or with a beast shall be deemed guilty of sodomy and on conviction thereof shall be imprisoned in the penitentiary not more than twenty years." [L. 1889, p. 251, § 1]

1890 Wyoming

Wyoming amended its sodomy statute to read as follows:

"Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast; or who being a male carnally knows any man or woman through the anus, or in any other manner contrary to nature, and whoever entices, allures, instigates or aids any person under the age of twenty-one years to commit masturbation or self-pollution, is guilty of sodomy, and shall be imprisoned in the penitentiary not more than five years or may be imprisoned in the county jail not more than twelve months." [L. 1890, p. 139, § 87]

1895 North Dakota

The language of the North Dakota statute was

amended to read as follows:

"Every person who carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, or attempts sexual intercourse with a dead body, is guilty of sodomy and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years, or in the county jail for not more than one year." [Rev. Code, 1895, § 7186]

1896 Louisiana

The Louisiana statute prohibiting sodomy was amended to read as follows:

"Whoever shall be convicted of the detestable and abominable crime against nature committed with mankind or beast with the sexual organs or mouth, shall suffer imprisonment at hard labor for not less than two years and not more than ten years." [Acts 1896, no. 6, § 1]

1897 Illinois

The Illinois statute prohibited "the infamous crime against nature either with man or beast". In 1897 the Illinois courts ruled that the crime may be committed by any act of bestial and unnatural copulation. [Honselman v. People, 168 Ill. 172, 48 S.E. 304 (1897)]

1898 Wisconsin

The Wisconsin legislature added the following clause to its sodomy statute:

"Said crime [sodomy, or the crime against nature] may be committed by the penetration of the mouth of any human being by the organ of any male person as well as by penetration of the rectum; proof of emission is not required." [Stats. 1898, § 4591]

1899 New Hampshire

New Hampshire has no specific statute prohibiting sodomy nor did the State ever enact one. However, in 1899 the legislature passed the following "offense against chastity":

"Whoever commits any unnatural and lascivious act with another person shall be imprisoned not less than three years and no more than five years or fined not less than \$100 nor more than \$1,000." [L. 1899, c. 33, § 1]

1902 Iowa

The Iowa legislature passed its first sodomy statute in 1892. Ten years later it revised the law to read as follows:

"Whoever shall have carnal copulation in any opening of the body except the sexual parts, with another human being, or have carnal copulation with a beast, shall be deemed guilty of sodomy." [29 G.A., c. 148, § 1 (1902)]

1903 Michigan

In 1892 the Michigan courts held that, to constitute the offense of sodomy, the sexual act must be committed in that part of the body where it is usually committed, i.e. anally. [People v. Hodgkin, 94 Mich. 27, 53 N.W. 794 (1892)]

Partly as a result of this ruling, the Michigan legislature passed the following statute in 1903:

"Any male person who, in public or private, commits or is a party to the commission of, of attempts to procure the commission by any male person or any act of gross indecency with another male person shall be guilty of a felony." [L. 1903, c. 198, § 1]

Similar statutes prohibiting gross indecency between females and between males and females were passed in 1939. [L. 1939, c. 148, p. 294]

In 1897 a bill to protect boys under fifteen years of age from homosexual advances was enacted:

"Any male person over the age of fifteen who shall debauch and deprave the morals of any boy under fifteen years of age by enticing or soliciting such boy to commit the abominable and detestable crime against nature, either with any man or beast, or who shall himself commit the abominable and detestable crime against nature, whether with or without the consent of such boy, shall be guilty of a felony." [L. 1897, c. 95, § 2]

1904 Georgia

Georgia's original statute defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman". In 1904 the State courts ruled that the statute covered fellatio. [Herring v. State, 119 Ga. 709, 46 S.E. 876 (1904)]

1909 Minnesota

The Minnesota statute prohibiting sodomy was amended in 1909 to make its language more explicit. It reads as follows:

"A person who carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or with the mouth, or voluntarily submits to such carnal knowledge; or attempts sexual intercourse with a dead body, is guilty of sodomy, and is punishable with imprisonment in the State prison for not more than twenty years." [L. 1909, c. 270, § 1] § 1]

1909 Washington

Washington did not have a sodomy statute until 1893.

In 1909 the law was amended to read as follows:

"Every person who carnally knows in any manner any animal or bird; or who carnally knows any male or female person by the anus or with the mouth or tongue; or who voluntarily submits to such carnal knowledge; or who attempts sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished by imprisonment in the State penitentiary for not more than ten years." [L. 1909, c. 249, § 204]

1910 South Dakota

South Dakota's statute prohibiting "the detestable and abominable crime against nature committed with mankind or with a beast" was declared by the South Dakota courts to cover copulation *per os*. [State v. Whitmarsh, 26 S.D. 426, 128 N.W. 580 (1910)]

1911 Missouri

The Missouri legislature revised its sodomy statute prohibiting "the abominable and detestable crime against nature" to read as follows:

"Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary for not less than two years." [L. 1911, p. 198, § 1]

1913 Nebraska

The original Nebraska statute prohibiting sodomy was passed in 1875. In 1910 the Nebraska Supreme Court ruled that the law did not prohibit acts of fellatio, noting:

"It is to be regretted that acts so infamous and disgusting have not been declared to be a felony by the legislature of this state, and we trust that the lawmakers will speedily remedy this defect." [86 Neb. 234, 125 N.W. 594, at 595 (1910)]

As a result of this ruling, the Nebraska legislature enacted the following statute in 1913:

"Whoever has carnal copulation with a beast, or in any opening of the body except sexual parts with another human being shall be guilty of sodomy and shall be imprisoned in the penitentiary not more than twenty years." [L. 1913, p. 203]

1913 Oregon

The original statute prohibiting "the crime against nature" was revised in 1913 to read as follows:

"If any person shall commit sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustain osculatory relations with the private parts of any man, woman or child, or permit such relations to be sustained with his or her private parts, such person shall upon conviction thereof be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years." [L. 1913, c. 21, p. 56]

In 1928 the Oregon courts held that the statute included mutual masturbation. [State v. Brazell, 126 Ore. 579, 269 P. 884 (1928)]

1914 Alabama

The original Alabama statute, prohibiting "the crime against nature, either with mankind or with any beast", was construed by the Alabama courts to include fellatio. [Woods v. State, 10 Ala. App. 96, 64 So. 2d 508 (1914)]

1914 Nevada

The Nevada statute, making a crime "the infamous crime against nature, either with man or beast", was held by the Nevada courts to cover all unnatural acts in whatever form or by whatever means perpetrated. [*In re Benites*, 37 Nev. 145, 140 P. 436 (1914)]

1914 North Carolina

The North Carolina statute, first passed in 1837, prohibited "the abominable and detestable crime against nature". In 1914 the North Carolina Supreme Court held that the language of the statute covered sexual acts *per os*. [State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914)]

1915 Alaska

The Alaska criminal code provided that sodomy, "or the crime against nature", be punished by one to ten years in the Territorial penitentiary. In 1915, the language was revised to read as follows:

"Unnatural crimes. That if any person commit sodomy, or the crime against nature, or shall have unnatural, carnal copulation by means of the mouth, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years." [L. 1915, c. 22, § 1]

1915 California

The California statute, prohibiting "the infamous crime against nature, committed with mankind or with any animal", was held by the California courts in 1897 not to include sexual acts *per os*. [People v. Boyle, 116 Cal. 658, 48 P. 800 (1897)]

As a result of this decision the California legislature, in 1915, enacted the following section to its criminal code:

"The acts technically known as fellatio and cunnilingus are hereby declared to be felonies and any person convicted of the commission of either thereof shall be imprisoned in the state prison for not more than fifteen years." [Stats. 1915, p. 1022]

In 1901, the California legislature passed the following statute prohibiting sexual acts with children under fourteen years of age:

"Any person who shall wilfully and lewdly commit any lewd or lascivious act . . . upon or with the body or a part or member thereof, of a child under the age of fourteen years, with intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be imprisoned in the state prison not less than one year." [Stats. 1901, p. 630]

1915 Delaware

The Delaware statute prohibiting "the crime against nature" was held to include sexual acts *per os* by the Delaware courts in 1915. [State v. Maida, 6 Boyce 40, 29 Del. 40, 96 A. 207 (Ct. Gen. Sess. 1915)]

1915 Montana

The Montana statute prohibited "the infamous crime against nature, committed with mankind or with any animal". In 1915, the Montana courts construed the statute as covering sexual acts *per os*. [State v. Guerin, 51 Mont. 250, 152 P. 747 (1915)]

1916 Idaho

The Idaho sodomy statute prohibited "the infamous crime against nature, committed with mankind or with animal". In 1916, the language of the statute was ruled to cover fellatio and cunnilingus by the Idaho courts. [State v. Altwater, 29 Idaho 107, 157 P. 256 (1916)]

1916 Maryland

The Maryland legislature added the following statute to its criminal code:

"Every person who shall be convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand dollars or be imprisoned in a jail or in the House of Correction or in the penitentiary for a period not exceeding ten years, or shall be both fined and imprisoned within the limits above prescribed in the discretion of the court." [L. 1916, c. 616, § 1]

1917 Arizona

In 1912 the Territorial courts ruled that Arizona's sodomy statute prohibiting "sodomy, or the crime against nature", did not cover fellatio. [Weaver v. Territory, 14 Ariz. 268, 127 P. 724 (1912)]

As a result of this decision the Arizona legislature passed the following additional statute in 1917:

"Any person who shall wilfully commit any lewd or lascivious act upon or with the body of (or) any part or member thereof, of any male or female person, with the intent of arousing, appealing to or gratifying the lust or passion or sexual desires of either such persons, in any unnatural manner, shall be guilty of a

felony and imprisoned not less than one year nor more than five years." [L. 1917, c. 2, § 1]

1917 Florida

The Florida sodomy statute, proscribing "the abominable and detestable crime against nature, either with mankind or beast", was originally enacted in 1868. In 1921, the Florida courts ruled that the statute covered sexual acts *per os*. [Ephraim v. State, 82 Fla. 93, 89 S. 344 (1921)]

In 1917 the Florida legislature enacted the following statute:

"Whoever commits any unnatural or lascivious act with another person shall be punished by fine not exceeding \$500, or by imprisonment not exceeding six months, or by both such fine and imprisonment." [Acts 1917, c. 7361, § 1]

1917 Oklahoma

Oklahoma's statute proscribing "the detestable and abominable crime against nature, committed with mankind or with a beast", was ruled to cover fellatio by the State courts. [*Ex parte De Ford*, 14 Okla. Crim. 133, 168 P. 58 (1917)]

1922 Hawaii

The Hawaii sodomy statute prohibited "the crime against nature, either with mankind or any beast". In 1922, the Territorial courts held that fellatio was covered by the statute. [Territory v. Wilson, 26 Hawaii 360 (1922)]

1923 Utah

The Utah statute prohibited "the detestable and abominable crime against nature". In 1913, the Utah courts ruled that sexual acts *per os* were not covered by the language of the statute. [State v. Johnson, 44 Utah 18, 137 P. 632 (1913)]

As a result of this decision the Utah legislature amended its sodomy law in 1923 to read as follows:

"Every person who is guilty of sodomy or any other detestable and abominable crime against nature, committed with mankind or with any animal with either the sexual organs or the mouth, is punishable by imprisonment in the state prison not less than three years nor more than twenty years." [L. 1923, p. 21, § 8121]

1924 Virginia

The Virginia statute prohibited "buggery, either with mankind or with any brute animal". In 1923 the Virginia courts held that the language of the statute did

not cover sexual acts *per os*. [Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923)]

As a result of this decision the Virginia legislature revised the language of its statute to read as follows:

"If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such a carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one nor more than ten years." [Acts 1924, c. 358, § 4551]

1925 West Virginia

The West Virginia legislature enacted a statute almost identical in wording to the Virginia statute of 1924. [W. Va. Code 1925, 61-8-13]

1925 Kansas

The Kansas statute proscribed "the detestable and abominable crime against nature, committed with either mankind or with beast". In 1925 the Kansas courts ruled the language of the statute prohibited sexual acts *per os*. [State v. Hurlbert, 118 Kan. 362, 234 P. 945 (1925)]

Also:

1899 Vermont

Vermont has never enacted a sodomy statute. However, in 1899 the State courts held that sodomy, *coitus per anum*, was indictable as a common-law crime. [State v. LaForrest, 71 Vt. 311, 45 A. 225 (1899)]

Sources:

Norman St. John-Stevas, *Life, Death and the Law* (London: Eyre & Spottiswoode, 1961), pp. 310-324; Walter Barnett, *Sexual Freedom and the Constitution* (Albuquerque: University of New Mexico Press, 1973), pp. 21-51; "Homosexuality and the Law — An Overview", *New York Law Forum*, XVII (1971): 273-303; "Note: Sodomy Statutes: The Question of Constitutionality", *Nebraska Law Review*, L (1971): 567-575; "Note: Victimless Sex Crimes: To the Devil, not the Dungeon", *University of Florida Law Review*, XXV (1972-73): 139-159; "Note: The Crimes Against Nature", *Journal of Public Law*, XVI (1967): 159-192; James R. Spence, "The Law of Crime Against Nature", *North Carolina Law Review*, XXXII (1954): 312-324. In addition, the statutes themselves have been consulted.

APPENDIX III

Year of first adoption, by State and Territory, of four laws against prostitution (to 1920)

State	White slavery ¹	Injunction and Abatement ²	Soliciting	Vice repressive ³
Alabama	*	1919	...	...
Arizona	1913 ^{abc}	1913	...	...
Arkansas	1913 ^{abc}	...	...	...
California	1911 ^{abc}	1913	...	...
Colorado	1909 ^{bc}	1915	1908	...
Connecticut	1911 ^{abc}	1917	1888	1919
Delaware	1911 ^{abc}	1919	...	1919
District of Columbia	1910 ^{ab}	1914	1916	...
Florida	1911 ^{ab}	1917	...	...
Georgia	...	1917	1918	...
Idaho	1911 ^{abc}	1915	...	...
Illinois	1909 ^{abc}	1915	1915	...
Indiana	1913 ^{abc}	1915	...	...
Iowa	1913 ^{ab}	1909	...	...
Kansas	1913 ^{ab}	1913	1913	...
Kentucky	1916 ^{abc}	1918	...	...
Louisiana	1910 ^{abc}	1918	1918	...
Maine	1913 ^{abc}	**	...	1919
Maryland	1910 ^{abc}	1918	...	1920
Massachusetts	1910 ^{abc}	1911	1910	...
Michigan	1911 ^{abc}	1915	...	...
Minnesota	1909 ^{abc}	1913	1913	...
Mississippi	...	1918	...	...
Missouri	1913 ^{abc}	1921	...	...
Montana	1911 ^{abc}	1917	1895	...
Nebraska	1911 ^{abc}	1911	...	...
Nevada	1913 ^{abc}	...	1912	...
New Hampshire	1911 ^{abc}	**	...	1919
New Jersey	1910 ^{abc}	1916	...	...
New Mexico	1913 ^{ab}	1921	...	...
New York	1911 ^{abc}	1914	1910	...
North Carolina	1911 ^{ab}	1913	...	1919
North Dakota	1909 ^{abc}	1911	...	1919
Ohio	1910 ^{ab}	1917	...	1919
Oklahoma	1910 ^{ab}	...	...	...
Oregon	1911 ^{abc}	1913	...	...
Pennsylvania	1911 ^{abc}	1913	...	...
Rhode Island	1910 ^{abc}	...	1910	1919
South Carolina	...	1918	...	...
South Dakota	1912 ^{abc}	1913	...	...
Tennessee	1917 ^{ab}	1913	...	...
Texas	1911 ^{ab}	**	...	...
Utah	1911 ^{abc}	1913	1909	...
Vermont	1911 ^{abc}	...	...	1919
Virginia	1910 ^{abc}	1916	1918	...
Washington	1909 ^{abc}	1913	1909	...
West Virginia	1911 ^{abc}	...	...	...
Wisconsin	1911 ^{abc}	1913	1915	1919
Wyoming	1915 ^{abc}	1921	...	...

Sources:

Herbert E. Gernert, "Legislation on the Social Evil: The White Slave Traffic Laws", *Vigilance*, XXV (June, 1912): 2-9; Timothy Newell Pfeiffer, "The Matter and Method of Social Hygiene Legislation", *Social Hygiene*, III (January, 1917): 51-73; George E. Worthington, "Developments in Social Hygiene Legislation from 1917 to September 1,

1920", *Social Hygiene*, VI (October, 1920): 557-568; Joseph Mayer, *The Regulation of Commercialized Vice* (New York: The Klebold Press, 1922), pp. 28-32; David Lawrence, "Washington — The Cleanest Capital in the World", *Social Hygiene*, III (July, 1917): 312-321. In addition, the statutes themselves have been consulted.

Notes:

¹ The White Slavery Laws have reference to three classes of offenses, indicated by the superscripts *a*, *b* and *c* after the year of adoption, viz.:

- ^a enticing, transporting, or forcing a female into prostitution;
- ^b pandering;
- ^c pimping and living off the earnings of a prostitute.

The table indicates the date of passage by the various states of a comprehensive law prohibiting these acts. In some instances these laws superceded previous statutes proscribing more specific aspects of these offenses, such as enticing a female under a particular age to a house of ill-fame.

² The Injunction and Abatement Laws permitted a civil action to enjoin the operation of a brothel as a public nuisance. The table covers legislation to 1921.

³ The Vice Repressive Law is a comprehensive statute prohibiting, among other things, keeping, setting up, maintaining, operating, occupying, permitting someone to

occupy, transporting to, directing someone to, residing in, entering, remaining in, any place, structure, building, or conveyance for the purpose of prostitution, lewdness, or assignation; soliciting for the purpose of prostitution, lewdness, or assignation; "giving or receiving of the body for sexual intercourse for hire", and, "giving or receiving of the body for indiscriminate sexual intercourse without hire".

* Alabama did not pass a White Slave Law by 1920. However, in 1897 its legislature passed a statute directed against procuring or employing a female over ten and under eighteen for purposes of prostitution. It later amended its vagrancy statute to cover pimps and prostitutes.

** Maine, New Hampshire, and Texas enacted statutes which classified bawdy-houses as nuisances prior to Iowa's passage of its Red Light Injunction and Abatement Law in 1909. The dates of passage are: Maine, 1891; New Hampshire, 1899; and Texas, 1907.