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TOWARD A THEORY OF LEGAL NATURALISM*

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INTRODUCTION

In legal philosophy there is perhaps no older, nor deeper, conflict than that which exists between legal positivists and natural law advocates. I use these "catch words" not without a certain trepidation since they have had shifting and divergent meanings. This has resulted in a preoccupation with attempts to define "natural law" or "positivism", rather than examining the underlying dispute.

I do not feel the need, however, to launch into any extensive search for definitions here, for to the extent that I discuss either view, I shall not criticize it. My premise is that within the limits of this discussion, each side is viewing a different, but genuine aspect of law. Though the conclusions of both schools are incompatible, many of their insights are not. My intention is, by uniting certain of these complementary insights, to synthesize a new outlook on law.

THE INSIGHTS OF NATURAL LAW AND LEGAL REALISM

If natural law stands for nothing else, it stands for the proposition that there is some objective standard or "higher law" against which positive (man-made) law can and should be measured. H. L. A. Hart characterized the classical theory of natural law as the view "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid".[1] The principal concern of the natural law theorist is, then, with the substantive content of law. The branches of natural law may extend in many directions and its roots run deep, but this is most certainly its core.

Legal positivism's essence is much harder to pin down. Its melodies are many and varied. A. P. d'Entrèves reduces legal positivism to three basic types:

1. *Imperativism* — On this view, law is seen as the command of a "sovereign" endorsed by the fact of habitual obedience. I shall touch on this "insight" later in this paper.

2. *Normativism* — "According to this theory, law cannot properly be understood except as a set of normative propositions. The 'validity' of each norm hinges on the validity of other norms, and thus leads us back to a 'basic norm', to an 'ultimate rule of recognition' which qualifies every single norm by giving it relevance and connecting it into a system."[2]

3. It is the third type of positivism, *Legal Realism,* that will be our immediate concern.

Legal Realism carried beneath its banner many different issues and concerns. So diverse were its proponents that even Karl Llewellyn, a founder of the movement, felt the need to list realists and their views in an effort to clarify the realist outlook.[3] Realists were social reformers, predominantly "left-wing" with what Prof. Lon Fuller has called a "rule phobia".[4] They shunned general principles in favor of individualized justice.[5] Focusing on the ideological and psychological motivations of the judiciary, they were deeply concerned with the sociological impact of law. Their attitude resembled that of the historical revisionists. They refused to genuflect before the mystical majesty of the State judicial system, although, like most revisionists, they did not reject statism. Indeed, most of them heartily embraced the State

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judicial system as the proper instrument of social change.[6]

"[T]he realists were distinctive, however, in their preoccupation with the *processes* of judicial decision, with how law is made."[7] This is the salient feature of realism which is of interest here. "Long before this school had a name, its basic assumption had been expressed by Holmes in his famous dictum, that law is the prophecy of what the Courts will do in fact. Law is here taken as a social phenomenon, as a decision or a *process of authoritative decisions*."[8]

Natural law theorists are mainly concerned with the *substantive* content of positive law and its congruence with morality. Law which does not conform with justice is not properly law at all, but simply naked force. The realists focused on the legal *process*, arguing that it was naive and illegitimate to deal with "principles" of law in a sociological vacuum. Law is a process, a system run by men. We must, they argued, examine the system to see what law was about.[9]

Each group vehemently opposed and attacked the other. In his book, the *Crisis of Democratic Theory*, Edward A. Purcell, Jr. brilliantly narrates this conflict. Purcell's thesis is that the battle between the "Moral Absolutists" (natural law theorists) and the "Scientific Empiricists" (Legal Realists) in the social sciences and jurisprudence rocked the foundations of democratic theory. At present, although there is an uneasy truce between the two sides, there is no enduring peace. The ultimate issues have yet to be resolved.

Could it be that the conflict is unresolved because both sides are partially right? A search for objective moral standards behind positive law is not, in principle, incompatible with an attention to the nature of the legal process. What is needed is an approach to law which embraces both substance and process. Though it is unlikely to please either side, such an integrating approach might serve as the just mean between two extremes.

THE MORALITY OF THE LEGAL PROCESS

Since I am arguing for a non-positivist theory while at the same time emphasizing the legal process, it might help to briefly outline what I mean by "process". The legal process is the system by which positive law is determined, applied and enforced. It is a dynamic rather than a static system. That is, it receives feedback from and reacts to the results of its previous actions. Since it is a category of human action, it is subject to the "laws" of economics, e.g. scarcity of resources, price and quality sensitivity of demand, etc. It is, in short, a complex system of transactions between individual actors.[10]

The legal process has one other characteristic. It has a purpose or function.[11] It is this aspect of law which may serve as the link between substance and process. For a comprehensive examination of this purposive aspect of law we need look no further than Lon L. Fuller's book, *The Morality of Law,* though we shall apply his theory in ways which he may not have intended.[12]

Fuller argues that there are two sorts of morality: the morality of aspiration and the morality of duty. The morality of aspiration "is the morality of the Good Life, of excellence, of the fullest realization of human powers . . . [A] man might fail to realize his fullest capabilities. . . . But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing."[13] The morality of duty, on the other hand,

> lays down the basic rules without which an ordered society directed toward certain specific goals must fall short of its mark. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.[14]

The substance of the law, argues Fuller, deals only with duty. It must act to enforce certain reciprocal understandings in order to avoid harm to the innocent. It cannot and should not "compel a man to live the life of reason. . . . We can only create the conditions essential for rational human existence. These are the necessary, but not the sufficient conditions for the achievement of that end".[15] The law, then, operates "at the lower levels of human achievement where a defective performance can be recognized, if care is taken, with comparative certainty and formal standards for judging it can be established".[16] It does not reward virtuous acts. This is left to more subjective, intuitive, and largely informal procedures.

The prime purpose of law, then, is the discernment and enforcement of legal duties and nothing more. This is entirely consistent with the natural rights tradition. On this view, these requisite legal duties are what natural rights are and their very formulation depends on their objective necessity as a condition of rational human existence. The law, therefore, must enforce human rights and nothing more.

To confine the purpose of law to the enforcement of duties is not, however, to minimize either its importance or the difficulties involved. Fuller argues that it is this purpose, however difficult, that determines the nature of the legal enterprise. And he sees the law as exactly that: an enterprise. Those who see the law as essentially a command are wrong. Law is no mere one-way street. It is as much a cooperative project as medicine or carpentry and as such it is governed by certain common sense rules. These rules are not arbitrary. They are and must be consistent with the goal of law: the determination of general rules of behavior to allow rational (or irrational for that matter) men to plan and act.

If these rules of lawmaking are not arbitrary, neither are they precise or absolute. The process of reaching the best possible law is more an art than a science and like all endeavors toward perfection, governed by the morality of aspiration. Fuller gives eight ways to fail to make a law, but he cannot, nor can anyone, say with precision when one factor should be given precedence over another. This decision must be made by the skillful practitioner based on the facts of each instance of law-making, just as a diagnosis of disease and a prescription for its cure can only be made well on an individual basis by a skilled physician.

Fuller lists eight roads to disaster:

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an *ad hoc* basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[17]

The thrust of Fuller's anti-positivism is his contention that to the degree that a law-maker fails to follow any one of these eight directions, he does not simply make "bad law"; he makes something that is not properly called law at all, "except perhaps in the Pickwickian sense in which a void contract can still be said to be a contract".[18] And while these eight routes to failure point to the indispensable conditions for law on its lowest level, they also serve as "eight kinds of legal excellence toward which a system of rules may strive".[19] The law, then, "embraces a morality of duty and a morality of aspiration. It . . . confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it".[20]

This then is Fuller's scheme. While it is firmly rooted in a natural law concerned with substance, it has a great deal to say about the legal process as well.[21] This puts him in sharp contrast with other theorists concerned with legal substance. Richard Taylor, for example, has said that it "is the ends or purposes of a legal order that are important, not its form".[22] Taylor claims that there is no reason why a despot could not enunciate a criminal law in faithful adherence to the principle of liberty Taylor outlines. "History certainly suggests that this is not what one should expect from a despotic form of government, but there is nevertheless no reason, *in principle,* why it might not exist."[23] On the contrary, it is Fuller's point that the shape and nature of a legal process should follow the true nature and purpose of law; that the ends and purposes of a legal order have a great deal to say about its form.

LEGAL NATURALISM: A TEST RUN

The philosophy which I call Legal Naturalism adds to the search for that substantive law which best suits the nature of man, a search for the legal system or systems which best "fits" the nature of law. Briefly stated the added methodology is thus:

(1) Determine the nature and purpose of law.
(2) Craft a legal process (structure, procedure and substance) consistent with that determination.

(I shall add a third step later.)

Compare this approach to the prevalent contemporary attitudes of legal philosophy. Positivism views law as a "fact", a given phenomenon to be studied and analyzed. Legal Naturalism views law as an enterprise, an activity with a purpose. If law has a purpose it is legitimate to ask if a given legal system is successful or unsuccessful. If law has an end, it is appropriate to craft a better means. While most contemporary legal philosophies are descriptive, Legal Naturalism is a normative philosophy. As I shall suggest in the next section, its practitioner attempts to analyze existing legal structures in light of their essential purpose and to judge them thereby.

With this brief sketch in mind it might clarify matters to try out this methodology briefly. But as we proceed, we should remember that the line between legal and political philosophy is a fine one. The State has traditionally been thought of as the main source of law. It may also be the first casualty of Legal Naturalist analysis.

Fuller sees in current legal thinking a persistent error. "This is the assumption that law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government [or law-maker] but as a one-way projection of authority, originating with government and imposing itself upon the citizen."[24] Fuller feels that these theorists erroneously identify law with the nation-state. Law, he points out, is everywhere around us in forms not imposed from above. International law, tribal law, the rules of private organizations are all "horizontal" forms of law. It is only a "vertical" concept of law which prevents the identification of these systems as legal systems. With examples of "reciprocal" or "horizontal" law abundant in history and the world, Fuller is at a loss to comprehend why contemporary thinkers refuse to see the law in this light. I shall suggest that there is a plausible reason for this phenomenon and that the explanation rests on Fuller's internal morality of law, or, more precisely, on one of his principles of legal excellence, *viz.*, that a law-maker should itself obey the rules it sets up to govern its citizenry. I conclude that the State is a source of law inconsistent with this principle. We must then examine this, Fuller's eighth principle, in more detail.

The question which gives the positivists the most trouble is, "How can a person, a family, a tribe, or a nation impose law on itself that will control its relations with other persons, families, tribes, or nations?"[25] The positivists view law as a thing which cannot be self-imposed; it must proceed from a higher authority. Fuller's answer emphasizes his eighth principle: "Now I suggest that all these questions would require radical redefinition if we were to recognize one simple, basic reality, namely, that enacted law itself presupposes a commitment by the governing authority to abide by its own rules in dealing with its subjects."[26] What Fuller means by this is that the rule-maker must first make rules by which laws are to be passed. It must then abide by these rules because of the justified expectations of the subjects that it will do so. The failure of the positivists to distinguish between the power of the State and the law is their failure to see that the law-maker is constrained by his own rules imposed from below by the justified expectations of the citizenry.[27] Thus even a State legal system is, to some extent, a two-way system.

I maintain, however, that this does not adequately explain the positivists' erroneous concept of law. Fuller fails in his attempt because he has not followed his own principle far enough. If he did, he would see that a State legal system does not conform to the principle of official congruence with its own rules. It is because the positivists see that the State necessarily violates its own rules that they conclude, in a sense correctly, that State-made law is *sui generis.* This is also why they associate "coercion" with the definition of law, an association which Fuller rejects.[28] What they are seeing is the *essential* nature of the State, the predominant source of law. An elaboration is obviously called for.

First of all, what do we mean when we speak of the "State"? For these purposes I have no quarrel with Weber's definition as put forth in his book, *The Theory of Social and Economic Organization*:

> A compulsory political association with a continuous organization (*politischer Anstaltsbetrieb*) will be called a "state" if and insofar as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.[29]

Furthermore, it is a central characteristic, if not an essential one, of the State that it claims the power to tax.

Fuller's eighth requirement is that "the governing authority . . . [must] abide by its own rules in dealing with its subjects".[30] I accept this principle as stated by Fuller but would disagree with his interpretation of it. I take this principle to mean that "what's good for the goose is good for the gander" or, more formally, the law-maker must obey the *substance* of his own laws. Instead of committing the law-maker to following *all* of his own rules, Fuller erroneously commits the law-maker to following only those rules which govern how to make a law. Clearly my formulation of this principle is a far more reciprocal one. And actually Fuller fails to give any reason why he limits the principle in the way he does.

If we accept what Fuller says but not his narrow interpretation, it becomes obvious that the State by its nature *must* violate this commitment. For example, the State says that citizens may not take from another by force and against his will that which belongs to another. And yet the State through its power to tax, "legitimately" does just that.[31] More essentially, the State says that a person may use force upon another only in self-defense, i.e. only as a defense against another who initiated the use of force. To go beyond one's right of self-defense would be to aggress upon the rights of others, a violation of one's legal duty. And yet the State by its claimed monopoly forcibly imposes its jurisdiction on persons who may have done nothing wrong. By doing so it aggresses against the rights of its citizens, something which its rules say citizens may not do.

The State, in short, may steal where its subjects may not and it may aggress (initiate the use of force) against its subjects while prohibiting them from exercising the same right. It is to this "social fact" that the positivists look when they say that the law (meaning State-made law) is a one-way, vertical process. It is this that belies any claim of true reciprocity.

Fuller's principle is correct, but he is wrong in applying it only to the law-maker's obligation to follow his own *procedure*. A law-maker fails to act in congruence with its rules and, as a result, fails to achieve the aspiration of a legal system to the extent that it fails to follow *all* of its rules, procedural and substantive alike. To the degree that it does not and cannot do this it is not and cannot be a legal system and its acts are outside the law. The State *qua* State therefore is an illegal system.

While Professor Fuller cannot be expected to agree with this analysis, it is quite plain that he would not be shocked by its conclusion. First, I do not contend that all State-made law is not law. It is a question of degree. Only when and to the degree that the State does not follow its own rules (as well as Fuller's seven other requirements) is it *acting* illegally.[32] As Fuller states, "both rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful".[33]

What then does this application of Legal Naturalism tell us about the proper source of law? An explication of Fuller's eighth principle reveals that a coercively[34] monopolistic legal system is objectionable. The alternative would be a non-monopolistic or multiple system of law. Such a system is perfectly consistent with Fuller's concept of law. As he himself states, "A possible . . . objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems."[35]

LEGAL NATURALISM: A PRESCRIPTIVE APPROACH

What would such a non-monopolistic system look like? Or, put another way, what process would be consistent with the true horizontal and reciprocal nature of law? At this point I will offer only a tentative sketch. We would do well, I suggest, to begin by examining Fuller's conditions for the optimum efficacy of the notion of duty mentioned in the *Morality of Law.*

Fuller sees three conditions for the "optimum realization of the notion of duty, the conditions that make a duty most understandable and most palatable to the man who owes it".[36] First, the duty must be created by the parties themselves. The relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected; they themselves create the duty.[37] Second, the performances required must be in some sense equal in value.[38] The third condition is that "the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow — in other words, the relationship of duty must in theory and in practice be reversible".[39] Fuller feels that without this condition, as a practical matter, people will have no reason to honor their obligations. It is Fuller's first condition (*viz.* that of voluntary agreement) that is of interest here.

To see how this principle might be applied in a non-monopolistic legal process, we might imagine a new legal system. In this system there is a company called Metropolitan Arbitration Services. This company has its offices mainly in large urban areas, usually in big office buildings. Most of the cases it considers are civil, primarily commercial disputes. Another competing company, the American Legal Services Company, is a more decentralized nationwide organization. It handles both civil and larger criminal cases at uniform, reasonable rates. There is also a National Association of Independent Judges (NAIJ). Judges who belong to this organization must meet certain requirements and publish their sources of personal income. There are members of NAIJ in virtually every town in North America. While many NAIJ judges practice alone, most are in "judicial partnerships" with other members. NAIJ is far larger than its competitor, the United Judges' Guild.

Each of the companies has its own legal code. Both Metropolitan and American have a policy of carefully reviewing their judges' decisions to see how closely they are following the intended meaning of their respective codes. For this reason, internal appeals are encouraged at minimal expense. The NAIJ has a code as well, but their judges have a great deal more latitude. Local chapters sometimes have their own codes and the precedents of the most respected member judges carry a great deal of weight. The Guild on the other hand has no uniform code. Each of its judges is free to decide a case however he or she chooses. Though they generally stay close to the other codes (or the Model Legal Code), their decisions are frequently radical and innovative.

There are also hundreds of small firms that compete with the large general organizations by specializing in fields like maritime activities, labor disputes, automobile accidents, etc. They commonly employ "expert juries" composed of persons knowledgeable in the area being litigated.

Though appeals are not common, there is a Unified Appeals System to which virtually every practicing judge belongs. Most company appeals are internal and cases heard before NAIJ or Guild judges are usually reviewed (by advanced agreement) by another member judge.

Generally in commercial cases the parties go to the court specified in the insurance contract covering the loss. Payment of claims is usually conditioned on good faith prosecution and faithful following of all court procedures. Those without insurance can hire an arbitration service or go to the court of the opposing party (thus saving the expense of two proceedings). In criminal law, restitution to victims is the favored sanction.[40] As a result crime insurance has been made profitable. Insurance companies, having paid the claim, collect the restitution and generally either prosecute their own cases or assign their right to prosecute to specialized prosecution law firms. As in civil cases, testifying and faithful adherence to court rules is a condition of insurance payments.[41]

If a single judge cannot be agreed on it is customary for each party to name his own judge, those chosen then hear the case as a panel. In the event there is an even number of parties, the judges choose a single independent judge to join them. To save the cost of a full panel, often the single independent judge will hear the case. This procedure is agreed to by the parties in advance of the naming of the judge. There has evolved an extensive conflicts of law doctrine which is followed by all concerned to determine which legal code applies.[42] Those in the past who have refused to follow the rules of conflicts have been unable to enforce most judgements against those who subscribe to alternate services and have gone out of business or accepted the rules.

In this system individuals and businesses choose their judge or arbitration company on the basis of reputation, the quality of service (speed, convenience, courtesy, etc.), the cost of service and the substance of the legal code adhered to. An arbitration firm or code is generally specified in all contracts. Though most legal codes in operation are very similar, some localities tend to deviate, as will Guild judges. Those who move so far from the mainstream as to alienate clients or make enforcement of judgments difficult or unpopular have tended to lose patronage. Boycotts have also proved effective.

Disputants, in short, have a direct input in and powerful impact on procedures and substantive legal questions. Those groups who wish to live by their own rules (a husband and wife or commune, perhaps) could bring their disputes to an NAIJ or Guild judge. They would show the judge their code (or he might have it on file) and he would apply it as best he could.

Anti-statists have long had trouble with the concept of law. Because they too have identified law with the institution that traditionally has made it, the State, many have rejected law altogether. Many critics of non-statist philosophy insist that without a State there can be no law. But Fuller has no such trouble. He argues that such theoretical difficulties "can arise only if theory has committed itself to the view that the concept of law requires a neatly defined hierarchy of authority with supreme legislative power at the top that is itself *free from legal restraints*".[43] Fuller's whole purpose, of course, is to reject this vertical view of law.

As to the practical difficulties of such a system, Fuller points out that they "can arise when there is a real rub between systems because their boundaries of competence have not been and perhaps cannot be clearly defined".[44] He points out that one possible solution, a constitutional arrangement, "is useful, but not in all cases indispensable. Historically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation".[45]

The legal process outlined above is consistent with the horizontal nature of law. It is non-monopolistic in the Weberian sense and in harmony with Fuller's first condition for optimal efficacy of the notion of duty. The reason for indulging in fantasy was not so much to draw a complete blueprint for a legal system but, rather, to give an example of the application of Legal Naturalist methodology and its ultimate goal: the formulation of a legal system or systems that are most consistent with the nature of the legal process.[46] Only if we have an ideal[47] in mind can we know what reforms to make in the present legal system, just as the democratic ideal is supposed to aid us in improving our political system. This suggests a third function of Legal Naturalism. The three together would be:

(1) Study the nature and purpose of law.
(2) Craft a system of law consistent with that nature and purpose.
(3) Place contemporary legal structure next to this ideal and devise ways of moving it in the direction of the ideal, thereby improving it or, as the schoolmen would say, actualizing its potential.

PROCESS AND SUBSTANCE CONJOINED

To this point this essay has focused almost exclusively on legal process. This emphasis results largely from the main thesis I've tried to present: that the natural law concern with substance wrongfully ignored questions of process about which its naturalist methodology had much to say. It would be to miss the point of Legal Naturalism entirely, however, to ignore the interface that should exist between the Naturalist concern with process and its concern with substance. For the Legal Naturalist approach, as I see it, embraces both areas which, after all — and this again is the insight of the Realists — can never be totally separated.

Nowhere is this conjunction more important than in the above hypothetical description of a multiple legal system. Our response to the substantive outcome of such a system can take one of two directions:

(1) Assuming we have demonstrated or might demonstrate the appropriateness of the process on Naturalist (and, therefore, non-positivist) grounds, we must necessarily accept whatever the process produces; or

(2) While the process is the most consistent with the purpose(s) of the legal enterprise, it is still capable of producing morally unjust results. We must, therefore, scrutinize and judge the results accordingly and if necessary fight any tyranny that arises — even if it arises in accordance with formal principles of legality.

The former choice resembles the version of positivism which I labeled above as Normativism. It closely comports with H. L. A. Hart's approach as presented in *The Concept of Law* except that here our Naturalist defense of the non-monopolistic system does the work of his "rule of recognition". Such a methodology of justifying a legal process by non-positivist means, only to accept whatever outcome may result, might usefully be called "secondary positivism". As such it is clearly inconsistent with a full Naturalist methodology as here described.[48] Legal Naturalism is an *extension* of the natural rights theorists' concern with the proper substance of law. A proper legal process is a necessary but not sufficient requirement for a fully legal order. A just substantive law is also required.

Although I shall not examine here the dispute between a Naturalist approach with its moral realist component and the positivist approach with its moral subjectivist component, it should be noted that Legal Naturalism stands in the mainstream of the growing anti-positivist, anti-subjectivist critique. This trend is nowhere better exemplified than in the recent work of Ronald Dworkin, who, in his book *Taking Rights Seriously,*[49] is sharply critical of moral subjectivism and legal positivism. As he concludes,

> It may be that the supposition that one side may be right and the other wrong is cemented into our habits of thought at a level so deep that we cannot coherently deny that supposition, no matter how skeptical or hard-headed we wish to be in such matters. . . . The "myth" that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.[50]

It is necessary, then, indeed crucial, for the Legal Naturalist to step back and judge the fruits of his labors, that is, to judge the justice or injustice of the laws which an otherwise legal system produces. The Naturalist methodology is intended to apply across the board, else the retreat to subjectivism and positivism is inevitable.[51]

CONCLUSION: WHY A LEGAL *NATURALISM*?

Before concluding it might be appropriate to comment on why I call this outlook Legal *Naturalism.* In addition to its obvious association with the substantive concerns of natural law theory, the Naturalist outlook seems to overlap a number of the meanings of the word "nature":

(1) As should be clear, the bedrock of concern is the *nature of law* and the legal process.

(2) The process of crafting a legal process around the nature of law, its purpose and aspiration, is reminiscent of ecological biology which strives to keep man in touch and in *harmony with nature.*

(3) The legal process which emerges from this type of analysis should, once evolved, *function naturally* or to use F. A. Hayek's term, "spontaneously". Spontaneous order is that which "results from the individual elements adapting themselves to circumstances which directly affect only some of them, and which in their totality need not be known to anyone . . . [and therefore such an order] may extend to circumstances so complex that no mind can comprehend them all."[52]

Social scientists are partial to thinking of society as a living organism and yet most of them wish to have its complex operation directed by some segment of the whole. Legal Naturalism is a truly organic theory of law. By tempering the moral concerns of the natural law theorists with the insights of the reformist Legal Realist movement, the Legal Naturalist may obtain a better understanding of the dynamic system we call law.[53] Only from an accurate conception of law can a truly just legal system evolve. It is with a deep hope for such an evolution that I urge a movement toward a theory of Legal Naturalism.

NOTES

1. H. L. A. Hart, *The Concept of Law.* (Oxford: Oxford University Press, 1961), p. 182.
2. A. P. d'Entrèves, *Natural Law,* 2nd Revised Edition (London: Hutchins & Co., 1970), p. 175.
3. Karl Llewellyn, "Some Realism About Realism — Responding to Dean Pound", *Harvard Law Review,* 44 (June, 1931): 1222–1264.
4. Lon L. Fuller, "American Legal Realism", *University of Pennsylvania Law Review,* 82 (1934): 444.
5. *Ibid.*, pp. 429–462.
6. A great deal of what the realist movement stood for will not be discussed in this paper. For those interested in a brief discussion of Legal Realism I suggest Yosal Rogat, "Legal Realism", *The Encyclopedia of Philosophy,* (New York: Macmillan and Free Press, 1967), 4: 420–421. For a highly entertaining retrospective introduction to Realism I recommend Grant Gilmore, "Legal Realism: Its Cause and Cure", *Yale Law Journal,* 70 (June, 1961). 1037–1048. For a more scholarly examination and criticism of the movement as well as additional references see Fuller, "American Legal Realism", pp. 429–462, and Edward A. Purcell, *The Crisis of Democratic Theory* (Lexington, Kentucky: University Press of Kentucky, 1973).
7. Rogat, "Legal Realism", p. 421 (emphasis added).
8. d'Entrèves, *Natural Law,* p. 175 (emphasis added).
9. An example of a concern with *substance* is the debate over the legality of abortion. Should abortions be permitted or prohibited? A concern with *process,* on the other hand, would consider how the decision should be made, who should make it and how it should be applied, etc.
10. I distinguish between "process" and "procedure". Procedures are rules within a system which govern the manner in which certain actions are performed and decisions made. Thus, the notion of a legislative process is a broader concept than legislative procedure which might include, for example, a "majority vote" requirement for passage of a statute. Although Fuller used the term "procedural", it is clear that his meaning is not inconsistent with the one adopted here. "What I have called the internal morality of law is . . . a procedural [as distinguished from a substantive] version of law, though to avoid misunderstanding the word procedural should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term procedural is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be." (*The Morality of Law,* Revised Edition, [New Haven and London: Yale University Press, 1969], pp. 96–97). I would further suggest that while legal process is to be judged in the manner set out in this paper below, legal procedures should be judged by utilitarian considerations, provided that they violate no moral side-constraints. See my "Whither Anarchy? Has Robert Nozick Justified the State?" *Journal of Libertarian Studies* 1, No. 1 (Winter, 1977): 15–21; and see also Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books, 1974), pp. 28–33.
11. Although I shall adopt Fuller's use of "purpose" I acknowledge that others feel that "function" is the more appropriate term. See e.g. F. A. Hayek, *Law, Legislation and Liberty,* vol. 1 (Chicago: University of Chicago Press, 1973), pp. 38–39. Hayek draws the distinction when describing his theory of "spontaneous order". I would argue that in some significant sense the legal process is or should be spontaneous, in which case the use of "purposive" is "a sort of 'teleological shorthand' . . . [meaning] merely that the elements have acquired regularities of conduct conducive to the maintenance of the order". (Hayek, p. 39). In another sense the legal process is "purposive" insofar as this implies "an awareness of purpose" (Hayek, p. 39) on the part of the "elements", in which case the legal process is not spontaneous. Fuller's use of the term "purposive" seems to embrace both meanings and, thus, both aspects of the legal process.
12. Although I shall rely heavily on Fuller's analysis throughout this paper, I do not agree with every part of his theory. Nor do I pretend to have rigorously demonstrated his view. This brief exposition cannot possibly match his own defense as presented in *The Morality of Law.* I urge interested readers to examine it for themselves.
13. Fuller, *The Morality of Law,* p. 5.
14. *Ibid.*, pp. 5–6.
15. *Ibid.*, p. 9.
16. *Ibid.*, p. 31.
17. *Ibid.*, p. 39.
18. *Ibid.*. p.
19. *Ibid.*, p. 41.
20. *Ibid.*, p. 42.
21. A. P. d'Entrèves criticizes Fuller for his "technological notion of natural law" whose "primary concern is with the means aspect of the means–end relation". *Natural Law,* p. 149. I agree that Fuller's approach is not sufficiently "ontological" (though he has moved a great distance in that direction since the article d'Entrèves refers to was published in 1954) and I will have reason to note below that this may lead to an incomplete anti-positivist position. For my present purpose, however, this is beside the point, since what I am searching for is a link between a substantive concern (which might be "ontologically" grounded — see e.g. Henry B. Veatch, *For An Ontology of Morals* [Evanston, Ill.: Northwestern University Press, 1971]) and the insight of the Legal Realists with regard to legal process. Fuller's scheme seems to fit the bill, "technological" or not. To be fair, it must be noted that Fuller does take up certain substantive considerations in his excellent outline of "The

Substantive Aims of Law" (*The Morality of Law*, pp. 152–186).

22. Richard Taylor, *Freedom, Anarchy and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 129.
23. *Ibid.*, p. 128 (emphasis added).
24. Fuller, *The Morality of Law*, p. 204.
25. *Ibid.*, p. 233.
26. *Ibid.* To fully understand and defend the principle would require a discussion far more extensive than would be appropriate here. See Fuller's discussion in *The Morality of Law*, especially pp. 215–224, 232–241.
27. "[I]t is safe to say that the tacit expectations that make up customary law will always enter into any practical realization of the ideal of legality. Fidelity to the Rule of Law demands not only that a government abide by its verbalized and publicized rules, but also that it respect the justified expectations created by its treatment of situations not controlled by explicitly announced rules. Even more plainly it requires that government apply written rules in accordance with any generally accepted gloss written into those rules in the course of their administration. Taking all these complications into account will, of course, embarrass the construction of neat juristic theories. But it will ease the transition of legal thought from state-imposed codes to the somewhat messier seeming manifestations of law exemplified in international and customary law." Fuller, *The Morality of Law*, p. 234.
28. Fuller, *The Morality of Law*, pp. 108–118.
29. Max Weber, *The Theory of Social and Economic Organization*, ed., Talcott Parsons, trans. A. M. Henderson and Talcott Parsons (New York: The Free Press, 1964), p. 154, as it appears in Jeffrey H. Reiman, *In Defense of Political Philosophy* (New York: Harper Torchbooks, 1972), p. 20 (emphasis in the original). I do not propose, however, to become embroiled in a debate over the definition of the State. The inevitable result of such semantic disputes is that one is urged either to broaden the definition so that we see "States" everywhere or to narrow it to show that there is really no such thing as a State. Such entreaties are illegitimate. Since the State exists, we need only define it so as to distinguish it from other organizations which are not States by picking out its essential features and then proceed with the discussion.
30. Fuller, *The Morality of Law*, p. 233.
31. Any reason for or justification of State taxation is not relevant to this discussion. I am dealing only with the fact that this action is incongruent with the State's rules for its citizens.
32. The discussion at this point is concerned only with the *legality* of State actions and the State rule-making system. I do not consider here the *morality* of State actions and the State rule-making system (although obviously the subjects are related). I will argue below that the Legal Naturalist methodology embraces both aspects of law, though it does so at separate states of analysis.
33. Fuller, *The Morality of Law*, p. 122. The rest of this passage is also interesting: "The truth that there are degrees of success in this effort is obscured by the conventions of ordinary legal language. These conventions arise from a laudable desire not to build into our ways of speech a pervasive encouragement to anarchy. It is probably well that our legal vocabulary treats a judge as a judge, though of some particular holder of the judicial office. I may quite truthfully say to a fellow lawyer, 'He's no judge'. 'The tacit restraints that exclude from our ordinary ways of talking about law a recognition of imperfections and shades of gray have their place and function. They have no place or function in any attempt to analyze the fundamental problems that must be solved in creating and administering a system of legal rules."
34. The word coercion has many radically different meanings. See Robert Nozick, "Coercion", *Philosophy, Science and Method* eds. S. Morgenbesser, *et al.* (New York: St. Martin's Press, 1969), pp. 440–472. A coercively monopolistic legal system, as I use the word, is one that sustains its monopoly by the use of physical force or the threat of physical force.
35. Fuller, *The Morality of Law*, p. 123.
36. *Ibid.*, pp. 23–24. These must be sharply distinguished from those characteristics that determine formally what a law is and its substantive validity.
37. *Ibid.*, p. 23.
38. Here I must disagree. Fuller searches for some measure of value to apply to things which are different in kind. Such a search will prove as fruitless as the medieval search for a "just price" and for the same reason. The subjective valuations of the parties (the only standard of relevance in a *voluntary* exchange) are incommensurable by virtue of their subjectivity and the lack of an *objective* measure of subjective values. What Fuller may be searching for (as his later reliance on the concept of marginal utility reveals) is a notion of an *ex ante* desire of each party for that thing held by the other. Only if such a condition exists is a free exchange possible, else why exchange? Fuller points out that "we cannot here speak of an exact identity, for it makes no sense at all to exchange, say, a book or idea in return for exactly the same book or idea". (*The Morality of Law*, p. 23). We leave to the parties the determination of the "fairness" of the exchange. Surely this satisfies Fuller's second condition of a situation which makes "a strong appeal to the sense of justice". (*Ibid.*, p. 23).
39. Fuller, *The Morality of Law*, p. 23. The principle of "equality before the law" as a precondition of the rule of law, is a reflection of this concern.
40. I have considered the possible use of restitution to victims of crime in "Restitution: A New Paradigm of Criminal Justice", *Ethics* 87, no. 4 (July, 1977): 279–301 and with John Hagell II in *Assessing the Criminal: Restitution, Retribution and the Legal Process.* (Cambridge, Mass.: Ballinger Publishing Co., 1977), pp. 1–31.
41. At this point I ask the thoughtful reader's indulgence. There are many practical problems which I shall not consider. I would suggest, however, that virtually all of them are *economic.* That is, they concern the economic feasibility of a criminal justice system which receives no income from taxation. Those who favor tax supported prosecution and criminal judicial proceedings might imagine a voucher plan of some kind. What is of concern here is the free-choice, multiple legal code aspect of such a system.
42. There is, of course, a currently existing body of law which attempts to solve similar problems. "What is the subject matter of the conflict of laws? A fairly neutral definition . . . is that the conflict of laws is the

study of whether or not and, if so, in what way, the answer to a legal problem will be affected because the elements of the problem have contacts with more than one jurisdiction." Russell J. Weintraub, *Commentary on the Conflicts of Laws* (Mineola, New York: Foundation Press, 1971), p. 1. For a discussion of various policies to be weighed in a consideration of choice of law problems see Elliot Cheatham and Willis Rease, "Choice of the Applicable Law", *Columbia Law Review* 52 (1952): 959–982.

43. Fuller, *The Morality of Law*, p. 124. (emphasis added).
44. The problem of multiple jurisdictions and its impact on the individual, while genuine, is certainly non-unique: "If the defendant does not want to submit to the jurisdiction of the court, he plainly would not authorize his attorney to enter a general appearance. If he is confident that jurisdiction over his person is lacking, he may, in theory at least, simply ignore the lawsuit entirely. To illustrate: *P* commences an action against *D* in State *X* for an alleged tort committed by *D* in State *Y*, seeking money for damages. *D* resides in State *Y* and has never set foot in nor had any connection with State *X* and has no property there. *P delivers process to D* in State *Y*. State *X* has not acquired jurisdiction over *D*'s person. If judgment on *D*'s default is entered against him, and an attempt made to enforce the judgment in State *Y* or elsewhere by an action in which proper service is made upon *D*, he can then set up the invalidity of the judgment. But *D* may wish to contest State *X*'s jurisdiction over his person in the courts of that State; he may be in genuine doubt whether State *X* has acquired jurisdiction over him, or he may not relish the prospect of an over-hanging judgment against him even though he is convinced it is invalid . . . (in which case) the defendant would file a notice that he was appearing solely for the purpose of challenging jurisdiction and/or submitting generally to the jurisdiction of the court." Richard H. Field and Benjamin Kaplan, *Civil Procedure*, 3rd edition (Mineola, New York: Foundation Press, 1973), pp. 199–200.
45. Fuller, *The Morality of Law*, p. 124.
46. It is legitimate to ask, at this point, to what extent my thesis rests on Fuller's. If you reject Fuller's thesis are you, thereby, forced to reject Legal Naturalism? The answer is a qualified no. The methodology of Legal Naturalism can be employed even if you were to substitute a positivist concept of law in step (1). The only question is why you would be interested in such an approach if you did not view law as a purposive enterprise.
47. I use the term "ideal" as a standard of perfection to be striven toward. While it does not and might never exist, there is no reason, in principle, why it could not come about. A "utopia", on the other hand, is a pleasant fantasy which would require for its existence some basic change in the nature of reality. Serious confusion can arise by using either term and failing to adequately draw this distinction.
48. Since my purpose is to outline the Legal Naturalist methodology I will not here strictly scrutinize a secondary positivist position. It is interesting to observe that Robert Nozick in his discussion of distributive justice does not, contrary to appearances, fall into this error, while David Friedman's *The Machinery of Freedom* (New York: Harper & Row, 1973) seems to be a good example of such a position.
49. (Cambridge, Mass.: Harvard University Press, 1977.)
50. *Ibid.*, p. 290.
51. The two-pronged characteristic of Legal Naturalist methodology may account for two flawed versions of a "free" society. The first (e.g. David Friedman) rejects the State as a proper law-maker (the process aspect of Legal Naturalism), but fails to judge the results of a non-monopolistic legal system (the substantive concern of Naturalism). The second variant (e.g. Ayn Rand) reverses the error by proposing to scrutinize substantively all acts of the law-maker, while accepting a monopoly State as the only proper source of law.
52. Hayek, *Law, Legislation and Liberty*, p. 41.
53. As Fuller puts it: "In the philosophy of science the reorientation associated with the names of Michael Polanyi and Thomas Kuhn has been marked by a shift of interest away from the conceptualization and logical analysis of scientific verification and toward a study of the actual processes by which scientific discoveries are made. Perhaps in time legal philosophers will cease to be preoccupied with building conceptual models to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to an analysis of the social processes that constitute the reality of law." Fuller, *The Morality of Law*, p. 242.

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RAWLS AND CHILDREN

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The status of children in the societal scheme proposed by John Rawls is determined by what would be the decision of persons in the original position. To see how Rawls's concept of justice pertains to children, we will look at three things: (1) Who the decision-makers are in the original position; (2) How the principles chosen in the original position apply to abortion; and (3) Whether the principles of paternalism chosen in the original position are satisfactory.

ORIGINAL POSITION

The original position is a fictional place where a hypothetical decision is made.[1] In the original position, an agreement is made as to the principles which will govern the society which will exist after the parties leave the original position.

Rawls takes this as his starting point because he writes in the contractarian tradition. He wants to have the binding moral force of an agreement, promise, compact, or contract — call it what you will — behind the principles and institutions of his society.

> Since the original agreement is final and made in perpetuity, there is no second chance. In view of the serious nature of the possible consequences, the question of the burden of commitment is especially acute. A person is choosing once and for all the standards which are to govern his life prospects. Moreover, when we enter an agreement we must be able to honor it even should the worst possibilities prove to be the case. Otherwise we have not acted in good faith. Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances.[2]

It should be noted, however, that this agreement, as described, has many of the moral difficulties associated with selling oneself into slavery or with compelling specific performance of a contract for personal services.[3]

It should also be noted that promising and contracting are part of a public system of rules that govern the society after the parties leave the original position.[4] To read this particular set of moral principles back into the conditions governing the original position is certainly invalid. Yet the principles chosen in the original position are not binding unless one of the chosen principles (obligation of promises) has already been accepted (and in a special form that allows something like slave contracts).

The parties in the original position are contemporary rational adults.[5] Rawls asserts that it is best to take a present-time-of-entry interpretation of the original position in which, by hypothesis, all parties are contemporaries.[6] Rawls wants to exclude any notion of the parties to the original position as including all possible persons — all persons who will ever live.[7] He says this is unnecessary because choice in the original position is "equivalent" to rational deliberation which takes place at any time and which satisfies certain conditions and restrictions.[8] Of course, if one takes this latter view and holds to it consistently, one loses the contract metaphor with its binding force on subsequent acts and newborn persons, and one might be tempted to decide moral questions on an act-by-act basis.

Rawls has said that the parties in the original position are rational,[9] and that children do not possess reason.[10] He confuses this picture by maintaining that the parties to the original position do not know to which generation they will belong.[11] Since, however, they know they are contemporaries and they know they are not irrational children, they know they are adults and hence know of their common status as adults in the society after they leave the original position. All that the restriction on knowledge of one's generation amounts to is not knowing how economically developed a society one will live in.[12] The parties in the original position must have adult capacities to reason in order to conduct their deliberations.

Because parties to the agreement in the original position are adults and must know that they have adult rationality, it cannot correctly be said of them that "no one knows his situation in society, . . . and therefore no one is in a position to tailor principles to his advantage".[13]

No matter how we look at Rawls's original position, only adults are present. If it is a hypothetical situation designed to serve merely as an expository device, only adults can operate properly in the hypothesis.[14] If it is a procedure for formulating a social contract, which in order to be valid must *actually* be carried out (as Rawls sometimes indicates),[15] then only adults, according to Rawls, have the capacity to do that. If the original position is merely another name for deliberative choice with special side constraints, again only adults are fit for the task. Rawls's decision-makers in the original position do know an important part of their place in society, their position, their status, and their relative strength — so long as they are adults.[16] And they can deliberate and choose only if they are adults. But it is not obvious that children will consider this method for choosing the principles of justice a fair one.

It should be added that not only are no children participants in the making of the social compact, but Rawls explicitly rules out any moral necessity of express consent on the part of new parties in the society.[17]

Rawls assumes away all problems presented by the all-adult character of the parties to the agreement in the original position by hypothesizing that the adults represent family lines, and that they are concerned for the welfare of persons in subsequent generations.[18] But their descendants may not accept these ancestors as spokesmen for the descendants themselves.

Maintaining that the decision-makers will be concerned for the welfare of others is an arbitrarily *ad hoc* hypothesis added only in the case of intergenerational justice. If it is plausible here, one might as well assume that the parties in the original position are always altruistic rather than self-interested. Rawls introduces intergenerational altruism only to make the results come out the way he wants. He has no warrant on the basis of his previous approach to allow this anomaly.

Rawls argues that later generations could object to the principles chosen in the original position only if the prospects offered by some other conception (e.g. utility or perfection) were such that the parties in the original position might not have been sufficiently intergenerationally altruistic in formulating it.

Thus, for example, Rawls develops a feudal notion of inheritance as the principle to govern the forced saving that will be carried out by the state. His notion is feudal rather than individualist because he focuses on the right to be given an inheritance rather than on the right of bequest as an aspect of property rights: "Imagining themselves to be fathers . . . they are to ascertain how much they should set aside for their sons by noting what they would believe themselves entitled to claim of their fathers."[19] Thus, for Rawls, justice between generations is a matter of feudal entail rather than individual will.[20]

ABORTION

The principles that Rawls maintains would be chosen in the original position may have implications for the question of abortion. Unfortunately some of the most important principles that apply are among the least developed in Rawls's theory. He confines extended discussion to those matters of right which directly bear on justice, to the neglect of other virtues.

First of all, Rawls argues that a "capacity for moral personality is a sufficient condition for being entitled to equal justice". By this he means that a being who is owed just treatment must have a moral personality or a potentiality for such a personality "that is ordinarily realized in due course".[21] This fits extraordinarily well with the Thomist notion of the status of a fetus.[22]

Perhaps it could be argued that at present — given existing technology, laws, and mores — many fetuses are aborted. Hence the personality of a fetus is not "ordinarily realized in due course". But such a view certainly diminishes the universality of Rawls's scheme, a formal property that he himself deems necessary.[23]

Historically, during prohibition of abortion, fetuses did ordinarily develop into moral persons. Given this historical fact, it seems difficult to point to some moment in time and say that from then on it was all right not to allow fetuses to develop, because in order to deny them status as Rawlsian moral persons they would already ordinarily not be allowed to develop.

An examination of Rawls's sketchy and admittedly vague comments on moral personality shows that it is at least plausible to contend that fetuses are entitled to full justice. Rawls says, "We are not directed to look for differences in natural features that . . . serve as possible grounds for different grades of citizenship". He adds:

> I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our judgments. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice.[24]

In addition, the fact that little is known about a fetus's character does not affect the justice owed to it. "As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position."[25] It seems unlikely that we would decree our own execution (unless it were deserved) in the original position.

Moreover it should be emphasized that Rawls may not have available to him the standard libertarian justification for allowing abortions. This libertarian position emphasizes that one does not have a binding obligation to support others. Hence, even if a fetus is a moral personality, no duty of the mother to support it exists.[26]

Rawls, however, contends that all persons have a natural duty to render low-cost aid to the imperiled.[27]

In his formulations of the duty of mutual aid, early in the book, Rawls says (as Bentham does) that the duty holds only when one can aid someone without "considerable" or "excessive" risk or loss to oneself. However, this utilitarian formulation may in practice be called into question by value theory and probability theory. Since costs are completely subjective[28] and since no assessment of the risk of a single event occurring can be given scientifically,[29] it would be difficult to know when to punish for omission of the duty of mutual aid.

This might mean that the duty of mutual aid should be acted upon only when the potential benefactor subjectively evaluates the opportunity cost of aid as negligible. Or this might mean that the state will set up an authority which will subjectively assess costs and then order persons to aid others or punish them for neglect of this duty. Such a state authority seems to share the drawback that Rawls pointed to in the impartial-spectator construct. It fails to take seriously the distinction between persons.[30] A state authority overseeing mutual aid would conflate all desires into one system of desire.[31]

The difficulty in justly enforcing the duty of mutual aid may leave the way open for abortion, but if it does so, it rules out all punishment for individual refusal to aid the needy and all impressment into such service. The consequences of such a notion for Rawls's difference principle in institutional life might be severe.

There remains, however, an additional problem: the priority of the duty of mutual aid. This is an underdeveloped aspect of Rawls's account. But there are reasons to believe that Rawls's position may still entail total prohibition of abortion, or at least frequent prohibitions.

In his formulation of the duty of mutual aid, later in the book, Rawls follows and expands upon a Kantian justification for the duty.[32]

Kant argues that the mutual aid principle ought to be acknowledged because in the long run we are as likely to need help someday as the next fellow. Kant does not include any Benthamite rider which limits the duty's application to only low-cost situations. Rawls too leaves off such qualifiers at this point.

Rawls also makes another sort of argument. He says that social life would be different and unpleasant if we did not know we could conscript others into serving our needs. Somewhat extravagantly, he claims that in such a situation self-esteem, that is "a sense of our own worth," would be "impossible".

More realistically, in a society in which the mutual aid principle was not enforced (this is the case in all present societies following the English common law practice of not mandating any duty to aid the imperiled), persons going into perilous situations would, with self-esteem intact, make contracts with rescue services in anticipation of possible needs. In addition, some rescue services might well operate on a charitable basis in such a society.

All that aside, Rawls presents the duty of mutual aid as a major natural duty and as one of a group of natural duties that are compatible with his principles of justice.[34] So, while the duty of mandatory mutual aid is perfectly compatible, according to Rawls, with liberty, fair equality of opportunity, and the difference principle, it may be in conflict with other natural duties, contractual obligations or good that could be achieved via supererogatory acts.[35] Since the other natural duties (according to Rawls) are mutual respect, not injuring others, and not causing others to suffer, the priority question is important.[36] It seems as if most contractual obligations and possible supererogatory good would be overridden by a mother's duty to aid and support a fetus dependent upon her for life. It also seems that the duty of mutual respect and the duty not to injure others would prohibit the abortion of a potential moral person.

Furthermore the origin of the pregnancy in voluntary sexual intercourse or in rape would not matter for Rawls, since natural duties apply unconditionally without their acceptance in any voluntary act of express or tacit consent.[37]

Hence, the only likely possibility is that sometimes the prevention of suffering to the fetus could justify abortion. Two possible cases might be certitude that the fetus would be a monster baby or certitude that no one, anywhere, would provide better than insufferable child care for the fetus when born. Even not causing suffering might rank lower than not injuring others in a fully developed system of Rawlsian natural duties.

It is impossible to be sure about the priorities Rawls would see until he writes more on the subject. In any case, the fact that Rawls's concept of right may well rule out most abortions is certainly a notable feature of his moral theory.

PRINCIPLE OF PATERNALISM

One of the principles chosen by the parties in the original position, according to Rawls, will be the principle of paternalism. This principle will be necessary because persons in the original position will want to protect themselves against the possibility that they will suffer from feeble-mindedness.

Rawls asserts as a matter of brute fact that in society "others are authorized and sometimes required to act on our behalf".[38] The wording of this description appears to have built into it authorization of the involuntary mental hospitalization of non-aggressive persons. In any case, Rawls, in this discussion, is searching for a general principle to govern all cases of incapacitation. He never considers the possibility that persons may wish to make their own separate contractual provisions for different sorts of incapacitation at different times.

The general principle (the principle of paternalism) that Rawls decides upon is a "real will' notion: "We must choose for others as we have reason to believe they would choose for themselves if they were of the age of reason and deciding rationally."[39]

There are at least two versions that this real will principle could take.[40]

In the first version it is argued that it is permissible to restrict a person's liberty if his choice to act is not rational and if he would not act in this way if he were rational. In this case, rational choice would have to be defined in contradistinction to uninformed choice, emotional choice, and ill-considered choice.

To apply this version then to children as a general rule and as a matter of right, it would have to be argued that all children always were incapable of making rational choices. This does not seem to be true.

Not only does this version assume that children are always irrational, but also that were they rational adults they would agree to the restrictions placed on them. However, common restrictions placed on children (governmental prohibition on purchasing cigarettes, governmental prohibition on running away from home) are not necessarily restrictions that rational persons would accept.

An alternative version of the real will notion makes use of what Gerald Dworkin terms "future-oriented consent".[41]

However, Rawls himself rules out future-oriented consent because he thinks it could be undermined by brainwashing a child to accept what was done to him.[42]

He therefore adds two restrictions on paternalism: (1) paternalistic acts can be engaged in only when the ward has neither will nor reason; and (2) paternalistic acts must be compatible with the ward's known preferences, the principles of justice, and the known primary goods.[43] Rawls's center of attention is the vague notion of brainwashing, but this is not the root of the problem.[44]

The problem with real will notions of the sort that Rawls invokes to justify paternalism lies in their distinction between the real and the actual will.[45] A person exists in time and makes decisions in time. To take the uninformed, emotional, and ill-considered choices and call them the actual will while taking opposite sorts of choices and calling them the real will, comes quite close to applying new terms to our normal distinction between good and evil choices.[46]

In reality, persons only make choices — some of them good, some of them bad. If these choices and actions violate the rights of others, they should be halted if possible or punished. If they are simply bad for the actor, this experience is part of living a life in which one's morality counts and is the proper assignment of risk-bearing.

What Rawls seems to forget is that children have a special relationship to certain adults — their parents. Because these parents have produced the children, as parents they have a right to the initial custody of the immobile infants. While the children live on the parents' property, the parents have the right to set conditions (e.g. curfew hours) on the continued use of that property, provided that these conditions do not violate the children's rights to self-ownership. (For example, physical child abuse would be an invasion of a child's rights.)[47]

Under this libertarian conception of children's rights, no general principle of paternalism is required as part of the theory of the right. While children are on their parents' property, the parents may have need of a theory of the good in order to properly set the conditions for their children's use of the parents' property. Once the children leave or run away from their parents (which they have an absolute right to do), the same principles of right ought to apply to them as apply to another person, including the right to make mistakes in self-regarding actions.

NOTES

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), sec. 3, p. 12; sec. 4, p. 21.
2. Rawls, sec. 29, p. 176.
3. John Norton Pomeroy, Jr. and John C. Mann, *A Treatise on the Specific Performance of Contracts*, 3rd ed. (Albany, N.Y.: Banks, 1926), sec. 24, pp. 78–79; sec. 310, pp. 683–686; sec. 311, p. 687.

   Jean-Jacques Rousseau, *The Social Contract*, bk. 1, chap. 4 in *Great Books*, vol. 38, p. 389; see also Locke, *Second Treatise of Civil Government*, chap. 4, in *Great Books*, vol. 35, p. 30; Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (Edinburgh: T. & T. Clark, 1887), p. 99. In Robert Paul Wolff's book *In Defense of Anarchism*, he criticizes civil obedience as being in conflict with autonomy.

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4. Rawls, sec. 52, pp. 344–350.
5. Rawls, sec. 24, p. 140; sec. 25; sec. 39, p. 249.
6. Rawls, sec. 24, p. 140; sec. 44, p. 292.
7. Rawls, sec. 24, p. 139.
8. Rawls, sec. 24, p. 138.
9. Rawls, sec. 25.
10. Rawls, sec. 39, p. 249.
11. Rawls, sec. 24, p. 137; sec. 44, p. 287.
12. Rawls, sec. 44, p. 287.
13. Rawls, sec. 24, p. 139.
14. Rawls, sec. 3, p. 12; sec. 4, p. 21.
15. Rawls, sec. 14, p. 86.
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17. Rawls, sec. 3, p. 13; sec. 51, p. 335.
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in Political Thought (Oxford: Basil Blackwell, 1975), p. 150.

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33. Rawls, sec. 51, p. 339.
34. Rawls, sec. 51, p. 334.
35. Rawls, sec. 51, p. 339.
36. Rawls, sec. 19, p. 115; sec. 51, p. 337. Rawls also speaks of duties to aid just institutions and duties during just wars, both these do not apply to abortion or child neglect.
37. Rawls, sec. 51, p. 335.
38. Rawls, sec. 39, 249.
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41. Gerald Dworkin, "Paternalism," in Richard Wasserstrom, ed., *Morality and the Law* (Belmont, Calif.: Wadsworth, 1971), p. 119.
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THE "RIGHT" TO A FAIR TRIAL

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The right to a fair trial is commonly considered so central to our system of justice and so much a part of our legal heritage that to deny that people in general have any such right might seem tantamount to impugning our legal traditions as a whole. The right to a fair trial might seem an unimpeachable example or "paradigm case" of what we *mean* by a "right" and certainly it is so widely believed that people have such a right that to claim they generally do not strikes one initially as absurd. I hope nonetheless to present reasons for thinking that people do not in fact generally have a right to a fair trial. Here as elsewhere something similar is true instead, and I hope at least briefly to suggest a proper approach to justification for fair trials as well as to dispute the justification most commonly offered.

I doubt that I will succeed in revising legal thinking in a certain dramatic way and at a single stroke. But I do hope to open for discussion an issue long presumed closed, and I think the results of so doing may prove very startling indeed.

I

(A) It is important for what follows to outline at least roughly a number of distinctions regarding rights and types of interpretations for the phrase "a fair trial". With respect to the former, two examples will be of aid:

(1) Before the civil war, slave owners had (were given, were granted) the right to treat their slaves in any way they saw fit.

(2) Slave owners had no right to own slaves, let alone to treat them as they did.

(1) and (2) are both true despite the apparent contradiction; a sure sign that very different things are being said despite very similar phrasing. The distinction between rights such as those referred to in (1) and rights such as those claimed in (2) has been commonly characterized in the literature as a distinction between "legal rights" and "ethical rights". (1) concerns itself with what rights slave holders had under the law, perhaps, or what rights they had on the books. Thus had the laws on the books differed, (1) might not apply. (2), on the other hand, is a claim the truth of which is independent of what laws were on the books. If (1) is true, then perhaps American law during the period of slavery did not recognize, or ignored, or flew in the face of, or denied people their rights in a certain sense. But they were not thereby without such rights in the sense of (2).

The distinction between "legal rights" and "ethical rights" which I will use in what follows is simply the distinction between rights in the sense indicated by (1) and rights in the sense indicated by (2). That rough distinction is, I think, adequate for present purposes. But it must be recognized that it is a rough distinction; we have no precise outline of either legal rights[1] or ethical rights. Legal rights are not, after all, simply rights on the books. Our legal traditions rely on Common Law as well as Statute Law. Moreover, there are now and have in the past been unconstitutional laws, granting certain rights, on the books. A court which decides such laws to be unconstitutional may thereby decide that people do not in fact have a legal right to something which a particular law says they do, but the court does not thereby decide that such a right wasn't on the books after all. Nor are legal rights simply rights which people would not have without a certain legal code, since there are also plenty of *ethical* rights they would not have without some legal code (the right, for example, to fair treatment under that code). Thus obvious difficulties face the attempt to get more specific about legal rights and ethical rights than I have attempted to get here.

Just as it would be wrong to claim more than a rough outline of such a distinction, I think it would be premature to claim that such a distinction was exhaustive; that all rights were either ethical or legal. Consider, for example, claims such as (3):

(3) The right to legal recourse is currently limited to those with the economic means to instigate legal action.

(3) is compatible with the claim that the poor as well as the rich have a right to legal recourse in the sense of both (1) and (2) above. It may involve some "extended" notion of rights, and should perhaps be read as claiming in a misleading and rhetorical manner that the poor cannot exercise their rights, but it certainly involves some different use of the term than is evident in the examples above. I appeal to it here simply as a warning against presuming all rights to be either ethical or legal, and also against a temptation to outline ethical rights as any rights which are not legal rights.[2]

(B) Something must also be said in preface regarding "a fair trial". We can for present purposes distinguish two basic types of interpretation which might be offered for the phrase; (i) those which would treat it as a phrase applicable only to trials which in fact reach a correct verdict, and (ii) those which would treat it as a phrase applicable independently of the correctness or incorrectness of whatever verdict is reached. Under (ii), for example, would fall interpretations treating "a fair trial" as a phrase (a) applicable on the basis of certain procedures such as a trial by a jury of one's peers, access to legal counsel, and the like, or (b) which specifies that the parties in question are treated fairly in a certain sense. As an account of "a fair trial" in the ordinary sense, I think, interpretations of type (i) are well off the mark and I have no particular candidate in mind of those which would fall under (ii); both (a) and (b) may be questionable. What is of importance here, however, is that various interpretations can be neatly distinguished as of types (i) and (ii).

It might be noted in passing that of the partial outlines presented above (ii.a) seems closest to traditional legal interpretations of "a fair trial". Though the sixth amendment is popularly believed to guarantee the right to a fair trial, it actually speaks only of a *jury* trial, and in fact specifies only that people will "enjoy" the right to a jury trial.[3]

II

Having distinguished several types of rights and types of interpretations for the phrase "a fair trial", we can separate several senses in which it might be claimed that people have a right to a fair trial:

(4) People have a legal right to a fair trial (in a sense specifiable independently of the correctness of its verdict).

(5) People have a legal right to a fair trial (in a sense not specifiable independently of the correctness of its verdict).

(6) People have an ethical right to a fair trial (in a sense specifiable independently of the correctness of its verdict).

(7) People have an ethical right to a fair trial (in a sense not specifiable independently of the correctness of its verdict).

Here (4) is obviously true and (5) is most plausibly false, and we need only to take a look at what is in fact on the books in order to decide their truth and falsity. (6) and (7), however, are more interesting claims, and (6) the more interesting of the pair. There is, I think, some reason to believe that both are false.

(A) Thus consider (6), involving an interpretation for "a fair trial" specifiable independently of the correctness of its verdict. It should first of all be noted that such a trial always involves the possibility of an incorrect verdict, thereby involves the possibility of improper punishment or improper release, and in that sense always involves the possibility of a miscarriage of justice.

Secondly, it must be remembered that people accused of crimes are almost always in fact either guilty or innocent of the crimes of which they are accused.[4] The dictum "innocent until proven guilty" is short for "*presumed* innocent until proven guilty", and the latter phrase wouldn't make any sense if people weren't either innocent or guilty independently of whatever legal proceedings take place and independently of whether they are found innocent or guilty.[5] That a court finds a man guilty entails neither that he is guilty nor that he wasn't until the court so "determined". One is innocent simply if one did not commit the crime in question, and guilty simply if one did.

Given all this, it seems plausible that at least many people accused of a crime, including both innocent and guilty people, cannot be said to have a right to a fair trial in the specified sense. A man guilty of murder may, precisely because he is guilty of murder, have no right to go unpunished for his crime, for the same reasons have no right to a chance to go unpunished for his crime, and thus have no right to any procedure involving a chance at going unpunished for his crime. A fair trial in the present sense is such a procedure, and thus he has no right to a fair trial. For similar reasons, he may have no right to an inadequately guarded cell. A guilty man may have plenty of rights, but the right to a fair trial need not be one of them; his crime may be such that he deserves only prompt and efficient punishment, and thus has no right to a procedure which might result in no punishment at all.

On precisely these grounds, I think, it can be argued that the guilty *generally* have no right to a fair trial. It appears that it would only be in bizarre cases (involving signed contracts guaranteeing fair trials and the like) that even the possibility of considerations overriding desert in virtue of guilt would arise.

It seems equally wrong to claim here that innocent people generally have a right to a fair trial. In the case of an innocent man, a fair trial in the sense at issue always involves the possibility of an incorrect verdict resulting in his unjust treatment. But it would be odd to claim in at least normal circumstances that an innocent man has a right to unjust treatment or a right to a procedure which involves the possibility of unjust treatment. Since it would appear that the innocent man has a right not to be subjected to such a procedure, it would seem very odd to claim that he has a right *to* it.

Similar considerations are relevant to the claim that people have a right to a fair trial in the other interpretation of "a fair trial" offered above. If a guilty man had a right to a fair trial in the sense of a trial specifiable only in terms of the correctness of its verdict, it would appear that a guilty man had a right to a procedure which *must* result in his conviction and proper punishment. But it seems odd to say that anyone has a right to be punished, odd to say that anyone has a right to be convicted, and thus odd to say that anyone has a right to a procedure which must result in these.

It may be more plausible that an innocent man has a right to a fair trial in this second sense, but it would still appear that he has a right moreover to no trial to all, a right not to be bothered with such things, and thus a right not to be subjected to any such procedure. Even if it were the case that the innocent had a right to a fair trial in this sense, it would not follow that people in general do; the guilty still would not.

(B) Two possible lines of objection against the argument presented spring immediately to mind, but neither seems adequate against it.

(1) It might be said, first of all, that the form of the argument is a bad one. It appears to argue from the claims that S has no right to x, and that y involves x or the possibility of x, that S has no right to y. But we can certainly think of contrary cases. Brushing one's teeth always involves the possibility of accidentally choking to death on a wayward bristle. It would seem odd to say that I have a right to accidentally choke to death on a wayward bristle. Yet I surely have a right to brush my teeth.

I think it can be maintained in defense of the original argument, however, that the toothbrush analogy is a misleading one. In particular, the case of brushing one's teeth is one in which the possible consequence x is not something that is wrong, right, or a travesty of justice; it is simply unfortunate. In cases in which it would be dreadfully wrong that x or a travesty of justice that x it seems much more plausible that one has no right to a procedure involving x or involving the possibility that x for the same reasons that one has no right to x. Were brushing one's teeth to involve the possibility of someone else's accidental electrocution or the violation of an important promise or a travesty of justice, I think, we would have good reason to withdraw the claim that one had a right to brush one's teeth. To the extent that the original argument fits this pattern rather than its offered analogue, it seems safe from such an objection.

It should also be noted here that whether S has a right to y, where y involves the possibility of x, may depend on both the seriousness of x and whether x is a real possibility or a far-fetched one. One would not have thought, however, that the right to a fair trial was intended as a right contingent on the seriousness of an incorrect verdict and the extent to which it was a real possibility.

(2) It might secondly be urged against the argument above that it takes a conveniently suspect claim as its target. Thus it might be insisted that there are other ways in which the right to a fair trial might plausibly be construed and which escape its clutches.

Consider first the claim that there is something else which people have a right against, namely punishment solely on the grounds that they have been accused of a crime. Wrongly or rightly, this has often been taken as being involved in the right to a fair trial, and has sometimes even been thought to amount to the same thing.

Here considerations of desert throw significant light. It is in one sense true, and in another sense questionable, that no one deserves to be imprisoned simply because they have been accused of a crime; that phrase is simply ambiguous. It may be read as claiming that there is one thing no one deserves, namely being imprisoned simply because they have been accused of a crime. But under that interpretation the claim seems questionable, since there might be a case in which someone is guilty of so heinous a crime that they not only deserve imprisonment but deserve to be imprisoned for the wrong reasons. It might well be the case with regard to a man guilty of murder and innocent of public drunkenness that thirty days merely on suspicion of public drunkenness is the least he deserves. The phrase may equally be read, however, as claiming that it is never solely in virtue of being accused that anyone deserves imprisonment. That, I think, is true, and applies to people irrespective of their guilt.

Consider with this in mind the claim that people have a right not to be imprisoned simply because they have been accused. If this is read as claiming that there is one thing which everyone has a right against, namely being imprisoned simply because they have been accused of a crime, the claim seems implausible for reasons similar to those given in other cases. I suggested above the possibility of a case in which someone deserved (because of having committed some heinous crime) to be imprisoned for the most arbitrary of reasons. Here as elsewhere it would seem odd to say that anyone has a right not to be x-ed when they in fact deserve to be x-ed, and thus in at least some imaginable cases there is or would be no ethical right against arbitrary punishment and no ethical right to anything else. There *is* a true claim regarding rights and accusation, closely related to the true claim concerning desert above, but it would seem a very odd "interpretation" of the claim concerning rights above. It *is* true that it is never solely in virtue of being accused that anyone has no right to anything but imprisonment.

Arguments of the same form can, I think, be framed against any right to a fair trial which it is claimed that people always have or always have in certain circumstances irrespective of guilt or innocence. There is one further way, however, in which the claim to a right to a fair trial might be interpreted. There are cases in which rights seem to conflict in a certain way; I may claim a right to x and you a right to y, x and y conflict, and the fact that I have a right to x results in the inapplicability in this case of any right you have in general to y. Thus I may in general have a right to free speech and you may in general have a right to silence noisy people. When an apparent conflict arises, it is because I have a right to free speech in a particular case that you have no right to silence noisy people in that case. Now it may be that the right to a fair trial is like y in such cases; it may be claimed simply that there is *a* right (in general?) to a fair trial, which accrues because an accusation has been made, perhaps, but *not* that the fact of accusation is sufficient for their being such a right in all cases, *not* that such a right fits the pattern of x above in all cases, and *not* that it is a right immune to inapplicability on the pattern of y and the right to silence noisy people above.

I see no reason to think there is such a right, and the alternative justification for fair trials suggested below is not one which would justify the claim that there is. But such a notion of the right to a fair trial *would* escape the clutches of the general argument presented. It would also, however, represent an incredibly weak and unhelpful as well as uncommon notion of any right to a fair trial.

It is not merely rights which may fit the pattern above. A whole constellation of things, including obligations and deserts, may do much the same work. I may in general have a right to brush my teeth as often as I like. But in a case in which brushing my teeth would involve violating important obligations or result in a tragic catastrophe that I could have foreseen, I can not be said to have any such right; in such situations I have no right to brush my teeth. It's also the case that one often has no right to x if one deserves something quite different; questions of desert may override claims to rights in certain standard ways. It would seem odd to say that I have a right to fail a particular exam if I deserve a passing grade, and it seems odd to say that I have a right to a passing grade if I deserve to fail.

The importance of all this is that it could be similarly argued that any right to a fair trial would be a right constantly rendered inapplicable by other things (including desert) which hinge on guilt or innocence. Thus even if there *were* a right to a fair trial in the sense outlined it would be a right constantly rendered inapplicable by the simple fact that the person accused is either guilty and thus deserves only punishment, or innocent and thus deserves immediate release. Since the situation in which someone is accused is almost always one in which they are either guilty or innocent, and since questions of desert hinging on guilt or innocence would generally if not always render inapplicable any such (general) right, there has rarely been and could rarely be a situation in which anyone in fact has a right which they supposedly have in general. Situations of accusation are generally ones in which it would be at least seriously misleading simply to claim that someone had that ethical right.

III

I promised in the introduction to give not only reasons to think that people generally do not have any right to a fair trial, but to offer as well some partial indication of what is true instead.

(A) It seems obvious that we should conduct investigations, as thorough as possible, into the guilt or innocence of people who have been accused of a crime. We should do so because that is the best way to find out whether people are guilty or innocent, and how we should treat them from then on depends on which they are. We owe it to ourselves, perhaps, to conduct trials of a certain form (that form which seems most likely to clearly exhibit innocence and to ferret out guilt) in that we owe it to ourselves to protect ourselves from the guilty among us and have an obligation to the innocent among us to protect them.

This, I think, is a proper if partial approach to ethically justifying fair trials. That people have a right to such is not the justification, because they generally have no such right. Moreover, such a justification for a fair trial is one which hinges on our ignorance; it is because we don't know who is innocent and who is guilty without proper investigation, or at least have no right to assume that we know without proper investigation, that we should conduct trials of a certain form.

Both the attack on the right to a fair trial above and the alternative justification suggested here, I think, fit neatly with our intuitions concerning proper procedure on a day of judgment before an omniscient god. It is precisely because the fair trial is to be justified as an *investigative* procedure that an omniscient god would be under no obligation to provide one and that no one would have any right to demand one.

(B) Things may be a bit more baroque when it comes to the relation between ethical rights and legal rights. It might seem, for example, that the existence of an ethical right to x entails that there should be a legal right to x, and that the lack of an ethical right to x is sufficient indication that it is not the case that there should be a legal right to x. But this need not be the case. If we should give people trials of a certain sort and the institution of a legal right to a fair trial is necessary to ensure that we do so, it may be that we should give people a legal right to a fair trial despite the fact that they have no ethical right to one. I will leave the consideration of such auxiliary issues to others or to another paper, since it is after dust has settled over the central issue of whether people have an ethical right to a fair trial that these other issues become most important.

(C) I would finally like to offer a simple example of why any of this is of importance, especially since one justification of fair trials has only been impugned in favor of another. It is common for lawyers to justify the fact that they are doing their level best to free a man they fully believe to be obviously guilty by appealing to the right to a fair trial and by construing it as a right which applies universally to the guilty as well as the innocent. To the extent that the outline above is correct, and to the extent that lawyers have attempted to offer an ethical justification for their efforts on behalf of the guilty, they've failed.[6]

NOTES

1. A term which may, after all, be quite ordinary.
2. I would also append a final warning with respect to ethical and legal rights. There are various rights in the sense of (1), (2), and perhaps (3), and some further sentence may involve a claim concerning rights in one of these senses. It would be wrong, however, to think that the term "right" has two senses: "ethical right" and "legal right", and it would be wrong to think that every appearance of the term "right" is one in which we can substitute either "legal right" or "ethical right" as meaning the same thing. Legal and ethical rights are like red and yellow roses in this way rather than like banks (the kind you keep your money in) and banks (of rivers). Were we to take "rights" as having several senses in the way the term "bank" does, we would for example be at a loss as to whether to substitute "legal rights" or "ethical rights" for the second appearance of the term "rights" in (4): A legal right is a right which is on the books. We cannot supposedly substitute "ethical right" for "right" in its second appearance, and to substitute "legal right" would make the phrase a 'a right which is on the books' peculiarly redundant. But this is a warning as to how we might go wrong in treating "senses" of "rights", rather than a legitimate problem. (4) parallels nicely in certain respects with (5): A red rose is a rose which is red.
3. I will not here consider at length whether what the sixth amendment says (or what it would say were it to read "people hereby have the right to a fair trial") is neither true nor false, in virtue perhaps of being a "performative utterance". If interpreted in terms of legal rights, I think, it would be true. If interpreted in terms of ethical rights I think it would be false for reasons given in the body of the paper, and at any rate the "hereby" would stand out like a sore thumb.
4. The exception, of course, being cases in which a law neither unambiguously applies nor fails to.
5. Nor does "presumed innocent until proven guilty" in fact apply to people accused of crimes. If we did indeed presume them innocent we would presume it a waste of time and money to try them, and would presume that they shouldn't be put on trial at all. If we either thought of them as innocent or treated them as if they were innocent we would immediately release them with no questions asked. The best defenses I've run across of the dictum "innocent until proven guilty" are (1) David Boyer's claim that it amounts to nothing more than a stricture concerning burden of proof, and (2) Jack Sanders' proposal that the jury (though not others) should indeed start with the presumption that the government is simply trying to harass the defendant.
6. I am much obliged to David Boyer for fruitful discussion on important points too numerous to indicate individually and for a frustratingly scrupulous reading of an earlier draft.

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THE NEGATIVE INTEREST RATE: TOWARD A TAXONOMIC CRITIQUE

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A basic principle of Austrian economics is that the originary rate of interest (the rate of discount of future goods compared to present, otherwise identical, goods) can never be negative.[1] The reason for this arises not because capital is productive, nor out of man's psychology. Rather, it is embedded in the very concept of human action. As Professor Mises eloquently states:

> Time preference is a categorical requisite of human action. No mode of action can be thought of in which satisfaction within a nearer period of the future is not — other things being equal — preferred to that in a later period. The very act of gratifying a desire implies that gratification at the present instant is preferred to that at a later instant. He who consumes a non-perishable good instead of postponing consumption for an indefinite later moment thereby reveals a higher valuation of present satisfaction as compared with later satisfaction. If he were not to prefer satisfaction in a nearer period of the future to that in a remote period, he would never consume and enjoy. He would not consume today, but he would not consume tomorrow either, as the morrow would confront him with the same alternative.[2]

Nevertheless, in spite of the foregoing, there are many benighted souls who insist upon the possibility of a negative rate of originary interest.[3] They are continually discovering cases which "prove" their conclusion. The number of such examples has reached such proportions that it seems advisable to take account of them in a systematic way. Accordingly, this paper is devoted to classifying them in a manner that makes the most intuitive sense: in accordance with the economic errors which are necessarily committed in their very statements.

1. DIFFERENT GOODS

Perhaps the greatest number of attempts to disprove the necessity of a positive rate of interest are those that do not properly appreciate the fact that in Austrian theory, the definition of a "good" can only be made in terms of the individual actor's choices — and not based on physical, chemical, geographical or other such properties.

Perhaps the most famous of these examples is the ice-in-summer vs ice-in-winter confusion. It is often stated that a man possessing ice in the winter, in the middle of the blizzard, would prefer to consume it in the summer, when there will be very little of this commodity in existence (before the advent of modern refrigeration). This, as far as it goes, is true enough. But when it is alleged that *therefore* the man in question prefers future consumption of ice to present consumption, that he discounts the value of present goods more heavily than future goods, that, in other words, his time preference for the future is equivalent to a negative internal rate of interest, then it is time to call a halt. For it is not true that the man prefers a good receivable in the future to the *exact same* good receivable in the present. On the contrary, it is a *different* good. As Prof. Rothbard puts it: "If Crusoe has a stock of ice in the winter and decides to 'save' some until next summer, this means that 'ice-in-the-summer' is a *different* good, with a different intensity of satisfaction, from 'ice-in-the-winter', despite their physical similarities."[4] If there is any question about whether "ice-in-the-winter" is the *exact same* good as "ice-in-the-summer", all one need do is ask, "If faced with a choice between the two, which would *I* choose?" As long as at least some people would prefer one over the other (presumably, the latter over the former), we can rest assured that they are not merely different elements of a supply of the same good.

This example can serve as the basis for the

*I owe the inspiration for this paper to the Human Action Seminar and especially to Genie Short and Don Lavoie.

generation of others: ice cream in the winter vs ice cream in the summer (before the advent of refrigeration); three hundred and sixty five cups of coffee this morning vs one cup of coffee each morning for the next year;[5] and so on. These are all cases where even though the goods may be physically, chemically, or biologically identical, they are *economically* quite different.

Then there are cases where the good is physically as well as economically different: A professional basketball team trades a present member of the club for a draft pick next year; or trades away a draft pick in 1977 for one in 1978. Far from indicating a negative interest rate, such action is indicative of the fact that the present member of the team is a *different* individual than the athlete who may be picked in next year's draft; and it may be that the owner of the team sees a better "crop" of players coming up in 1978 than will be available in 1977.

Ludwig Von Mises points to the case of the recipient of a gift of two tickets, one to *Carmen* and the other to *Hamlet*. Unfortunately, they both take place on the same evening. The person may well feel, with regard to the show he does not see: "I wish I had a ticket to a later performance, rather than one for this evening." But this does not prove a preference for future as opposed to present goods. As Mises states: "(The person) does not have to choose between future goods and present goods. He must choose between two enjoyments both of which he cannot have together. This is the dilemma in every instance of choosing."[6]

Mises goes on to point out that even the case of the miser cannot contradict the universality of the law of time preference for the present, "for the miser, too, in spending some of his means for a scanty livelihood, prefers some amount of satisfaction in the nearer future to that in the remoter future".[7] But then it seems as if the great Mises wanders from the path:

> Extreme instances in which the miser denies himself even the indispensable minimum of food represent a *pathological* withering away of vital energy, as is the case with the man who abstains from eating out of fear of morbific germs, the man who commits suicide rather than meet a dangerous situation, and the man who cannot sleep because he is afraid of undetermined accidents which could befall him while asleep.[8] (my emphasis)

Calling these extreme instances pathological[9] would seem to imply that they are somehow inconsistent with the universal validity of time preference. But the suicide is not a counter-example. We cannot legitimately interpret suicide as a preference for the future over the present. (Does the suicide not realize that he will never reach the future if he does not consume, at least minimally, in the present?) Even the starving miser *acts*. He does *something* in the present, and, as such, exhibits his time preference for the present. What does he do? He sits there and refuses to eat! But he refuses to eat *now*, as opposed to *later*, when he might be dead, and no longer able to fulfill his historic mission of refusing to eat. By refusing to eat *now*, the starving miser indicates his time preference for *present* refusals to eat, as opposed to future such refusals. Suicide is an *intra* temporal phenomena, not an inter-temporal one, whether one achieves death by not eating, not sleeping, or actively killing oneself. The suicide prefers death to life, at the moment he does away with himself. He may be misguided, he may be misinformed; but these are only psychological considerations. As far as praxeology, the logic of human choice, is concerned, we must interpret the suicide as preferring the state of affairs which includes his death, to the one in which he continues to live. As such, it is purely an intratemporal choice, entirely irrelevant to time preference.

2. COMPLEMENTARITY

Another alternative interpretation in cases of seeming negative time preference is complementarity. Thus, a person may not want to consume milk now, preferring to consume milk later on, for a whole host of reasons relating to complementarity. He may have just eaten a heavy meal, and be of the opinion that milk would be discomplementarious to the other foods he has already eaten. Alternatively, he may only like to drink milk while he eats cake, and cake, for some reason, may not be available until later. He then prefers milk later to milk now not because of any time preference for the future, but because, given cake in the future, but not in the present, future milk is more of a complementary good, for him, than is present milk. Again, he may prefer milk later to milk now because he intends to engage in strenuous physical exercise in the immediate future, and drinking milk right before athletics is harmful.

This phenomenon may play a part in examples such as drafting basketball players, which we considered above under the rubric of "different goods". A team may be willing to part with a present player in order to gain a future draft pick because the latter fits in better with other players than the former. A 1978 draft pick may be preferred to one in 1977 if he is expected to be more complementary to the 1978 team than the latter will be to the 1977 team.

3. ANTICIPATIONS

There scarcely exists a child, who, when confronted with a cream filled Oreo cookie, did not make the following analysis of the situation: (1) the cream filling is a delight beyond description ("indescribably delicious", in the felicitous phraseology of the advertisements for Mounds Bars); and (2) the path toward true joy lies in the putting off, for as long as possible, of the consumption of said cream filling.

Now, were whole generations of American kiddies secretly addicted to negative time preference, for shame? No. They all preferred cream filling later to cream filling now because, given the former, in addition to all that cream, they could also enjoy the anticipation of the future delight. They soon learned that to give in to their brutish instincts, and to gobble up the cream filling forthwith, would be to lose out on these anticipations. Thus, what was at issue was not merely present vs future cream filling; allied with future cream filling, as against present cream filling, were the *anticipations* of the former. Since these anticipations were only possible if the brutish consumption were put off, the choice came down to present consumption as against future consumption *plus* anticipation. That the latter was chosen, then, in no way implies time preference for the future.[10]

4. GIFTS

Let us suppose that, the previous analysis notwithstanding, loan contracts are consummated actually stipulating negative rates of interest. For example, A lends $10 to B, right now, and agrees to accept $9, in one year from now, as full payment of the debt. Are we forced to conclude that the rate of interest is equal to minus 10%? (We make the usual assumptions of no inflation, perfect certainty of debt repayment, and all others necessary to maintain the originary rate of interest.)

By no means. One alternative interpretation is that there is an implicit gift being made from A to B, of an amount of $1, *plus* the true (positive) interest payment based on the $10 loan. That is, in lending $10 to B, and accepting $9 in return, a year later, A is really just *giving* B $1, plus the amount that could have been received from lending $10 for one year at a positive rate of interest.

5. INSURANCE PREMIUMS

Another possibility is that A, for some reason, thinks that money, all money, will be in danger for less than a year, and that after one year passes, money will suddenly become safe again. For example, A may expect an injun attack to take place sometime between the present and one year from now, and have certain knowledge that the cavalry is due in exactly one year. If the injuns attack, no money will be safe; but after the cavalry arrive, the usual conditions of safety will prevail.

The supposed negative rate of interest would then really be an insurance premium. For example, the originary rate of interest could be 7%, the insurance premium could be 17%; 7% − 17% = − 10%.[11]

Those who thought the attack was most likely (and/or who had the least tolerance for the risk) would be willing to pay the highest insurance premiums; i.e. they would be willing to offer the most present money in return for a given amount of notes payable after the one year period. Those who thought the attack unlikely, or felt that the troops would arrive immediately, would be the borrowers of present money, the lenders of future money in the form of notes.

There would have to be *some* costs to holding money for A to be willing to part with $10 for the promise of $9 in a year (we assume zero storage costs given an era of paper money). If it is not an implicit gift, and there are no such costs, why then would a person such as A be willing to give up $10 to receive $9, when he has the alternative of waiting for one year, and having at least the $10 he started with, at no costs to himself?

NOTES

1. For the view that the *market* rate of interest can never be negative see *Man, Economy and State*, by Murray N. Rothbard (New York: D. Van Nostrand Company, 1962), II, 693–698. For the opposite point of view, see Ludwig Von Mises, *Human Action* (Chicago: Henry Regnery Company, 1966), p. 542.
2. *Ibid.*, p. 484.
3. Robert Nozick is wide of the mark as far as time preference is concerned. In his "On Austrian Methodology" (Unpublished Manuscript), page 62, he states:

   > "The time preference found in animal experiments is not, I assume, to be explained by their performing rational calculations, even implicitly. How is it to be explained? . . . (A)n organism which . . . exhibits . . . time preference will, on the average, satisfy more of its desires. Supposing that such a time preference tendency arose by random mutation and was transmitted genetically, and that the desires involved themselves were connected with survival to reproductive age, ability to protect progeny, etc., then time preference would be evolutionarily adaptive, and would be selected for in the process of evolution, once it appeared. If some such explanation accounts for its presence in lower organisms, it is reasonable to think that we too have some genetically based time preferences. The evolutionary process has built time preference into us, for within that process the rationality of time preference is reflected as adaptive value."

   The problem with seeing "time preference as evolutionarily adaptive" is that this implies that there was a time before time preference took hold; that in the past, creatures *acted* and *chose*, even though they lacked the capacity to prefer present action to future; which means, they lacked the ability to act in the present — a manifest impossibility.
4. Rothbard, *Man, Economy and State*, p. 61.
5. Roger Garrison, "Reflections on Misesian Time Preference" (Unpublished Manuscript), p. 6.
6. Ludwig Von Mises, *Human Action* (Chicago: Henry Regnery, 1966), p. 489.
7. *Ibid.*, p. 490.
8. *Ibid.* p. 490.
9. The word "pathological" must be meant either in a psychological sense or in an economic one. If the former, it is completely irrelevant to praxeology, our area of interest, which is concerned with the logical *implications* of human action, not with the psychological motivations behind it. If the latter, Mises must be interpreted as seeing the case of suicide through extreme dieting as *sui generis*, as not fitting within the usual nexus of positive time preference. It is this latter view that is criticized in the text of this paper.
10. Negative anticipations are also possible. Thus, if one is promised a public whipping, for transgressions of the criminal code, one may well wish to get it over as soon as possible. This case may be interpreted as indicating a higher time preference rate than is actually true. Here again, it is not a simple choice between whipping now and whipping later. If one chooses immediate whipping, he also gains by not having to suffer from the anticipation of the future punishment. It is only when this additional benefit is netted out of the analysis that the true rate of (positive) time preference can become apparent.
11. It must be stressed that the resulting negative number is based on insurance principles, and cannot legitimately be considered a "negative rate of interest". As Roger Garrison has brilliantly written (in personal unpublished correspondence):

    > "The possibility of a negative rate of interest is mentioned by George Stigler in his *The Theory of Price* (3rd edition only) on page 278. He footnotes his remark and points out that no one would accept a negative interest rate unless there were considerable *storage* costs associated with holding cash. His negative rate, then, is really the interest rate minus the storage rate. Of course, if the latter is larger than the former, the difference will certainly be negative. What is objectionable is thinking of this difference as the interest rate. The Austrians have never claimed that the interest rate minus whatever anyone might decide to subtract from it will still of necessity be a positive number! (The interest rate minus the distance to the moon is a very large negative number. It is not an extremely negative rate of interest. Rather, it is approximately the distance to the moon.) In other words, the Misesian insight that the interest rate must be positive abstracts from e.g. storage payments."

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SHACKLE: A CRITICAL SAMPLING

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The works of Shackle are a mixed bag. There is no better critique of the modern Neoclassical orthodoxy than his *Epistemics and Economics* and few worse analyses of Keynes than his essay "Keynes and the Nature of Human Affairs".[1] We do not have a unified coherent body of thought but rather scattered insights, flashes of brilliance, moments of confusion.

His foundation is solid. His analysis starts from the point of view of the decision-maker, apparently identical in every respect to the Misesian "actor", and he sees the fundamental category in economics to be choice in the face of uncertainty. From this auspicious beginning he formulates an impressive and detailed theory of decision, integrating a nondistributive subjective probability theory into an analysis of the role of time. In addition to this tremendous wealth of positive theory he has incisively dissected the prevailing orthodoxy for its failure to conform to the characteristics of the decision-maker's situation.

This is the kind of theoretical groundwork upon which one could hope for the construction of an intricate edifice of higher economic theory. Such hopes are unfulfilled. Indeed Shackle disdains the task of unifying economic thought under any one formalization.[2] He sees the tremendous division of labor in his field to be an encouraging sign, that the science is expanding, that we are willing to apply different tools to different problems. No one doubts that specialization *per se* is indispensable to the advancement of any science. But the tentacles of different abstract economic theories must not become disconnected from their roots. There is no connecting tributary amongst the plethora of economic theories from Leontief to Harrod, from Samuelson to Sraffa, or even between micro and macro. Most of economic thought today, as Shackle has demonstrated, is explicitly *disconnected* from the roots, choice in an uncertain world. What is needed in such a quagmire is an old style economic treatise, a consistent unifying body of knowledge. It is this need which Shackle fails to grasp, and it is the fact that this need is being filled by the modern Austrian school that makes so much of the modern orthodoxy more irrelevant than wrong.

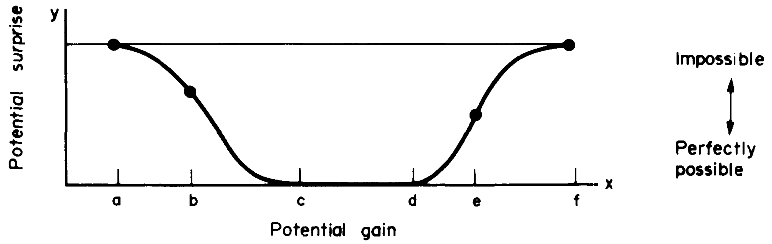
This paper is a critique. I see little need for reiterating everything Shackle says with which I *do* agree, and little possibility of refuting everything Shackle says with which I don't. I've chosen three topics of varying scope and importance as a kind of critical sampling of the works of this intriguing economist.

I. CARDINALITY

Certainly some of Shackle's most fertile efforts have been his investigations into the nature of decision in the face of uncertainty. Among his most insightful contributions is his concept of focus loss/focus gain. A decision-maker reviews several courses of action, the results of any of which he is uncertain. What he wants to know is what is the best possible and the worst possible result of taking each particular action. The actor focuses attention on possible loss and possible gain in order to decide among action schemes.

In his De Vries lecture, "Decision and Uncertainty",[3] Shackle formulates a theoretical construction to explain a decision by means of graphical and mathematical techniques. If we take X to represent the range of potential gain of an imagined course of action, as seen by the actor, and Y to represent the plausibility of that chain of events, we could draw the graph:

For example, X could be in units of dollars, profit, or a measure of some kind of psychic profit, and Y could be in units of potential surprise ranging from zero surprise (perfectly possible) to maximum surprise (impossible). Thus at $X = a$ the expected profit is small, and the outcome is judged impossible, while at



$X = d$ the outcome is larger and perfectly possible. Shackle then shows how the most important possible futures imagined are the least gain (or worst loss) and the best gain (least loss) which are deemed reasonably possible, for example points b and e on our graph. Outcomes less than b and greater than e are too unlikely to be relevant to the actor, points in between b and e are irrelevant since worse or better outcomes are possible. This "relevance" is expressed by Shackle's variable ϕ, attention arresting power, which he proceeds to graph on a third axis.

As a purely expository technique I would have no quarrel with this graphical construction. It is as handy and as liable to misuse as the Marshallian scissors. The focus gain/focus loss curve expresses more knowledge of a phenomenon than we can imagine ourselves ever having (for example any person's risk aversion). It also brushes aside the problem of measuring such "quantities" as potential surprise, attention arresting power and (to be general) *ex ante* psychic profit. One could suspend disbelief to achieve the clarity of graphs so long as Shackle acknowledges these difficulties. He apparently doesn't.

> . . . for each degree of intensity of feeling which any of these symbols (X, Y, ϕ) can represent, there must be just one and only one particular member of the set of real numbers which can be assigned to this degree of feeling.

The intensity of feeling must be "uniquely cardinal", with explicit non-arbitrary units and zero points. Critics (notably Carter) have charged that these criteria do not obtain and that therefore his "function" is indeterminate. The problem is that the axes are elastic. "If, having given one possibility a likelihood of 0.8 and a desirability of 10, we give a second possibility 0.5 and 20, the second is made more arresting. But if we give the second 0.4 and 17 — and there is no reason why we should not — then this *first* will get a higher value of ϕ".[4]

Shackle draws an analogy with measuring a box to determine its volume. We could measure length in inches, width in centimeters and height in feet, but were we to do so our function $V(X, Y, Z)$ of volume would be different than if we had measured everything in inches. Similarly, he argues, if we change the units of X, Y, and ϕ their functional relationship would have to change too, so, he concludes, his function *is* determinate.

But this argument misses the point. Surprise is not to profit what length is to width. Shackle's problem is to find non-arbitrary units of three entirely different phenomena and relate them in a function in which the units are mathematically resolved. He must find the analog to 1 inch = 1/12 foot for his units of intensity of surprise and attention-arresting power. He has done nothing of the kind.

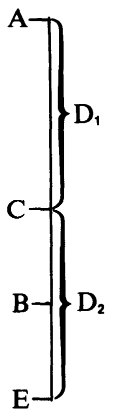
In a "solution" suggested by Popper, Shackle tries to nail down the function by specifying degrees of surprise Y (e.g. flabbergasted, startled, etc.) and separate and identifiable degrees of pleasure X (ecstatic, delighted, etc.) He then forms an indifference curve among different specific points, say (Y = mildly disconcerted but X = delighted) is deemed equivalent to (Y = startled but X = dejected). But to attach names to intensities of feeling is not to make them cardinal or determinate. The degree of surprise attached to "startled" is no less arbitrary a unit than the degree of surprise designated by 0.8. One would have hoped that the quantification of feelings would have died with Bentham.

The problem is not that a person measures surprise in a different and incomparable way from the way he measures pleasure. The *more basic* question is whether we can say that a person measures *any* feeling. "A is preferred to B" is different from "A is measured to equal feeling intensity = a, and B is measured at b, and $a>b$". Feelings can be ordered but not measured. Chocolate is not twice as good as vanilla. The decision-maker does not measure their pleasures and compare results, he simply prefers chocolate to vanilla, period.

In another essay Shackle points to the limitations of dealing strictly with ordinal numbers. ". . . (S)o long as we suppose that the discriminated levels of any kind of feeling are merely orderable, we shall still be precluded from attaching any meaning to the relative steepness of such a curve at different points and to the convexity or concavity of its segments".[5] It is admittedly understandable that an economist brought up in the current orthodoxy would feel uncomfortable until his analysis had been fully translated into calculus and geometry. Mathematization has superseded plain conceptual clarity as the ultimate expository methodology. To get nicely continuous functions we merely have to "suppose that the decision-maker's discriminable and orderable levels of feeling were *infinitely* many within the meaningful range of potential surprise and that of desiredness and covered densely the whole of each of these ranges".[6] Usually an admirable fanatic for accuracy to the decision-maker's circumstances, Shackle has sacrificed pure methodological individualism before the altar of mathematics. The actor does not stop and *measure* the intensities of his potential surprise or psychic profit to compare them. No computation is necessary to decide if this or that outcome has greater attention arresting power.

Shackle discusses the argument of W. E. Armstrong that an ordinal scale can be translated into a cardinal one given certain subsidiary assumptions. If the actor can "compare *differences* between intensities, as well as the intensities themselves, and judge that the 'distance' from A to B is greater or less than the distance from B to E, then if an intensity C is presented to him such that he cannot . . . declare the distance A to C to be greater, or less, than the distance C to E, we can claim, as a starting point, that the whole interval A to E has now been divided into two *equal* subintervals".[7] It is by no means obvious that an actor actually *can* make the above subtle distinctions, but even if he could it is certainly true that in making a decision he *doesn't* pause to formulate a unit of measurement of his psychic intensities by dividing his value scale into equal parts. When we analyze a decision it should be on the basis of how it *is* made, not on how it *might* be made. The actor *orders* preferences and in general psychic intensities. The biological technique by which the mind does this is irrelevant (and, incidentally, presently entirely unknown).

Value Scale



II. TIME PREFERENCE

Time for acting man is a continual flux, not a uniform space. There are the categories of *ex ante* and *ex post,* and of nearer and more remote futures. "The 'now' of the present is continually shifted to the past and is retained in the memory only."[8] In Shackle's words, "(t)here is for us a *moment-in-being*, which is the locus of every actual sense-experience, every thought, feeling, decision and action".[9]

Shackle has trouble with the idea of duration. The theorist, he explains, can step back from time and view a duration, a span of time each instant of which can be called actual. But for the actor whose only reality is the fleeting present, the moment-in-being, duration presents a "paradox", a combination of actual with imagined instants of time. "In what sense can duration form an aspect of the individual's moment-in-being?"[10]

At the outset I must protest that I fail to see the paradox. To think about a period of time *is* to step back from time. The moment-in-being itself must be a duration if such time consuming processes as thought, feelings, action, etc., are to take place in it, as he says they do. He rejects the idea "that the actuality of one moment-in-being could be added in some sense to the actuality of another and of another so that a long-lasting experience would be in some sense more powerful, more to be desired or feared, than a brief one . . ."[11] No, when a person evaluates a good which can serve him for 10 years he doesn't do any adding of actualities, whatever that would mean. The actor steps back from time *at least* to the extent of imagining the whole duration, and the utility to him of the service he can receive from the good over that time span. If there is a paradox in the idea of duration for the actor it is one of Shackle's own creation. But his cure for this so called paradox is worse than the disease.

> Inside the moment-in-being, duration must, I think, be looked on as a cumulated intensity, built up and stored by memory or anticipated by imagination. . . . We must allow for a complex pyramiding of enjoyments by anticipation in which the individual looks forward, say, on Monday not only to an enjoyable event on Friday but to his anticipation on Thursday of that event, and to his anticipation on Wednesday of Thursday's pleasure of anticipation, and so on.[12]

This tortured explanation only confuses the matter. Afraid to give his decision-maker the power to abstract from time and evaluate a duration, Shackle instead has his actor anticipating his own anticipations. This is supposed to explain why a longer duration is more to be desired or feared then a brief one. When a man buys a house that is expected to last 50 years, its greater value to him over one which lasts 20 years is self-evident. Very simply, "the quantity of service rendered is different in both cases".[13] It is no more surprising that the 50 year house is more valuable, than it is that 50 chairs are more valuable than 20. A year of shelter is a good, and the theory of marginal utility applies to it as well as to any other good. The fact that a man always *exists* in the present does not prohibit him from imagining and evaluating any duration, in the future or past.

But Shackle doesn't stop here. Brandishing his weapon, cumulative anticipations, he challenges the Austrian theory of time preference. "But if the notion is accepted, that the act and the psychic concomitants of imaginative anticipation can themselves be anticipated, then it seems to follow that, for example, Sunday's picnic or concert can be anticipated with enjoyment on Saturday, and that on Friday not only the event itself but Saturday's anticipation of it can be enjoyed in anticipation, and so on indefinitely, so that in a rather complex manner the total intensity of an anticipational experience may conceivably be an *increasing* function of the length of time expected to elapse between the moment-in-being and the date of the anticipated event."[14] Imagine the scenario: "No, Harriet, I think I'll buy the car next year to give my anticipations of anticipations . . . a chance to pile up." But why not take it a little further? As mentioned above, the future is evaluated in anticipation, the past in memory. If I buy the car now, then tomorrow I could experience the pleasure of remembering my having the car today. And in two days I could have the pyramiding memory of tomorrow's memory of today's use of the car *plus* the memory of tomorrow's use of the car. And then we can speculate on whether yesterday we had the pleasure of anticipating tomorrow's memory of today's use of the car.

The only people who think like this are philosophers. But to solidify the defenses of the theory of universal time preference, a few comments are perhaps in order. Let's say we have Shackle's case of a picnic-goer who on Friday anticipates his anticipation on Saturday of the picnic on Sunday. On Friday he has a balance of forces between firstly a kind of time preference (which Shackle calls "vividness of the direct image of an anticipated event"[15]) and secondly by the piled up anticipations of anticipations. Now Saturday comes along. Why not delay the picnic until Monday, to allow the same order (2) of anticipations to cumulate as he did on Friday? Why has the pyramiding effect been reduced relative to the "vividness" effect? If this picnic-goer is really serious about his Friday's anticipations of anticipations as being the only reason for delaying the picnic two days, then why has he on Saturday suddenly cut the delay to one day? The Shacklean picnic-goer would never have his picnic, nor would he want it, for he's valuing the anticipation higher than the picnic. In fact, in praxeological terms the good desired *is* the anticipation, not the picnic.

In general, the good which is desired *may* be neither the picnic itself nor the Saturday anticipation but rather both taken together. When the child on Christmas Eve prefers to keep the anticipation until the next morning, it is clear that the good is the whole experience including the pre-Christmas anticipation. In any event, the example fails as a critique of time preference.

The usual misunderstanding of time preference is evident here, a confusion between pure time (nearer vs remoter) and calendar time (Friday vs Sunday). The Misesian theory of universal time preference says that, other things being equal, the actor prefers satisfaction in the nearer to satisfaction in more remote time periods. In the actor's plan, a more or less complete calendar of actions is structured; some actions, such as going to work, must take place in definite calendar time slots, say 9 to 5 Monday through Friday. Sundays may be free for picnics. This structure imposes constraints on the effectiveness of the time preference, for other things are not equal. Many actions cannot be done simultaneously with one another but must be ordered, and fit into the structure of plans. The structure of plans might be analogous to blocks on an incline, where the present time is at the base and the actor's horizon at the top. Plans must be fitted into this incline, some blocks must precede others, but other things being equal, the blocks slide down toward the present. The force of gravity (time preference) brings actions as close to the present as possible.

Calendar time schedules, say a class at 6:00 Monday, forces certain actions into particular slots, around which actions unconstrained by calendar slots can be fitted. We can't really prefer to take that class today because it's not *given* today, we have no option of preferring the class today over the class Monday. The picnic-goer has a calendar preference for Sunday picnics, not a preference for remoter time as such, as proven by his Saturday decision to *not* delay the picnic until Monday.

Goods are valued for their ability to fit into the plans of the actor as he moves through time. A good which fills an empty slot in his plans tomorrow will, other things being equal, be valued higher than an otherwise identical good which fills a slot next month. This preference is directly reflected in the discounting of future returns from assets. If I have an acre which yields me $100 a year in rent, the $100 coming up *this* year is more vaulable to me than the $100 I expect next year. The 1978 rent fits into a slot on my planning incline at a nearer point to the present and thus is valued more to me than the 1979 rent which fills a more remote slot. The value of that acre to me depends on the intensity of my time preference (the slope of the incline), my calendar constraints (slots), my expectations upon which the plans are built, and (in a market economy) on the acre's selling price and the market rate of interest. But time preference alone is enough to explain the finite valuation of an infinite stream of returns.

"Interest rates", Shackle writes, are "determined in the speculative bond market". This is true but somewhat superficial, like saying a price is determined by supply and demand. A bond represents a theoretically infinite stream of income; why then are not all bond prices infinite? Because people discount the future; a dollar today is worth more (even without inflation) than a dollar in ten years. The degrees to which speculators discount the future decide the price of the bond. The degree of future discounting, or time preference, is primary to the formation of the demand and supply of bonds, and thus to the bond price. Expectations concerning this particular bond issuer's future earnings, in conjunction with the investor's time preference, determine the bond price and simultaneously the market interest rate.

Shackle tries to explain the discounting of future income streams entirely by the uncertainty of the future. "In order to give themselves some presumption of getting back at least as much as they lend, lenders will require the promised repayments to exceed, in total, the principal which is initially lent."[16] "Lender's uncertainty is the beginning and end of the essential explanation of interest rates." Risk plays a significant role in market interest rates but could hardly be called a sufficient explanation. Even if the future were known with certainty people would still prefer an apple today to an apple in 10 years, or 1000 years. The fact that the near future is valued more highly than the distant future is expressed by Shackle indirectly and as if it were a secondary consideration of minor importance. The lender in foregoing present consumption subjects himself to "mental discomfort" and must receive "compensation for this". This compensation for discomfort, an apparent throwback to the abstinence theories of interest, would be more conveniently integrated into a coherent theory of interest if it were simply acknowledged that an actor values the near future more than the distant future, other things being equal.

III. KEYNES AND THE DEPRESSION

The most disappointing characteristic about Shackle to an Austrian is his worship of Keynes. One becomes accustomed to seeing economists pay homage to the Keynesian revolution; the way they will scramble over each other to prove what Keynes really meant, it always miraculously turning out to be just what *they* meant; the way theories which had been common before Keynes are attributed to Keynesian innovation; the way the contradictions are reconciled, excused, ignored. That so many great minds fall to their knees before the Keynesian Mystique is to me an embarrassment to the economic profession. Listen to this:

> There is a time, perhaps more than one, in the history of every science when it has its *mystique*: an idea, surprising, vaguely hinting at enormous powers of explanation, and far from being fully understood, takes command of some men's thought and imagination, and is followed to the stars. It is for these men a time of great happiness, a time filled with a sense of purpose, of conquest, of being members of a small *elite*, a time of achievement past and promised, of great prestige and a feeling of being borne upon irresistible waters of success. Such a time, in England, was the 1930's for those who had any share, however humble, in the Keynesian liberation. Whether a man was himself a liberator or a young convert whose feet were scarcely yet entangled in the classical net and was unknowingly eager for release, the time was magical.[17]

With the Keynesian "liberation" came "prestige" and "success". "At last I understood . . . I joined the elect, for I understood Keynes. (And this, at first, put one in rather the position that understanding Einstein had done a decade earlier.)"[18] Einstein indeed.

Shackle got more than *esprit de corps* from Keynes. "This . . . great convenience, conferred by money, is called liquidity, and when preference for liquidity over more specific schemes of gain becomes very widespread and very strong, we have unemployment and business depression, because, of course, merely *holding* money rather than investing it in the purchase of plant, equipment, buildings, livestock and so on employs nobody."[19] But this higher demand for cash balances is a symptom, not a cause of a depression. When the stock market crashes are we to reprimand people for being somewhat hesitant to invest? But no need to worry. Shackle assures us that next time we have a depression the government will "unhesitantly start to spend their way out of it".[20]

If Shackle merely accepted Keynes on depressions and left it at that it would be understandable if not ideal. But he holds Hayek's theory in very high regard at the same time. In fact, hard to believe as this may seem, Shackle thinks he can reconcile Hayek and Keynes. "Was this [Hayekian approach] the antithesis of Keynesianism? Not at all, it only seemed to be. Hayek was describing what happened when easy credit in a time of full employment leads to overambitious schemes of equipment-building, to consequent shortage of consumers' goods and to rising consumers' goods prices, which finally defeat the equipment schemes by bidding factors of production away from them, so that they are left half-finished and stranded. It is strange that this theory gained adherents in the thirties, when it was scarcely being illustrated anywhere in the

Western World. [*sic*!] It is not surprising that it was readily abandoned in favor of Keynes. But it has made a dramatic comeback. For since the Second World War we have seen in many countries just that steady rise of the general price level which comes of trying to do too much with given resources. . . . We may say that the Hayek–Keynes debate of 1932 was unnecessary, for Keynes was discussing deflation and Hayek was describing inflation.''[21]

Surely Shackle should know that money inflation was at the same time Hayek's cause of, and Keynes' cure for, the depression. They weren't discussing different things; the world was in a depression and both theorists were trying to explain why and what to do about it. Their answers to both questions are different. Hayek's theory *does* apply to the 1930s: it tells us how we got there. What does it mean to try to ''do too much with given resources'', and what does this have to do with a ''steady rise of the general price level'', and most importantly, what does *either* have to do with Hayek's business cycle theory? Hayek cannot and should not be reconciled with the economist who wrote ''. . . the remedy for the boom is not a higher rate of interest but a lower rate of interest! For that may enable the boom to last''.[22] Either Shackle has failed to understand Hayek or I have.

Shackle also seems to have been impressed by the multiplier theory. ''Here then is the great lever which Kahn and Keynes showed could be applied to the elimination of unemployment. If, when there is massive general unemployment, the Government starts an extra stream of annual purchases of machinery, buildings, roads, *or anything which cannot directly satisfy consumers* of, say, £100 million, and if the marginal propensity to consume is, say, 3/4, then £400 million a year of extra income, and the corresponding extra employment, will be generated.''[23]

The brilliant criticisms of the multiplier theory in Hazlitt[24] and Rothbard[25] need not be repeated here. The fundamental error of Keynes was to confuse a purely formal relationship, investment as 1/4 of income, with a causal relationship (a practice which, incidentally, macroeconomics has nowadays made a commonplace). One could expect naïve-positivist neoclassical economists to fall for such a theory, but for Shackle of all people, the indeterminist radical, to accept this mechanistic theory is inexplicable.

The multiplier must get under way through inflation of the money supply. It is interesting here to contrast the Keynesian account of inflation spreading prosperity through the economy, with Mises' treatment of inflation:

> An increase in a community's stock of money always means an increase in the amount of money held by a number of economic agents . . . For these persons, the ratio between the demand for money and the stock of it is altered; they have a relative superfluity of money and a relative shortage of other economic goods. The immediate consequence of both circumstances is that the marginal utility to them of the monetary unit diminishes. This necessarily influences their behavior in the market. They are in a stronger position as buyers. They will now express in the market their demand for the objects they desire more intensively than before; they are able to offer more money for the commodities that they wish to acquire. It will be the obvious result of this that the prices of the goods concerned will rise, and that the objective exchange-value of money will fall in comparison.
>
> . . . the increase of prices continues, having a diminishing effect, until all commodities, some to a greater and some to a lesser extent, are reached by it.
>
> The increase in the quantity of money does not mean an increase of income for all individuals. On the contrary, those sections of the community that are the last to be reached by the additional quantity of money have their incomes reduced, as a consequence of the decrease in the value of money called forth by the increase in its quantity.[26]

The multiplier theory ignores the late tributaries of the inflation process, by assuming constant relative prices. Those who receive money first benefit, and increase spending; those from whom they buy benefit and increase spending. But all this magically increased spending must have some effect on prices. Those who see costs going up *before* they benefit from any stimulated sales are hurt by the inflation. Everyone on the tail end of the multiplier suffers and there's no *a priori* reason to suppose that the net effect is an improvement. The inflationary boom could be entirely an accountancy illusion owing to depreciation of the currency between the time of purchase of factors and the time of sales.

But the outstanding contrast between the Keynes and Mises treatment is in methodology. Mises is concerned with factors which influence individual decision makers, a point of view with which one usually finds Shackle to be in sympathy. Keynes is concerned with the mechanics of the system, with the functional relationships between faceless macro variables.

The chief beneficial effect of the *government investment* multiplier is seen to be its stimulation of the economy by instilling a general sense of optimism among investors. Keynes sees the depression to be essentially a result of general pessimism among investors; all we have to do is jostle them into a good mood and, presto, we'll end the depression. Shackle applauds Keynes for this insight, citing it as an infant version of a theory of expectations.

Prenatal, perhaps. Just as Keynes aggregates all other aspects of his field, his theory of expectations is macro: investors as a class have overall optimism or overall pessimism. But it is not investors as a class who invest, and it is not investment as such about which decisions are made. Individual investors make specific investment decisions about specific investment possibilities. Even in portfolio investment the broker who picks out components of the package does so on the basis of his expectations of the profit-making possibilities of the specific stocks involved. To obscure this complex decision-making process under the macroeconomic categories of general optimism and pessimism is to abstract from the essence of the very process under scrutiny.

Furthermore, Keynes tries to use this macroized simplification of expectations to explain booms and slumps. What reason have we to believe that when a few bears turn into bulls this will start a stampede? Where is the connection between pseudo-random changes in expectations and massive unanimity?

The Keynesian explanation for the stampede is Keynes' caricature of the stock market in Chapter 12 of the *General Theory*. Speculation is reduced to gambling and expectations to guesses about everyone else's expectations.

> Speculators may do no harm as bubbles on a steady stream of enterprise. But the position is serious when enterprise becomes a bubble on a whirlpool of speculation. When the capital development of a country becomes a by-product of the activities of a casino, the job is likely to be ill-done.[27]

This diatribe shows more about Keynes' ignorance of investment decisions than it tells us of the stock market. First of all gambling is the *creation* of risk for sport, speculation is the *assumption* of already existing risk for profit. Secondly, Keynes assumes that professional speculators are ignorant of (and unconcerned with) the real companies and products, the future of which they are trying to forecast. This assessment conflicts with both what we know about professionals in Wall Street and with what we would reasonably expect. The most successful stock brokers are the ones with the *alertness* for inside tips and company policy changes, intimate knowledge of the industry, a pragmatic, hardnosed understanding of human action, experience in the interrelations between industries, in short, those who know the real world. Gamblers who merely bet on trends, who jump bandwagons of optimism or pessimism are not likely to survive long in the speculation business.

Individuals always expect something and reveal their expectations in action. If most people expect terrible disasters the expectations for religious "production", cemetary plots, space ships, fallout shelters, hospitals, and so forth, improve relative to, say, pension plans. If major transformations take place in the context of expectations there will be capital losses from specific capital, retraining personnel, etc. But this change is poorly characterized by the general terms "optimism" and "pessimism" which beg the crucial question: "Optimistic with respect to what?"

The Keynesian sees the depression as a period when everybody is too pessimistic (presumably with respect to every conceivable investment!) or too timid to invest, and the solution is to have the optimistic, brave government do some "investing" to bring everybody into a good mood. The Austrian sees the depression as a period of manifested malinvestment, where drastic changes in relative prices are necessary to adjust capital allocation toward conformity with consumer time preferences. The solution is to allow these adjustments to occur.

Shackle's sympathy with the gambling-game description of speculation is evident in section 19.3 of *Epistemics and Economics,* where he uses the pure gambling game as a first approximation to a stock market, but he is unwilling to go as far as Keynes in ridiculing speculators. Elsewhere usually a methodological individualist, Shackle makes at best an uncomfortable Keynesian. His concession to the gambling analogy can only be explained as one example of his occasional exaggeration of the thesis that the future is unknowable. He has carried the uncertainty of the future to the extreme of envisioning stock market speculation as wild guesses about guesses, tied only tentatively and indirectly to any real factors.

This extreme Shacklean position, best expressed by his phrase "knowledge of the future is a contradiction in terms",[28] at best de-emphasizes and at worst ignores most scientific knowledge. Shackle looks at the decision-maker moving through time, aware of the past *only* through memory and of the future *only* through imagination. Neither "only" is correct. In a recent issue of *Scientific American* half a dozen methods of dating objects from the distant past are evaluated from the famous carbon-14 test to tree ring counting. Since World War II our anthropological knowledge has improved immensely, and one should hardly call this knowledge "memory". When a physicist charts the radioactive decay from a rod of uranium into the future the word "imagination" does not adequately convey the nature of his estimate. We have much knowledge of the past beyond memory, we have much knowledge of the future beyond imagination, in short, we learn natural laws of the universe and apply them in analysis of both future and past events. $E = mc^2$ is not an historical statement, it represents knowledge of the future.

Of course in dealing with human action our knowledge of the future has vast pockets of ignorance. There is uncertainty in our understanding of other actors' plans and expectations. But to say that our knowledge of the future is highly incomplete is not to say we have *no* knowledge of the future. An entrepreneur must rely on his understanding of human action and there is no foolproof way of predicting human behavior. Nonetheless, some entrepreneurs are evidently better at this understanding and hence predicting than others. We do not exhibit scientific rigor in such predicting but on the other hand we are not entirely blind. Since we have *some* knowledge of the future (as Shackle argues, we can eliminate the impossible) some entrepreneurs, e.g. those who know natural laws and praxeology, are more likely to succeed than others. There is such a thing as speculative expertise. There is a divergence of expectations among speculators about specifics, but the expectations are bounded by *real* considerations. It may be called a guess, to speculate that the price of potatoes will be X in a year. There will be a divergence of "guesses" on the futures market around the price X. But there is general *convergence* among the experts about the reasonable range $X–a$ to $X+b$ which is most likely. The person lacking in speculative expertise with regard to the future's market in potatoes might guess wildly outside of the reasonable range, and on rare occasion may even be right. But we must emphasize that on the whole the experts are more often correct and that if they are guessing it makes sense to call it *educated* guessing.

Shackle mentions the constraints to guessing imposed on the speculator by the real world as an afterthought, as a minor revision to the great Keynesian insight. Perhaps Shackle is just being too modest. The Keynesian diatribe against the stock market *rests* on the alleged irrationality of speculators, but Shackle (and others) have demolished that charge the moment real world constraints are shown to influence speculation significantly.

Concerning educated guessing, Shackle emphasizes the "guessing", that is, emphasizes the divergence of expectations in a speculative market around the market-day equilibrium, the balance between the opposing forces of bears and bulls. The Austrians emphasize that important adjective "educated", and point out the convergence of expectations about whatever *range* of possibilities is overwhelmingly suggested by the evidence. There is no contradiction here. Whenever our knowledge of a phenomenon is incomplete, characterized neither by complete ignorance nor by omniscience, there will emerge both convergence of opinion concerning the likely range of possibilities derived from our limited knowledge, and divergence of opinion with regard to any single specific outcome, due to our pockets of ignorance.

The neoclassicals are wrong in characterizing actors as omniscient, while Keynes is wrong in tending to characterize actors as totally ignorant of the future. The Austrians correctly perceive actors to be uncertain but not blind. Shackle, while he possesses definite nihilistic Keynesian tendencies, probably belongs with the Austrians on this issue. It's a shame he doesn't know it.

NOTES

1. Shackle, *The Nature of Economic Thought* (Cambridge University Press, 1966), p. 33.
2. *Ibid.*, p. 16.
3. Shackle, *Time in Economics* (North-Holland Pub. Co., 1958), p. 35.
4. *Ibid.*, p. 57.
5. Shackle, *Decision, Order and Time* (Cambridge University Press), p. 130.
6. *Ibid.*, p. 130. (emphasis mine).
7. Shackle, *Decision, Order and Time*, p. 131. (emphasis Shackle's).
8. Ludwig von Mises, *Human Action* (Chicago: Henry Regnery Co. 1966), p. 100.
9. Shackle, *Time in Economics*, p. 13.
10. *Ibid.*, p. 30.
11. *Ibid.*, p. 30.
12. *Ibid.*, p. 30.
13. Mises, *Human Action*, p. 483.
14. Shackle, *Time in Economics*, p. 32.
15. *Ibid.*, p. 32.
16. Shackle, *Epistemics and Economics* (Cambridge University Press, 1972), p. 190.
17. Shackle, *The Nature of Economic Thought*, p. 14 (emphasis his).
18. *Ibid.*, p. 53.
19. *Ibid.*, p. 129.
20. *Ibid.*, p. 14.
21. *Ibid.*, p. 55.
22. Keynes, *The General Theory of Employment, Interest and Money* (Harcourt, Brace & Co., 1936), p. 322.
23. Shackle, *The Nature of Economic Thought*, p. 48 (emphasis mine).
24. Henry Hazlitt, *The Failure of the New Economics* (Princeton, N.J.: D. Van Nostrand & Co., 1959), pp. 135–155.
25. Murray N. Rothbard, *Man, Economy and State* (Los Angeles: Nash Publishing Co., 1973), pp. 757–759.
26. Mises, *Theory of Money and Credit* (New York: Foundation for Economic Education, 1971), p. 139.
27. Keynes, *The General Theory of Employment, Interest and Money*, p. 159.
28. Shackle, *Epistemics and Economics*, p. 47.

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J. S. MILL: THE UTILITARIAN INFLUENCE IN THE DEMISE OF *LAISSEZ-FAIRE*

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The period which encompasses, roughly, the years from 1836 to 1870, was the critical one for political economy as conceived by Adam Smith. It was at this juncture that some of the inconsistencies in the doctrine of the Classical Economists of the earlier years came to be questioned, that certain tendencies in the old position which were opposed to *laissez-faire* came to full fruition, and that the old notions of the nature of political economy as a discipline came under close scrutiny and were, ultimately, transformed.

The anti-regulationists, the heirs of Adam Smith, won perhaps their finest battle in the 1840s with the repeal of the Corn Laws under the prodding of the leaders of the Manchester School, Cobden and Bright. But from then on the tide seemed to reverse itself as critics, such as Cliffe Leslie, a follower of the German Historical School of economics, and the socialists, focused upon the supposed shortcomings of the free enterprise, self-interest system. Initially, the main focus of attack was upon the distributional aspect of free competition, with the claim being that the ideal of distributive justice was not attained in an individualistic, competitive system where some men inherited great fortunes and enjoyed most of the fruits of other men's labor. Gradually, the Smithian claim that a system based upon individual self-interest would lead to the maximization of national output fell under critical scrutiny. Charges were levelled that such an organization of industry wasted both human talents and natural resources, and that it tended towards monopoly and the curtailment of output in an effort to raise prices artificially.

The orthodox political economists — i.e. those who considered themselves to be the followers of Adam Smith, or Smith through Ricardo — contributed to this re-evaluation of received doctrines and also reacted to the assaults upon it by its most influential critics, the socialists. John Stuart Mill, Cairnes, and Sidgwick, particularly, devoted a great deal of effort to evaluating the validity of these attacks upon Classical Economics, and they themselves lent appreciable impetus to the movement away from viewing political economy as definitively proving the validity of the system of *laissez-faire*. Thus, the received doctrine suffered considerable assault both from its avowed enemies and its putative supporters.

Also in this period, under the influence of Nassau Senior and J. S. Mill, political economy as a discipline underwent a metamorphosis in scope and method. The Smithian conception of political economy came under attack. Smith had conceived of it as a science for perceiving natural laws and formulating principles of direct assistance to the legislator in his efforts to maximize national output. Senior and Mill divided political economy into a "science" and an "art", following the hint offered by Bentham, with the "science" having nothing definitive to say to the political artist, the legislator. Senior even went so far, at one point in his life, as to deny the very possibility of an "art" of political economy. The general result of this discussion of scope and method was to give further impetus to the movement to disassociate political economy from the practical prescription of *laissez-faire*.

If political economy *qua* "science" could not offer practical advice with any certainty, if considerations other than economic ones must be weighed by the legislator in making policy decisions on economic matters, then the "science" of political economy cannot definitively establish the validity of any one system of industrial organization over any other. It cannot prove that *laissez-faire* should everywhere and at once be enacted, nor can it disprove a socialistic, regulationist organization of society. It can merely analyze the economic effects of either system, and it can only do this abstractly and hypothetically.

As we examine these changes, it will become apparent that, under the twin influences of the socialists' critique of political economy and the changes wrought by its defenders, political economy came to recognize ends other than the single Smithian one of the maximization of national production. The justice of the distribution effected by the free market became a question of critical importance to political economists of the orthodox school. The problems of poverty and the working class became a much greater concern to these men than it had been to their immediate predecessors.

John Stuart Mill was the dominant influence in this period. It was he who provided the theoretical justification for the abandonment of *laissez-faire*. He did so, not, I have concluded, by any innovations on the level of "pure" economic theory, for in such matters he was a strict Ricardian, accepting the cost of production theory of value, the wages-fund doctrine, the subsistence law of wages, the Malthusian population theory, the Ricardian rent doctrine, and the projection of a future stationary state. No, we must look elsewhere for Mill's contributions to the demise of *laissez-faire*. It was, rather, in his reappraisal of Bentham's moral principle of utility, in his distinction between the laws of production and the laws of distribution, in his sympathetic examination of socialism, and in his enthronement of expediency as the regnant principle with regard to governmental intervention in the economy, that Mill's influence proved decisive. Let us first examine Mill's reformulation of the greatest happiness principle.

1. MILL'S UTILITARIANISM

Mill was far less of a political egalitarian than Bentham. In his moral system, too, Mill was must more of an elitist than Bentham. He criticized Bentham for placing all pleasures, intellectual and banal, upon an equal footing, discriminating between them not on their quality but merely their intensity and duration, as well as their tendency to produce subsequent pleasures unalloyed with pains. Mill attempted to place pleasures in an hierarchical order based upon their "intrinsic" quality rather than their "circumstantial advantages" as he implied Bentham had done.[11] In order to accomplish this ranking of pleasures, Mill had to invoke the Platonic notion of the wise man capable of judging between pleasures of the flesh and those of the mind. Having experienced both, he can be the only one capable of judging between them. This *deux ex machina* affixed to the Benthamite principle of utility changed it essentially from a principle giving equal weight to everyone's pleasures regardless of their nature as judged personally by the legislator to a principle which required some omniscient elite to declare which pleasures are to be preferred, which are to be discouraged by legislative policy, and who is going to be encouraged in his mental pleasure and who discouraged in his venal delights.

While Mill insisted that each man is to be treated as one and his pleasures given equal consideration, it is quite evident that his principle, by leaving much greater room for individual value judgments by a "moral legislator", permits and necessitates an ever greater measure of discretion on the part of civil authorities given the task of evaluating policy recommendations in the light of their tendency to promote the greatest happiness of the greatest number.

Bentham's principle of utility is open to objection on the grounds that it leaves too much room for arbitrary decisions on the part of government officials in applying the principle to concrete cases. The reason for this is the elusiveness of the principle itself. In fact, the principle is really two principles — one dictating that the individual pursue the greatest happiness for himself, and the other directing that the general good of society as a whole ought to be the end. And, furthermore, the principle is not decisive as to whether a policy affording a greater total happiness with great inequality is to be preferred to one offering smaller units of happiness but with a more equal distribution. The relevant question at this point being — did Mill provide an explanation of the principle of utility which could overcome these objections, or did he succeed only in muddying the waters a bit more?

Mill follows Bentham's example in declaring that, like all ultimate ends or first principles, the principle of utility does not admit of proof in the ordinary meaning of the term.[2] The sole evidence that anything is desirable is the fact that people do actually desire it. Mill claims, then, that no reason can be offered why the general happiness is desirable except that each person desires his own happiness; each person's happiness is a good to that person, therefore, the general happiness is a good to the aggregate of all persons. Thus, Mill commits the same logical fallacy, the fallacy of composition, that Bentham committed before him. Given the syllogism that:

> Frederick desires Frederick's happiness
>
> and Albert desires Albert's happiness . . . therefore
>
> Frederick and Albert desire the happiness of
>
> Frederick plus Albert.

This is simply not a logically legitimate deduction; for it to be legitimate one would have to assume the following additional premises that:

Frederick desires Albert's happiness and Albert desires Frederick's happiness.

The point being that one cannot deduce from the statement that each individual prefers his own happiness over his own pain that, therefore, the happiness of the aggregate of all persons is an object of desire for each one of them, or desirable for them, or even to say exactly what that would mean. Mill has not improved on Bentham's argument at all in this respect, which is rather curious considering Mill's otherwise acute logical faculties.

Mill underscored the importance of the moralist and legislator placing the happiness of all people upon an equal footing. It is important to take note of his phrasing because it differs from Bentham's. What he says is that this equal claim of everyone to happiness involves an equal claim to *the means* of happiness, except to the degree that the inevitable conditions of human life and the general interest set limits to this maxim.[3] The conclusion being that all social inequalities which have ceased to be considered expedient assume the character not simply of inexpediency, Mill maintains, but of injustice — they appear tyrannical. One may conjecture, then, that if private property, for example, were to cease being considered expedient, then it would be just to abolish the institution and its inherent inequality. Actually, one need not engage in speculation on this score, for this is precisely Mill's argument in the *Principles of Political Economy* and his "Chapters on Socialism". If it were proved that socialism could provide a feasible alternative to capitalism and, in addition, Mill's concern over its possibly deleterious effects upon individual independence and creativity could be overcome, then socialism would be acceptable.

It is quite evident that Mill's moral foundation is much more radical than Bentham's, for Mill says that each individual has a claim to equality in the *means* of happiness, and this is something Bentham did not maintain. The implication of Mill's foundation, is, clearly, that each individual, so far as it is possible, considering the demands of general happiness and the conditions of development of the society, has a claim to be supported.

Mill improved upon Bentham's doctrine in one respect, that of clarity, when he declared that the Utilitarian standard is not the agent's own greatest happiness but the greatest amount of happiness altogether. He chose the collective formulation of the principle explicitly, while Bentham shuttled from the individualist to the aggregative formulation depending on the occasion. The result of this choice on Mill's part was that the principle became much more collectivist in orientation, more sympathetic, and more concerned with unselfish beneficence. Noble characters are necessary to the fulfillment of the Utilitarian ideal. Between his own happiness and that of others, Utilitarianism, Mill enjoins, requires one to be as strictly impartial as a disinterested and benevolent spectator. The Christian moral injunction of Jesus is quoted with approval as personifying the ideal of Utilitarian moralists — to do as you would be done by, and to love your neighbor as yourself.[4] This summons up memories of Smith and his "impartial spectator" much more than it does Bentham. Although Bentham did say that beneficence was a virtue, his man was beneficent for the rewards it would bring to him and not for some abstract ideal of sympathy with mankind.

For Mill, the Platonic wise man is more than a philosophical construct designed solely to provide a theoretical tool by which to judge between pleasures. Bentham's famous epigram is categorically rejected by Mill. It is better to be a human being dissatisfied, he triumphantly declared in contravention of Bentham, than a pig satisfied, better to be Socrates dissatisfied than a fool satisfied. The final judges between pleasures must be the ones who know both the mental and physical pleasures, or be a majority of such men if they disagree. That this doctrine had more cogency when it was buttressed by the Platonic teleology of the realm of the Ideas, is abundantly apparent. The Platonic man of wisdom was in touch with the Forms, with an existent hierarchy which had more reality than the flux of the natural world. When he claimed that the study of mathematics was, say, superior to the life of a farmer, he had an entire eschatology to back him up. Mill's wise man has no such claim. Where does he get this authority from; who designates him as the authority for a particular society; and how does one know that he truly knows all pleasures and is unbiased and a perceptive observer? An infinite regress seems to be involved here. One would need wise men to designate the wise men, and other wise men to select the first group . . . These are all problems raised by Mill's innovation, but he does not answer them.

Mill's explication of the principle of utility left much greater room for discretion, for arbitrary determinations of what constitutes the greatest happiness of society on the part of legislators and moralists, than did Bentham's already loose formulation. It is quite evident, also, that Mill's greater emphasis upon man's social nature and his identification of his own interest with that of the whole, left the way open for a much more favorable attitude towards government intervention in the economy and even socialism, should the expediency of the latter prove evident. The tension between individualism and the aggregative implications of the principle of utility were still apparent in Mill, but, except in the extreme case of total social homogeneity, Mill seemed less troubled than Bentham by the need for social unification and harmonization of interests.

2. THE PRODUCTION — DISTRIBUTION DISTINCTION

In his *Autobiography*,[5] Mill characterized the original element in his political economy as consisting in the distinction he drew between the laws of production, which he said had the properties of natural laws, and the laws of distribution, which were subject to human intervention and man-made conventions and institutions. He claimed to have been awakened to this distinction, which he said was overlooked by previous political economists, by his reading of the St. Simonians and the promptings of his wife, Harriet Taylor Mill. However, Senior made the same distinction in his *Outline of Political Economy* in 1836, although he was not prompted by this observation (as Mill was) into questioning the validity of private property and the general framework of the competitive system. Mill is justified, then, in crediting himself with the thorough application, if not the original formulation, of the "production-distribution" distinction.

Let us now examine Mill's argument rather closely and critically, because it is the basis of all his subsequent endeavors at disassociating political economy as a science from any *a priori* association with or justification for a particular economic system or method of property distribution; i.e. of his efforts to purge political economy of any identification with the *laissez-faire* system exclusively. What Mill maintained was that the laws pertaining to the production of wealth are "real laws of nature", dependent on the properties of objects, the "unchangeable conditions of our earthly existence", and the knowledge we possess of these properties at any given time. The laws of distribution, on the contrary, are dependent on the human will, and merely the necessary results of particular social arrangements, although the consequences of such laws are not arbitrary. Mill's predecessors, he argued, failed to distinguish between the two kinds of laws and assumed that the existent social arrangements — for example, the determination of wages, prices, and rents — are inherent necessities, impervious to human intervention and will. The existent institutions and customs of a particular society, which constitute the conditions and presuppositions upon which deductions about the shares of distribution must be made, are treated by Mill as transitory, as not "final". With progress and social improvement, these presuppositions (for example, the existence of private property) are liable to be altered, and, hence, the laws of distribution, which depend partly on necessities of nature and partly on social arrangements, will be correspondingly transformed.

Mill's contention that there is nothing optional about the "natural laws" of production,[6] which depend upon antecedent accumulation, the ultimate properties of the human mind, and the nature of matter — while the distribution of wealth is conducted at the discretion of society — is superficially quite appealing. "The things once there, mankind, individually or collectively, can do with them as they like",[7] he argued, and any disposition takes place at the "consent of society". Men are permitted to keep what they produce at the option of those in authority, and the rules, consequently, differ at different times and in different places. However, the consequences of these rules of distribution are not arbitrary, and are as much like the character of physical or natural laws as are the laws of production.

Now, if these laws of distribution have consequences which are not arbitrary but necessary and uncontrollable by human will, then in what manner do they differ from the laws of production? The latter, too, can be altered by human intervention — we can attempt to construct better organized assembly lines employing more sophisticated technology, but we can also, in our ignorance, utilize methods inappropriate to the desired end. Similarly, in the case of distribution, we could redistribute property with the objective of achieving equality, or greater production, only to find that we have instead created chaos and the reemergence of inequality by the back door of black markets. In the former case, production has been curtailed by the application of counterproductive means; in the latter case, intervention in the distribution of productive resources has led to the consequence that less is available for distribution. In what way do these cases differ? Mill admits that production depends on more than the properties of matter, that its extent and sophistication is attributable to an additional cause, which is the extent of human knowledge concerning the physical universe and its laws. The breadth of this knowledge is, then, dependent upon human volition, character, motivation, etc. If we are ignorant, apply inappropriate means, or lack diligence at our labors, our steel will crumble, plaster will crack, and our tractors will lay broken and idle in the fields. Production can be further affected by human intervention to the extent that government regulatory agencies dictate the minutiae of industrial processes to industry.

Mill does not deny all this, yet he fails to see that, just as the "laws of distribution" of goods can be affected by government activities, so can the "laws of production". In the case of distribution, private property can be proscribed or income can be progressively taxed; while in the case of production, featherbedding may be legislated, or minimum wage laws, or environmental codes, etc. Furthermore, when the laws of distribution are altered, production is affected, a consequence which Mill was well aware of when it came to analyzing the effects of socialism upon production, but a truth which he apparently lost sight of in the process of drawing his theoretical distinction between the laws of production and distribution. If authorities intervene in the productive process, and alter the "laws" or rules of production in an unenlightened manner, then less will be produced — this would constitute a natural law under Mill's terminology. And if the same authorities intervened to abolish private property or confiscate incomes above the subsistence level, then less would be produced (due to lack of incentive, mal-administration, etc., according to Mill himself) and less could be distributed — this, too, seems to carry the causal necessity of a "natural law". Mill's distinction appears to have collapsed. Men can intervene to alter the rules of production, the laws which approximate most nearly to reality and hence secure the greatest output, and they will pay the necessary and inevitable consequences. In a similar fashion, they can alter the rules of distribution, but they will suffer the inevitable consequences if their intervention was of a kind which went against man's nature, his motivational mechanism, and his natural desires. Men can "violate" the "laws of production" as well as the "laws of distribution", and they will pay the consequences in both instances.

Mill's purpose in drawing this distinction, as he stated it in the *Autobiography*, was to underscore the point that societal arrangements regarding distribution — such as private property — could not be assumed to be inevitable, or immune to human intervention, as he said previous economists implicitly held. To the extent that any of the earlier political economists suffered from such a misapprehension his distinction, though invalid if our previous argument was correct, may have hinted at an important truth; i.e. that economists should not assume the permanence of the existing economic relationships. But it is difficult to point to any of the English Classical economists, with their attention to other systems, such as Mercantilism, Agriculturalism, and Socialism, who suffered under that particular error.

The *Principles of Political Economy* represented another significant departure from previous treatments of the subject in that its format reversed the order of the subtopics of Exchange, Distribution, and Production, as the subject matter had been presented by Adam Smith and his followers. The format of the *Principles* appears, on first inspection, to be logically organized, proceeding from Production to Distribution and then to Exchange. However, it is actually inverted, because production is not the primary constituent or the proper starting point of economic investigation. Men's needs, desires, and expectations comprise the fundamental constituent in political economy, for it is these aspects of volition which govern what is to be produced, how much is to be produced, and in what manner production is to be carried forth. Production, then, is a derivative, not a causative agent in the economic process. Mill categorized political economy as a mental science, heavily dependent upon an analysis of man's nature and his motivations. Thus, it appears that for a science so conceived, the order employed by Adam Smith in the *Wealth of Nations* — beginning with man's inclination to truck and barter and its consequence, the division of labor, and then proceeding to a discussion of exchange and exchange value — is far more logical.

Thus, Mill lost sight of an important element in Smith's political economy; its consumer orientation. For Smith, all production had as its end the satisfaction of human needs. Consumption was the end of production. By placing production first in his treatise, Mill undercut the very purpose behind the whole process, which was in Smith the effort by each individual to secure the means of his own survival and enjoyment. By treating production as a primary, as almost a given, Mill was able later in his discussion of distribution to treat the products of industrial society as almost pre-existing entities, there to be distributed by those in authority. While Mill was careful to analyze the effects of changes in distribution on production — he is not being accused, here, of having committed any sins in that regard — his order of discussion of production and distribution served the same purpose as the "production–distribution" distinction; i.e. to sever the connection between the laws of economics and the political prescriptions associated with the *laissez-faire* doctrine. In pointing this out, we are not imputing a particular motivation to Mill; rather this was his stated purpose, admitted quite freely in the *Autobiography* — although not in the *Principles*. But we are questioning the validity and cogency of the means he employed for effecting this objective; i.e. the "production–distribution" distinction and the order "production–distribution–exchange" followed in the *Principles*.

3. MILL'S EVALUATION OF SOCIALISM

Mill's treatment of the laws of distribution, which included his controversial and famous analysis of the leading socialist movements of his day, was the outcome of his "production–distribution" distinction. If all laws of distribution were, indeed, man-made, and men held their products only at the sufferance of society, then all existing property relations can be brought into question. Is the present distribution of property just? Is it expedient? Does it provide for the weak and the poor? Questions of this type become a crucial part of the political economists' task.

As Mill revised his *Principles of Political Economy*, his attitude towards socialism underwent subtle changes of both tone and substance. In the first edition of 1848, he appeared to be more critical than he did in the third edition of 1852; and, finally, in his posthumously published "Chapters on Socialism", he partially reverted to his earlier skepticism, putting greater emphasis upon the measures by which the private property system could be improved and perfected, rather than upon the vision of a far distant socialistic future which had seemed to hold considerable attraction for him in 1852.

Inequality of property, and the injustice of some being born to riches and others to poverty, drove Mill and his wife, Harriet Taylor, towards socialism and away from democracy, abandoning pure democracy out of fear of the ignorance and brutality of the as yet uneducated masses. Their socialist vision encompassed the following elements: a society which would be divided no longer into the idle and the industrious; in which the rule that those who do not work will not eat should be applied impartially to all; in which the division of the produce will be made in concert on an acknowledged principle, and not on a mere accident of birth as at present; and in which individuals will strive to procure benefits for society as a whole and not merely for themselves. Education, habit, and the cultivation of the sentiments must operate first to change men's characters or, rather, to develop the inherent social feelings which have been discouraged under the present system. Generations will have to pass before men will achieve this state, but man's constitution does not prohibit such an interest in the common good. Existing institutions serve to accentuate people's self-interest motivation, but through small, communal experiments other institutions could be developed and perfected which would bring out the communal tendencies of man. Private property cannot be dispensed with before these other, selfless motives have been cultivated, but its continued existence should be considered as "merely provisional".

In the third edition of the *Principles*, which contained the critical revision of the socialist argument, Mill contended that one cannot say that schemes of common ownership are impracticable. His former objection — that, under socialism, men would shirk their fair share of labor with the result that productivity would be curtailed and also that new inventions and methods would be less likely to be tried by bureaucratic personalities — is now deflated with the claim that in the modern business world each man does not reap the rewards of his own labor directly, anyway, so that the same objection can be lodged against the existing system. Men, he thinks, are capable of a much larger public spirit than they are ever called upon to display in our competitive system, and, even if such were not the case, they would, under socialism, prove no lazier than men on a fixed salary today. Thus, the extent to which energy would be either depleted or enhanced is an open question, one that cannot be decided *a priori*, but, rather, must await the onset of socialistic experiments.

To another of his former criticisms — that the assurance of subsistence would increase population — Mill now felt that public opinion, which would constitute a much greater force under socialism, would prevail against the instinct towards selfish intemperance. Finally, the problem of the difficulty of fairly apportioning labor is dismissed as not an insurmountable objection. Anyway, such a system, no matter how imperfect it might be, or how far it missed the ideal of perfect justice, must be less unjust than what we have at the present time. Thus, Mill asserts that if the choice were between the current state of affairs as of 1852, in which the harshest labor is the least remunerated, while those who labor not at all get the most reward, or Communism, he would choose Communism.

However, the possibilities were more extensive than that. First, less extreme schemes of a socialist nature could be devised, on the order, perhaps, of the St. Simonian or Fourierist variety. By apportioning more benefits to those who work more, they would approach a less perfect ideal of justice than the absolute equality of the Communist system, but they would be more just than what exists currently. While praising both these movements, Mill criticized the St. Simonians for their select, scientific boards to apportion work, suspecting that such control would not be tolerated. Fourierism is praised for adapting the motive to exertion which exists in present society to a more just system of ownership and control. And second, Communism must be compared to the private property system as it could be at its best, when it would be freed from its origins in usurpation, conquest, and violence, and made truly the system which rewards men on the basis of their labor and not the labor of others, unfairly acquired. "The laws of property", Mill argued, "have never yet conformed to the principles on which the justification of private property rests".[6]

If the law had taken as much pains to ameliorate the inequalities arising from the workings of the individualistic principle as it had in aggravating them, if legislation had favored the diffusion of wealth rather than its concentration, then the principle of private property would have no necessary connection with the physical and social evils which socialist writers attributed to it as inherent properties.[7] Comparing capitalism at its best — i.e. as the system which guarantees to each individual the fruits of his own labor and abstinence, while all that is opposed to this principle is expunged — with Communism at its best, Mill concludes that we are too ignorant to judge which of the two systems will be the ultimate form of human society. The choice will probably depend, Mill hopes, on which system allows for the greatest amount of human liberty and spontaneity.

This last consideration was closest to Mill's heart, and he once again warned that liberty, which stands next in order of priority to subsistence, must never be sacrificed to the desire for affluence or equality. Socialism, however, could be so arranged that it would not fall victim to such a mistaken hierarchy. "The restraints of Communism would be freedom in comparison with the present condition of the majority of the human race",[8] he wrote. Most workers under capitalism have little more freedom than slaves, and women are subject to domestic tyranny. Despite his inclinations towards socialism, as offering a more just ideal for mankind, Mill could not remove from his mind that nagging worry that the uniformity in thought which he saw as spreading and eventually engulfing society, would be accentuated under such a system, for it would present an education even less diverse than in his time. The perils to individuality presented the most troubling aspect of socialism or communism.

This is as far as Mill ever went in the direction of socialism. It is indeed much further than any of his predecessors among the Classical economists had gone. They condemned socialism as totally impractical and economically disastrous, if they considered it at all. Mill's approach was friendly, yet cautious and irresolute. His attempt to analyze socialism and the attacks upon the private property system advanced by its proponents was enlightening and long overdue from the Ricardian economists. What Mill concluded, then, was that the future would hold the answer, that the decision as between private property at its best and Communism perfected, would be made by future generations. In the meantime, all forms of socialism deserve a trial on a small scale, with only willing participants, and at no peril to the rest of society.[9]

4. GOVERNMENT INTERVENTION IN THE ECONOMY: SUBJECTED TO THE STANDARD OF GENERAL EXPEDIENCY.

In the final book of the *Principles*, Mill began by displaying the inadequacy of the political principle which would restrict government intervention to the protection of the individual and his property from force and fraud. He argued that such a restrictive principle would not permit acts of governmental interference which every reasonable man and every existing government does and must acknowledge as a legitimate function of the state. The nearest one can come, Mill admonished, to laying down a universally applicable principle in regard to the proper limits of government activity is to say that any action which is *generally expedient* for the government to perform, any action which men want the government to take, it has a right to execute. However, he did acknowledge the non-interference principle — that is, *laissez-faire* — as the general principle, departures from which must be justified by a claim of overriding expediency.

In appearance, then, this was a very Benthamite formulation. But as Mill's argument unfolds, and the circumstances in which governmental interference are recounted, the principle of *laissez-faire*, even as a guideline, is almost completely negated. Finally, he declared that in particular circumstances, there is not anything important to the general interest which the government may not do if individuals are not doing it or cannot do it.[10]

Mill found the *laissez-faire* doctrine — that government should be limited to protecting people against force and fraud — entirely too arbitrary and restrictive. Other functions of government which command almost universal agreement are eliminated by this principle, including: establishing and enforcing laws of inheritance, defining property, obliging people to perform their contracts, and deciding what contracts are fit to be enforced. All these are proper governmental functions, universally acknowledged to be valid. Also, governments perform a whole range of services simply because they "conduce to general convenience"; examples of which are — coining money; prescribing a set of standard weights and measures; paving, lighting, and cleaning streets; raising dykes and embankments, etc. In addition, there are limits to the doctrine that individuals are the best judges of their own interests in that such a principle is applicable only to those people who are capable of acting in their own behalf. The exceptions are children, lunatics, and those fallen into imbecility, over whom the government may act as protectors of their interests. All these functions — the necessary functions of government, inseparable from the very idea of government, or exercised habitually and without objection by all governments — are fundamental to government, and they constitute the minimum that any government performs.

> But enough has been said to show that the admitted functions of government embrace a much wider field than can easily be included within the ring-fence of any restricted definition, and that it is hardly possible to find any ground of justification common to them all, except the comprehensive one of *general expediency;* nor to limit the interference of government by any universal rule, save the simple vague one, that it should never be admitted but when the case of expediency is strong.[11]

Mill distinguished these kinds of activities from the optional functions of government, about which there could be disagreement concerning their efficacy or desirability. The distinction between the two classes of activities is, apparently, not a rigid one, for two classes of functions are not to be determined on different principles — both are to be subjected to the test of expediency — but the former are distinguishable from the latter only by the fact that the former comprise functions which are universally undertaken by all governments, while the latter embrace activities sometimes judged expedient and sometimes not.

Mill first considers the economic effects arising from the manner in which governments perform their necessary and acknowledged functions. These include raising taxes, enacting laws regulating property and contracts, and enforcing the laws through a judicial apparatus and a police force. On the subject of taxation, Mill endorsed Smith's four maxims — (1) that the subjects should contribute in proportion to their respective abilities, (2) that the tax paid by each should be certain and not arbitrary, (3) that it should be levied in a convenient manner, and (4) that it should take from the people as little as possible over what it deposits in the treasury. However, he thought that equality of taxation, the first of Smith's propositions, warranted further elaboration. His conclusion being that while a graduated income tax would be unacceptable, as a penalty on the prudent to relieve the prodigal, a graduated tax on estates would be acceptable as a means of diminishing inequalities of wealth. Such a graduated estate tax would be justifiable on the grounds that it would only effect unearned fortunes. On the same grounds, it would be advisable to tax any kind of income that would have a tendency to steadily increase without effort on the part of the recipient. For unearned incomes of this type, it would be no violation of the principle on which private property is grounded (here, Mill is referring back to his previous argument concerning the genesis of landed property) if the state should appropriate this income. Thus, the "unearned income" of landlords could be legitimately appropriated by the state; by the standard of the "general principle of social justice" they have no claim to this income. Mill drew this conclusion as a direct result of Ricardo's theory of rent, which he adopted, combined with his own theory of property which excluded land from the category of things over which men can have a fixed and unchallengeable claim.

Concerning the economic effects of ordinary government activities in the other two areas, regulating property and enforcing the laws, Mill emphasized the point that oppression by government was worse than insecurity of property or anarchy. And he described, in typical Smithian and Benthamite fashion, the various erroneous theories upon which acts of governmental intervention had been justified. (He did, however, acknowledge that government had a legitimate right to regulate joint-stock companies and partnerships, and to enact insolvency and bankruptcy laws.) Included under the false grounds of interference were: (1) protectionism; (2) interference with contracts, particularly usury laws; (3) attempts by governments to either cheapen or make more costly certain commodities; (4) government grants of monopolies; (5) laws against workers' efforts to raise wages, and finally, (6) government attempts to control opinion.

When Mill passed from these generally admitted functions of government, and their perversions, to an evaluation of the optional functions of government, he once again adverted to the *laissez-faire* principle. Although he rejected the conclusions of the advocates of the *laissez-faire* principle — that the government should be limited to the minimal state, night-watchman functions — he did envision a role for the principle in representing a starting point for debate, a criterion, departures from which must be justified by an overriding claim of general, public expediency. In pursuing this approach, Mill mirrored Bentham very closely.

Attempting to take a middle ground between the advocates of wholesale interference, on the one hand, and the extreme non-interventionists, on the other, Mill argued that the question of governmental interference does not admit of any *a priori*, universal solution, but requires instead an endeavor to draw the line in particular cases between too much and too little governmental activity. Both extremes represent excesses and errors in certain circumstances, and an attempt must be made to mediate between the two polar positions. Mill derives a commonsensical solution by taking the principles of each and combining them together, with the expediency standard serving as a corrective to the inflexibility of the *laissez-faire* principle.

There are two categories of governmental interference, argues Mill, and in the first — that of "authoritative interference"; i.e. controlling the free agency of individuals — the government's role should be more circumspect and hesitant than in the second — that of giving advice and promulgating information or establishing agencies to do what cannot be entrusted solely to private interest. This is the familiar distinction previously drawn by Bentham. But Mill's second category is more expansive than Bentham's. Falling under the latter category would be such activities as Church Establishment, schools, colleges, a national bank, government industries (without monopolies against private banks or industries), post office, a corps of engineers, and public hospitals.

Authoritative interference, which involves direct curtailment of the freedom of individuals, must be subjected to much more stringent standards. In all civilized governments, no matter what their constitutions may be, there must be a recognition of a circle around every individual from which government should be excluded. Where should this limit be placed, and how large a province shall this reserved part embrace? It should, Mill contends, include all that which concerns only the inward or outward life of the individual, and does not affect the interests of others, or affects them only through moral example. Thus, Mill concludes that opinion should be left free, and so should actions not injurious to others. Even in the portion of our conduct which does affect others, the onus of making out a case to restrict such activity always lies with the defenders of a legal prohibition.[12] (This is the same argument which Mill later advanced in the essay "On Liberty".) To be prevented from doing what one is inclined to do is irksome, and it also starves the creative faculties of man. "It is not merely a constructive or presumptive injury to others which will justify the interference of law with individual freedom".[13] However, Mill, in one telling passage, steps back from the extreme tendencies of this exposition when he says that:

> Scarcely any degree of utility, short of absolute necessity, will justify a prohibitory regulation, unless it can also be made to recommend itself to the general conscience; unless persons of ordinary good intentions either believe already, or can be induced to believe, that the thing prohibited is a thing which they ought not to do.[14]

Despite the severity of the language in the initial, critical phrase of this quotation, Mill clearly expanded the scope of government intervention in the sphere of individual activity when he allowed that any regulation could be warranted if some nebulous entity called the "general conscience" were judged, by the legislator presumably, to have consented to such an abridgment of their liberty.

With respect to government activity of the second type, the case for rejection is a far weaker one, since Mill maintains that such activities do not directly interfere with an individual's free agency. Even in these cases, however, there is still a *prima facie* argument against intervention because it must be supported by compulsory taxation.

Mill then goes on to adduce several other instrumental objections to governmental intervention. Every increase of the government's functions necessarily increases its power, and that power is to be feared even in a democratic state. The independence of the individual must be jealously guarded from the overweening force of the mass. Also, every increase of the functions of government presents an additional problem in management and organization. Things tend to be done worse by government than by private agencies. Here, Mill endorses the typically Classical argument that the individual is the best judge of how his business should be conducted because he has the greatest interest in its outcome. Where this "interest" argument holds true, it should condemn all governmental intervention; e.g. in the common operations of industry or commerce. Even if the government could do a better job in a particular instance, it should, in general, forbear from acting, because individual initiative has an educative function and, furthermore, it would be extremely dangerous to human welfare if most intelligence and talent were co-opted by the government.

On the basis of the foregoing, instrumental arguments, Mill concluded that: "*Laissez-faire*, in short, should be the general practice: every departure from it, *unless required by some great good*, is a certain evil".[15] Although not explicitly advocating a utilitarian standard, this is what Mill's statement actually amounts to. If a greater good can be proved for any particular act of governmental interventtion, then the *laissez-faire* objection is surmounted, and the government is justified in proceeding. This is a completely different standard, with utterly different conclusions for practical, governmental action, than the one advocated by the natural rights proponents of the non-intervention principle. For such theorists — the Frenchman, Bastiat, is a convenient example — the *laissez-faire* principle absolutely forbids governmental activity of Mill's type, (2) and it limits the first category to governmental acts which protect people and their property from force and fraud. No overriding reasons, such as general expediency or general utility, are acknowledged as warranting any contravention of the non-interference principle; for such acts would constitute a violation of the natural rights to life, liberty, or property.

Laissez-faire, for theorists of Bastiat's type, is a principle derived from the natural rights of individuals. The reasoning being that if individuals do not have a right to compel their neighbors, to violate their property, to tax them, to conscript them, etc., then the aggregate of individuals — the government — cannot possibly have such rights. Thus, the government is limited to defending individuals from encroachment of their rights by other individuals. But for Mill, the *laissez-faire* principle is a principle of an entirely different order. It is not based upon any prior foundation, such as natural rights, but is, rather, the conclusion of induction based upon experience only. It is, then, based upon expediency; i.e. upon a series of instrumental assessments that government activity is to be rejected over a certain broad range of issues because it produces certain undesirable effects. Hence, it is merely a general conclusion, to be dispensed with when this same standard — general expediency — dictates that some greater good will be served by governmental intervention. In the final analysis, Mill really has one standard, expediency, and not two, as it might appear from the way in which his argument unfolded. By the end of his argument, the expediency standard reigns supreme, and the *laissez-faire* principle is almost completely discarded. Mill declared, finally, that the government can do *anything* that is important to the general interest.[16]

Mill next considered precisely those cases in which the general objections against governmental intervention do not obtain. That is, the cases in which the non-intervention principle is overridden by counter-considerations of greater importance. The assumption upon which the *laissez-faire* principle was based in the Utilitarian treatment was the psychological observation that the individual is the best judge of his own affairs because his interest is the most intimately connected with the outcome. It was Mill's contention that in certain cases this general principle did not hold true — that, in point of fact, the individual was not the best judge of his own interest in all cases. While in most instances the individual is the best judge of commodities for his physical needs, he feels the want of mental "commodities" in inverse proportion to his need. When the need is greatest for these cultural, character building goods, the lack of them is felt hardly at all. The voluntary, market system cannot fulfill these cultural needs because the demand is not there. What Mill is saying, in effect, is that he is willing to supplant the judgments of individuals in the marketplace when he feels that those judgments are misdirected. An elitist, authoritarian assertion, to be sure, but one in which he was joined by Bentham, and when it came to education, even Smith. Thus, on the Utilitarian ground that all members of a community suffer from the ignorance of some, Mill maintained that the government can compel parents to give their children an elementary education, and also make available such an education at public expense.

Other instances in which the individual is not the best judge of his own interest would include the following cases. (1) That those individuals — lunatics, idiots, and infants — who are incapable of judging or acting for themselves should be superintended by the government. In the case of children the government is justified in compelling parents to do everything in the interests of the children which it can be proved desirable for parents to do for their offspring. The government may prevent children from being overworked; thus Mill endorsed the Factory Acts. This is, quite evidently, a widely expansible concession — that the government can make parents do anything which it is decided that parents ought to do for their children. An Orwellian theorist, without Mill's obvious concern for individual liberty, could take this proposition and run far with it.

(2) The *laissez-faire* principle only obtains when grounded on present, personal experience, Mill contends, and so when the individual attempts, irrevocably, to decide what will be best for his interests at some future date, the state is justified in intervening. What Mill had in mind, here, were marriage contracts and

contracts in perpetuity.

(3) Mill argued that whatever can only be done by joint-stock companies is often better done by the government. The point being that since individuals can only manage their affairs by delegated authority in such circumstances, it is better to opt for public control. Even if the government can perform these functions better, however, it is often of greater general benefit that such functions be left in private hands, but under government regulation. In monopolized industries, the government should take them over, regulate them, make concessions for a limited time, confiscate profits if they are mismanaged, depending on the particular circumstances of the industry involved.

(4) The *laissez-faire* principle is also overridden in cases where individuals alone cannot give effect to their own judgments, and their joint ventures can only have effect when they are sanctioned by law. Examples of this would include limiting the hours of work by government edict, and cases in which something would be advantageous to a class, but to the immediate interests of every individual to violate. Thus, if a large class of competitors, say laborers, could only limit their hours of work by legal means, even though it would be in the interest of all as a class to limit their hours of labor, Mill would sanction such a law.

(5) The non-intervention principle, based on the individual being the best judge of his own interest, does not obtain where an individual is acting in the interest of another. Thus, public charity, in the form of the Poor Laws, is to be preferred to private charity.

(6) Also, the principle does not hold in those cases where an individual, acting solely from his own interest, acts in such a way as to affect the interests of the nation or posterity. Government regulation of colonial policy is warranted, then, on the ground that such activities affect the permanent interest of civilization.

(7) And, finally, the government ought to act when no individual has an interest in performing an important public service because no adequate remuneration would accompany such a performance. This last exception comes straight from Smith. What Mill had in mind, here, are such activities as scientific exploration, lighthouses, and providing endowments and salaries for the maintenance of a scholarly class. But Mill went much further under this heading than did Smith, who envisioned little more than roads, canals, and sewers. It will be instructive to quote Mill at length on this point, since it illustrates so perfectly the extent to which the expediency standard rendered the *laissez-faire* principle nugatory.

> It may be said generally, that *anything* which it is desirable should be done for the general interest of mankind or of future generations, or for the present interests of those members of the community who require external aid, but which is not of a nature to remunerate individuals or associations for undertaking it, is in itself a suitable thing to be undertaken by government: though, before making the work their own, governments ought always to consider if there by a rational probability of its being done on what is called the voluntary principle, and if so, whether it is likely to be done in a better and more effectual manner by government agency, than by the zeal and liberality of individuals.[17]

Thus, Mill concluded that the government can do anything which is for the public good, if it would not be done but for its agency. The determination of what constitutes this "general interest" is left at the discretion of government officials, with the admonition that liberty should be restricted only in those instances in which the "general conscience" will go along with the circumscription. In a sense, then, Mill took Bentham's "Be Quiet" principle of governmental intervention, justified on instrumental, Utilitarian grounds, and demonstrated the potentiality for ever-expanding government activity which lay dormant yet implicit in Bentham's formulation. Mill's final discussion of governmental intervention was along Benthamite lines, yet it was not incompatible with his earlier treatment of socialism in Book II of the *Principles*. If individual interest failed to automatically secure either the individual's own benefit, or the benefit of society (the latter was implicit in most of Mill's analysis of the cases in which the individual was not the best judge of his own interest), then the government was justified in stepping in to remedy the deficiency. Clearly, there was nothing in the final "Book" which might provide a *prima facie* case against redistribution, or government ownership of the means of production, provided only that such activities were determined actually to conduce to "general expediency". Thus, while socialism here and now was further than Mill wanted to go, the principle of government intervention judged solely or predominantly by the standard of "general expediency" was almost infinitely expansible, as Mill himself realized.

What restrained Mill personally from advising such extreme, socialistic ventures, was not his principle of governmental intervention, but rather economic arguments concerning the possibility of a curtailment of production under a socialistic organization of industry, and his own *personal* preference for individual liberty and his desire to be assured that liberty would not be irreparably damaged by socialistic conformity and regulation.

Mill moved the boundaries of governmental intervention far beyond his predecessors, even though he himself backed away from some of the more extreme consequences of his method, relegating socialism to a far distant future. However, he was quite willing to incorporate some of socialism's fervor for distributive justice and greater equality within the present organization of the private property, competitive system. He accomplished this expansion by the introduction of the "production–distribution" distinction, which rendered all laws of distribution subject to the intervention of government; by the utilization of the "general expediency" or utility principle which, in effect, undercut the *laissez-faire* principle; by drawing the consequences of Ricardo's rent doctrine, when he declared that the government may rightfully confiscate unearned incomes; by making a critical alteration in the Lockeian argument for private property, which made ownership subject to the discretion of the community; and by exploding, in important instances, the conviction of the Classical School that the individual is the best judge of his own interest. And he did *not* effect this expansion by advancing any essentially new theories in the field of "pure" economics — his theories of value, rent, labor, wages, etc., came straight from Ricardo.

He accomplished what can be considered as nothing less than a demolition job on the connection between "pure" economic doctrines and the question of government intervention which had existed in Classical economics. The Classical system had been based upon individual interests leading to the general interest, and the individual being the best judge of his own interest, and this was precisely what Mill challenged in critical cases. This was to have far-reaching effects.

However, we do not have to wait for the future to perceive the effects of Mill's work, for even in the acts of governmental intervention which he unequivocally endorsed we can see an expansion much beyond that advocated by his predecessors. Thus, Mill sanctioned, at one time or another, the following governmental acts of intervention in the economy: the state ownership of land in the case of Ireland;[18] the aiding of workers thrown out of work by the introduction of machinery;[19] the curtailment of inheritance;[20] the granting of a right to relief;[21] the enforcement of a legal restraint against those who brought children into the world who were a burden on society;[22] the regulation of marriage;[23] the introduction of an income tax;[24] the regulation of joint-stock companies;[25] the regulation or nationalization of monopolistic industries;[26] the provision of compulsory education;[27] the regulation of colonies;[28] the provision of funds for scientific discoveries, universities and scholars;[29] and the regulation of the hours of work for children.[30]

One Classical principle which was entirely absent in Mill was the Smithian notion of the harmony of interests — that each individual by pursuing his own interests will be led as by an invisible hand to take that course which will be most beneficial to society. For Mill, who questioned in so many important cases whether the individual could even be the best judge of his own interests, the disharmony of interests as a result of the existence of poor and rich classes seemed the overwhelming social reality, so much so, in fact, that he never even discussed the "harmony of interest" doctrine explicitly. He argued, instead, that in many cases, such as monopolies, joint-stock companies, or land ownership, the "general good" will not be served by the free play of individuals pursuing their own interests. Thus, Mill built upon the class conflict aspect which was an element in Smith's economics, but then only a subordinate one to the "harmony of interest" contention.

It was primarily on the philosophical level, in his rendering of the principle of utility as a less rigid and more elitist doctrine, in his "production–distribution" distinction, in his sympathetic examination of socialism, and in his substitution of the principle of expediency for that of *laissez-faire*, that Mill really set himself apart from the earlier economists of the Classical School. On the level of "pure" economic theory he remained a convinced Ricardian. Thus, moral considerations — of general happiness and distributive justice — were more critical to Mill's attempt to undermine the doctrine of *laissez-faire* than were considerations of a purely economic nature.

NOTES

1. J. S. Mill, "Utilitarianism," in *The Utilitarians* (Garden City, N.Y.: Doubleday & Co., 1961), p. 408.
2. *Ibid.*, pp. 439–440.
3. *Ibid.*, p. 468.
4. *Ibid.*, p. 418.
5. J. S. Mill, *Autobiography* (1873: rprt. New York: The Library of Liberal Arts, The Bobbs-Merrill Co., 1957), pp. 159–160. Also discussed in Mill, *Principles of Political Economy* (6th ed., 1st ed. 1848, rprt. from 1909 ed., New York: Augustus M. Kelley, 1969), p. 21; and *ibid.*, Book II, Ch. I, pp. 199-200.
6. Mill, *Principles*, p. 199.
7. *Ibid.*, p. 200.
8. *Ibid.*, p. 208.
9. *Ibid.*, p. 208.
10. *Ibid.*, p. 209.
11. *Ibid.*, p. 210.
12. *Ibid.*, p. 216.
13. *Ibid.*, Book V, Ch. XI, p. 578.
14. *Ibid.*, p. 800.
15. *Ibid.*, p. 943.
16. *Ibid.*, p. 943.
17. *Ibid.*, p. 943.
18. *Ibid.*, p. 950.
19. *Ibid.*, p. 978.
20. *Ibid.*, p. 977.
21. Mill, *Autobiography*, pp. 188–189.
22. Mill, *Principles*, p. 99.
23. *Ibid.*, Book II, Ch. II, p. 219.
24. *Ibid.*, p. 365, and Book V, Ch. XI.
25. *Ibid.*, Book II, Ch. III.
26. Mill, "On Liberty," in *The Utilitarians*.
27. Mill, *Principles*, Book II, Ch. II.
28. *Ibid.*, Book V, Ch. IX.
29. *Ibid.*, Book I, Ch. IX, and Book V, Ch. XI.
30. *Ibid.*, Book V, Ch. XI.
31. *Ibid.*, Book V, Ch. XI.
32. *Ibid.*, Book V, Ch. XI.
33. *Ibid.*, Book V, Ch. XI.

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THE JACKSONIANS, BANKING, AND ECONOMIC THEORY: A REINTERPRETATION

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Andrew Jackson's war upon the Second Bank of the United States and the economic consequences stemming from it badly need a new historical interpretation. The traditional interpretation asserts that Jackson's veto of the Bank re-charter and withdrawal of government deposits caused an inflation; Jackson's Specie Circular and the distribution of the surplus caused a panic and depression. Recent research has included much evidence that indicates that this traditional interpretation requires economic, and also political, revision. More importantly, however, the traditional interpretation suffers from a faulty economic theory.

In no other field is the relationship between theory and history more explicit than in economic history. The obvious effect different understandings of economic theory will have upon the interpretation and explanation of specific historical–economic events makes the importance of theory undeniable. It is also clear that, in most cases, the validity of the theory is decided *a priori* to history, on some other basis, and then is applied to the data. Rarely is history used to generate new economic theories.

I believe that the economic theory that has guided the traditional interpretation of Jackson's Bank war is wrong. In this paper, I will show the evolution of the traditional interpretation and then survey the recent research that makes it historically untenable. I will conclude with a reinterpretation based on an economic theory that is both theoretically sound and historically consistent.

I

The first economist to write about the Jacksonians and banking was William Graham Sumner. In his two books, *A History of Banking in the United States*[1] and *Andrew Jackson,*[2] Sumner presented an analysis that foreshadowed subsequent accounts and set the pattern for what developed into the traditional interpretation. That such should be the case is extremely ironic, for Sumner, himself a staunch advocate of *laissez-faire*, perceived that *laissez-faire* was the central ideological tendency of the Jacksonians. "The democratic party was for a generation, by tradition, a party of hard money, free trade, the non-interference theory of government, and no special legislation", he wrote.[3] However, he differed in that the Jacksonians were radicals, using democratic means to throw off the power of the state, while Sumner was a conservative, defending *laissez-faire* from the twin evils of plutocracy and mob rule. Sumner's animosity toward Jackson was a consequence of focusing on the democratic and egalitarian aspects of Jacksonianism. Sumner, and other members of what Charles Grier Sellers, Jr., calls the "Whig" school of historiography,[4] objected to the increased political role of the masses and the spoils system. Both of these were procedural changes in the form of government rather than substantive changes in its size and power, but Sumner saw them as creating a social environment hostile to the preservation of a limited government.

On the Bank war, despite his frequent moral judgments, Sumner was ambiguous, almost contradictory. He called the Bank war "one of the greatest struggles between democracy and the money power", a "premonition of the conflict between democracy and plutocracy",[5] and he applauded the bullionists of the Jacksonian party who "put a metallic currency high up on its banner".[6] Yet, he also felt that in waging war on the Bank "Jackson's administration unjustly, passionately, ignorantly, and without regard to truth, assailed a great and valuable financial institution".[7] Sumner's praise for the Bank was not without reservation, and he accused Nicholas Biddle, president of the Bank, of insincerity, but on the whole he considered the Bank a successful restraint on the inflationary proclivities of the state banks. Sumner it should be noted, did not blame the economic instability of the years from 1829 to 1840 entirely on Jackson's policies. He mentioned international factors — British capital flows, the discount rate of the Bank of England, and changing cotton prices — as contributing to the inflation of 1835–1836 and the Panic of 1837.

Ralph C. H. Catterall, in *The Second Bank of the United States,*[8] filled in the details around Sumner's basic account, eliminating the ambiguity and balance. Catterall, who wrote prior to the Federal Reserve System, believed that the Second Bank had provided the United States with the soundest currency it had ever had and that the reasons given by Jackson for vetoing its charter were "in the main beneath contempt".[9] "Jackson and his supporters committed an offense against the nation when they destroyed the bank. . . . few greater enormities are chargeable to politicians than the destruction of the Bank of the United States."[10] Catterall did not carry his story through the later history of the Bank after it lost its national charter and became a state bank, but his praise of Biddle was also qualified. Catterall's book on the Bank was followed twenty years later by Reginald Charles McGrane's book on *The Panic of 1837.*[11] McGrane, like Catterall, blamed Jackson's ignorant policies for the Panic.

With the Progressive shift in American historiography at the turn of the century, the attitude of historians towards Jackson became friendlier. Interestingly enough, despite the change in outlook, the historical debate was still conducted within the terms originally laid down by Sumner and his "Whig" contemporaries. Sumner had condemned the Jacksonians for unleashing majority rule; Turner, Beard, and Schlesinger praised them for the same thing. Later, the acceptance of the Marxist notion of class converted Turner's sectional conflict into Schlesinger's class conflict and helped obscure Sumner's insight into the anti-statist thrust of Jacksonianism.[12] The Jacksonian opposition to state privilege was translated into an opposition to capitalism, and the Bank war was interpreted from that angle.

Arthur M. Schlesinger, Jr., in *The Age of Jackson,*[13] correctly evaluated Jackson's destruction of the Bank as part of a calculated hard-money campaign which included a change of the mint ratio between gold and silver to bring gold back into circulation, an effort to suppress bank notes of small denominations, the establishment of an independent treasury, and an attack on state banks. However, he saw this campaign as motivated by an underlying labor class consciousness. After the publication of Schlesinger's book, Joseph Dorfman wrote "The Jackson Wage-Earner Thesis",[14] an article demonstrating that the Jacksonians were not anti-capitalist, but really anti-government. It is indicative of the strength and pervasiveness of Marxist class analysis among American historians that Richard Hofstadter, in *The American Political Tradition,* managed to convert Dorfman's refutation of Schlesinger's class thesis into a new class interpretation — one with the Jacksonians as aspiring and rising entrepreneurs.[15]

While the political nature of Jacksoniansm was the subject of considerable disagreement, the economic account remained largely unaltered. Schlesinger admitted that "In destroying the Bank, Jackson had removed a valuable brake on credit expansion."[16] Hofstadter complained that Jackson "had left the nation committed to a currency and credit system even more inadequate than the one he had inherited".[17] During the next decade, four additional books dealing directly with the Bank war expanded and fortified the traditional interpretation. Walter Buckingham Smith, in *Economic Aspects of the Second Bank of the United States,*[18] portrayed the Bank as an effective central bank, although like Sumner, he also stressed international factors. Thomas Payne Govan, in the biography, *Nicholas Biddle: Nationalist and Public Banker, 1786–1844,*[19] praised Biddle as an astute central banker well ahead of his time, as did Fritz Redlich, in his two volume *The Moulding of American Banking: Men and Ideas,*[20] a work which particularly emphasized the impact of the European banking tradition on America. The traditional interpretation received its most effective and popular presentation in Bray Hammond's highly overrated *Banks and Politics in America: From the Revolution to the Civil War.*[21] Hammond, who had developed his ideas in a previous series of articles, grafted the traditional economic interpretation to the Hofstadter entrepreneurial thesis.[22]

The economic theory to which Hammond, Redlich, Govan, Smith *et al.* adhere and which is at the heart of the traditional interpretation may be called the sound banking doctrine. Banks have always issued more notes or deposit liabilities than they have monetary reserves to cover. This process is called fractional reserve banking, and through it, banks create money. Thus, an ante-bellum bank which issued $1000 in notes with only $100 in specie (gold or silver bullion and coin) as reserves in its vault, had created $900 and had a reserve ratio of 10%. The sound banking doctrine holds that fractional reserve banking is necessary and beneficial for a prosperous economy. There are insufficient quantities of gold and silver in existence to satisfy monetary needs. Money creation by banks is a needed service. However, monetary creation can go too far. Banks will overissue their notes and deposits and reduce their reserve ratios to dangerous levels if governed solely by the banker's desire for profit. That leads to inflation, economic instability, and wildcat banking. People will drown in a deluge of unbacked paper money. Therefore, external checks are necessary to insure that fractional reserve banking stays within certain limits and that reserve ratios stay at certain levels, and government must provide the checks. It can be seen that this doctrine occupies the middle ground between the extremes of hard money on the one hand, and inflationary banking or fiat money on the other.[23]

Central banking is one of the means, according to the sound banking doctrine, by which government can restrain private banks. Since the Second Bank of the United States was a nascent central bank, it was a useful institution. The state banks were inherently inflationary and tended toward wildcat banking, and the Second Bank restrained them. Because it was national and because it was the government depository, the Bank held a dominant position in the U.S. economy. In the process of its operations, it tended to receive the notes of state banks. Its mechanism of control was forcing the state banks to redeem their notes in specie.

Jackson, by vetoing the charter of the Bank in 1832 and later removing from it the government deposits, destroyed the Bank's effectiveness as a central bank. He consequently unleashed the state banks, which overissued their notes and generated an inflationary boom. The government deposits were placed in pet banks, and this further encouraged credit expansion. Traditional accounts differ as to the precise cause of the Panic of 1837 and on whether or not it was made inevitable by the previous boom, but they all agree that certain of Jackson's policies contributed to bringing it about. First, the distribution of the surplus shifted bank reserves and made certain banks contract their note issue. Secondly, the Specie Circular increased the demand for specie and put a drain on the reserves of banks. The banks were compelled to contract and finally to suspend specie payment.

Politically the Jacksonian attack on the Bank represented an alliance between two divergent groups, according to the traditional interpretation. One of these was the hard-money agrarians, who ended up defeating their own purpose. The other more important group included the aspiring capitalists who wanted state bank inflation and the state banks themselves, which wanted to be free from the Second Bank. Other motives at work include the political desire to bring the Bank within the Democratic fold and the desire of New York City bankers to escape the financial hegemony of Philadelphia, where the Bank was located. The importance of Jackson himself is disputed. Some picture him as a tool of his advisors, while others consider him to be the primary actor initiating the Bank war.

The destruction of the national Bank represented the triumph of the aspiring capitalists within the Jacksonian movement at the national level; "free banking" represented their triumph at the state level. "Free banking was an application of *laissez faire* to the monetary function", writes Hammond, and its adoption insured "a permanent policy of monetary inflation."[24] It was an inferior system, primarily because it was unregulated.

These various propositions constitute the major tenets in the traditional interpretation, and they add up to a severe indictment of the Jacksonians. The response of pro-Jackson historians to the difficult problem of reconciling these charges has been varied and ingenious. Robert V. Remini,[25] following in a direction pointed by Leonard D. White,[26] has emphasized the role of the Bank war in the growth of Presidential power, considering that a positive good regardless of how it was used. George Rogers Taylor[27] admits that under Biddle the Bank performed splendidly, but argues that it had shown in the past that it had an immense potential for abuse lying dormant. The Bank was too independent from the national government, and that justified not renewing its charter. Schlesinger, in a review of Smith's book,[28] goes so far as to take up the cause of the state banks, when he asserts that "the men in Jackson's day who were most nearly right from the viewpoint of economic growth were neither the Bank advocates nor the hard-money theorists but the soft money men of the West".[29] None of these approaches questions the essential validity of the traditional interpretation.

II

The recent scholarly work challenging the traditional interpretation falls into two broad categories: political revisionism and economic revisionism. The political revisionism has been dominated, although not exclusively, by historians using statistical tools, and the pioneer in statistical methodology applied to the Jacksonian era is Lee Benson. Most of Benson's book, *The Concept of Jacksonian Democracy: New York as a Test Case,*[30] is an effort to develop an alternative to Marxist class notions in describing political behavior and does not relate specifically to the banking issue. Of that which does relate, much of it reinforces the traditional interpretation. Benson, like Hammond, feels that Jackson's attack on the Bank was instigated from New York by Martin Van Buren, but not for the same reason. Rather than an effort to gain financial ascendancy for Wall Street, Benson construes the Bank War as a diversion to relieve anti-monopoly pressure directed against the Regency banking system. "Seen in historical context, the Jacksonian 'Bank War' becomes a brilliant counterattack — not a bold offensive on behalf of free enterprise."[31] Benson's major revisionist contribution is his assessment of who was responsible for New York's "free banking" act.[32] "Free banking", it turns out, was not a scheme promoted by the Locofoco radical Democrats, with their anti-monopoly, hard-money views; it was a scheme promoted by the Whigs. It was not consistent with Democratic ideas about limited government; it was consistent with Whig ideas about positive state action. It restricted entry on the basis of capital, limited the liabilities of stockholders, provided stringent regulations, and established a board of bank commissioners. Most significantly, by making note issue dependent on holding of state bonds, it forged a close alliance between the bank and state. "Free banking" was neither Jacksonian nor *laissez-faire.*[33]

Van Buren's prominence in the Bank war, along with charges of a New York–Virginia conspiracy, were finally called into question when Frank Otto Gatell published his article, "Sober Second Thoughts on Van Buren, the Albany Regency, and the Wall Street Conspiracy".[34] Gatell points out that although the Regency had intimate connections with Albany banks, it was not that close to New York City banks. There was no reason for the Regency to champion the interests of Wall Street. In answer to Benson's version of the New York conspiracy, Gatell argues that politically the Regency did not need the Bank war; indeed, it was a fairly risky venture for Regency politicians. Gatell concludes that Jackson "still remains central to the Bank War".[35]

The political tenet of the traditional interpretation, however, hinges not on New York but on the supposition of general state bank opposition to the national Bank. That supposition is addressed in the most important work of political revisionism, Jean Alexander Wilburn's *Biddle's Bank: The Crucial Years.*[36] By carefully analyzing the vote over the Bank's re-charter in Congress in 1832, a vote on a resolution to Congress on that issue by the New York State legislature, petitions and memorials sent to Congress, and Biddle's correspondence with allies in which he organized support for the Bank, Wilburn attempts to determine exactly who supported the Bank. She finds that prior to Jackson's veto, support was overwhelming, even among state banks:

> We have found that Nicholas Biddle was correct when he said, "state banks in the main are friendly". Specifically, only in Georgia, Connecticut, and New York was there positive evidence of hostility. A majority of state banks in some states of the South, such as North Carolina and Alabama, gave strong support to the Bank as did both the Southwest States of Louisiana and Mississippi. Since Virginia gave some support, we can claim that state banks in the South and Southwest for the most part supported the Bank. New England, contrary to expectations, showed the banks of Vermont and New Hampshire behind the Bank, but support of Massachusetts was both qualitatively and quantitatively weak. The banks of the Middle states all supported the Second Bank except for those of New York. There, the Mechanics' and Farmers' Bank together with the other banks Olcott controlled "arrayed a powerful force against the Bank".[37]

Wilburn's much-needed refutation of the myth of state bank opposition to the national Bank is only slightly marred by her resurrection of the New York–Virginia conspiracy. In her version, the prime figure is Thomas Olcott, who is able to wield undue influence because of Biddle's failure to establish a branch of the Bank in Albany.

Since the publication of Wilburn's book, two books have been written which examine the struggle over banking at the state level. Both used statistical analysis of voter returns. The first was James Roger Sharp's *The Jacksonians versus the Banks: Politics in the States After the Panic of 1837.*[38] Sharp presents an overview of all the states, but selects for special concentration Mississippi, Ohio, and Virginia. In each of those states he does the kind of voter correlation introduced by Benson. His conclusion is that with the defeat of the Second Bank and the Panic of 1837 the Jacksonian campaign for hard money shifted into the state arena:

> The Democratic Party did not engage in the battle over banks and currency as the party of the entrepreneur in the age of enterprise. . . . After the Panic of 1837, although the rhetoric of the two parties often obscured their real position, it is clear that the Whigs were the champions of the banks against the "radicalism" of the Jacksonians. Despite internal feuding, the main body of the Democratic party supported radical reform of the banks and, in some cases, their destruction. The party reflected, in both ethos and program, the hard-money position.[39]

Sharp found that the hard-money program varied among states. In the more agrarian states, it was more radical, calling for the abolition of state-chartered corporate banks, while in more commercial states, the hard-money advocates compromised for less hard-line reforms. William Gerald Shade, in *Banks or No Banks: The Money Issue in Western Politics, 1832–1865,*[40] confirms Sharp's major findings. Shade focuses on the five states of the Old Northwest, with special statistical attention on Illinois (where he interestingly finds confirmation for Benson's ethno-religious voting behavior thesis). Both books agree that nowhere was "free banking" a Democratic proposal. When it passed, it was with the support of the Whigs and occasional defecting Democrats.

The most recent contribution to the political revision of the traditional interpretation is David A. Martin's article, "Metallism, Small Notes, and Jackson's War with the B.U.S."[41]. Martin is an economist, and some of his findings can be considered economic revisionism. However, his main effort consists of putting the Bank war within the context of a broader, encompassing hard-money (or metallist) program at the national level. In doing so, he amplifies Schlesinger's original presentation. According to Martin, the specific planks of the program in addition to the Bank war involved: (1) a change in the mint ratio,[42] (2) the establishment of branch mints to increase coinage, (3) the reinstitution of legal tender for foreign coins, (4) the prohibition of small notes, and (5) the establishment of a government bank without note-issuing authority. The second and third planks have previously escaped historians; the fourth, of course, failed; and the last evolved into the independent treasury. Martin is even sympathetic with the Jacksonian program to the extent that, while he agrees with the traditional interpretation that the Bank provided a uniform currency for large, interregional transactions, he claims that the overissue of small notes drove specie out of circulation and made smaller and local transactions more chaotic than generally supposed.

III

The economic revision of the traditional interpretation has been accomplished by cliometricians, practitioners of the new economic history. The cliometricians, most notably Peter Temin, have completely demolished almost all of the major propositions of the traditional interpretation. The first work of economic revisionism to appear was Richard H. Timberlake, Jr.'s, "The Specie Circular and the Distribution of the Surplus".[43] Compared to Temin and the others that followed, Timberlake's article is only mildly revisionist, but it broke the ground. By examining the volume of public land sales and their importance within the economy, Timberlake reached the conclusion that the "Specie Circular was dramatic but innocuous",[44] in its impact upon the economy. He also discovered that distribution of the surplus resulted in very small interstate species flows and that the cooperation of state banks and state treasuries prevented any intrastate drain. Timberlake is left with only a small interstate demand for specie (mostly against New York) as a cause for the Panic of 1837. Harry N. Scheiber in an article on pet banks questioned Timberlake's conclusion on the Specie Circular,[45] so Timberlake in a brief second article buttressed it with more evidence.[46]

The next contribution to economic revisionism, George Macesich's "Sources of Monetary Disturbance in the United States, 1834–1844",[47] is broader in its scope. Building upon the suggestions found in Sumner and Smith, Macesich argues that international factors were actually to blame for the monetary disturbances of the Jacksonian era. U.S. prices were not autonomous, but linked to an international market. British capital flows were followed by specie imports or exports, which in turn forced expansion or contraction of the U.S. money supply and consequent changes in the price level. To reach his conclusion, Macesich constructed a series of figures for the stock of money in the U.S. from 1834–1845 along the same lines as the series constructed by Milton Friedman and Anna Jacobson Schwartz[48] for a later period. He used the Friedman–Schwartz proximate determinants for analysis.

Jeffrey G. Williamson, in an article entitled "International Trade and United States Economic Development, 1827–1843",[49] criticizes Macesich for using a static specie-flow balance of payments model and ignoring the dynamic impact of the growth of the U.S. economy. It was real economic growth in the U.S. that induced both the capital inflows and the gold inflows (and an unfavorable balance of trade). Williamson attributes economic disturbances during the period not to exogenous external events but to an internal natural cycle, or long swing, in economic growth.[50] While Williamson and Macesich disagree over the source of economic disturbance, they both agree that the U.S. banking system responded passively in its monetary expansion and contraction to factors beyond its influence. In other words, neither granted the Bank war much significance.

In a rejoinder, Macesich argues that capital flows induced growth, rather than *vice versa,*[51] but the next important contribution to the debate is Thomas D. Willett's "International Factors in Specie Flows and American Stability: 1834–1860".[52] Willett raises theoretical objections to Williamson's model, but does not totally agree with Macesich. Instead, his hypothesis not only stresses international specie flows but includes the reaction of the U.S. banking system as an active agent. The Macesich–Williamson–Willett debate involves more issues than those raised by Jackson's Bank war, and by the time Willett's contribution appeared, Temin's preliminary article had also been published. Nevertheless, the controversy in many ways anticipated Temin's findings.

Another work of economic revisionism, one which Temin almost entirely incorporates, is Jacob Meerman's article, "The Climax of the

Bank War: Biddle's Contraction, 1833–1834''.[53] Meerman studied the data on the contraction Biddle is credited with bringing on and found that it was a highly exaggerated event. Biddle's action resulted in a very small decrease in the rate of growth of the money supply and a very minor recession.

The most sweeping economic revision of the traditional interpretation is contained in Temin's book, *The Jacksonian Economy,*[54] and a prior article, ''The Economic Consequences of the Bank War''.[55] Temin's work is based on an improved series for the stock of money in the U.S. from 1820 to 1858. Temin, like Macesich, uses the Freidman–Schwartz proximate determinants, one of which is the reserve ratio (the percentage of bank circulating money — notes plus deposits — covered by specie reserves in bank vaults). According to the traditional interpretation, one of the advantages of the Second Bank as a central bank was that it kept state bank reserve ratios higher than they otherwise would have been; Jackson's war supposedly precipitated a decline in the reserve ratio. Temin found that, on the contrary, from the period 1831 to 1837, when the reserve ratio should have been declining, that it actually remained fairly constant. There was an increase in the money stock, but it wasn't due to Jackson's war or the state banks. It resulted from an inflow of specie which increased bank reserves. However, Macesich's guess that the specie came from England is wrong. The inflow resulted from increased specie imports from Mexico coupled with decreased specie exports to the Orient. The importance of British capital was not that it was followed by specie but that it prevented the U.S. unfavorable balance of trade from driving the new specie overseas.

Just as Jackson's Bank war had nothing to do with the inflation, his Specie Circular and the distribution of the surplus had nothing to do with the Panic of 1837. The major cause was a contraction started by the Bank of England with its high discount policy. It drew capital and specie out of the U.S. and abruptly ended the inflation. Furthermore, during the period of deflation and contraction following the brief recovery in 1838, conditions were not as bad as often pictured. Other of Temin's findings include the fact that reserve ratios were not lowest in the south and west; they were lowest in New England. In addition, the currency ratio (the percentage of money held by the public in the form of specie) rose dramatically after the destruction of the Bank, indicating a decrease in the public use of bank money.

Since the publication of Temin's book, Edward J. Stevens, in his article ''Composition of the Money Stock Prior to the Civil War'',[56] has done a Friedman–Schwartz money stock analysis for 1842 to 1859. His figures are not strictly identical with Temin's, but they similarly show a rising currency ratio. Stevens points out that gold from California must have stayed in the hands of the public rather than passing into bank vaults. Stanley L. Engerman, in ''A Note on the Economic Consequences of the Second Bank of the United States''[57] starts with the assumption that paper money is less expensive than specie and attempts to calculate the cost resulting from the increased currency ratio following the destruction of the Bank. He comes up with 0.15% of GNP annually.

Hugh Rockoff has published various articles on the nature of ''free banking''.[58] In ''Money, Prices, and Banks in the Jacksonian Era'',[59] in addition to summarizing Temin's conclusions, he offers a profit maximization equation to explain the note issue behavior of banks. ''American Free Banking Before the Civil War: A Re-Examination''[60] argues that ''free banking'' only led to wildcat banking if the statutory limit on the amount of notes that could be issued against state bonds significantly exceeded the market price of the bonds. Wildcat banking was a visible, but minor, problem. In ''The Management of Reserves by Antebellum Banks in Eastern Financial Centers'',[61] which Rockoff co-authored with Roger H. Hinderliter, they attempt to subject the reserve behavior of eastern banks to econometric analysis. In his most recent article, ''Varieties of Banking and Regional Economic Development in the United States, 1840–1860'',[62] Rockoff tries to determine if ''free banking'' laws, which he considers ''the antithesis of *laissez-faire* banking laws'',[63] had any negative impact on regional economic growth:

In summary, free banking was a mixed blessing. At

> times it produced wildcat banking. But this was due primarily to defects in the land security system for circulating notes. When these defects were absent, free banking, judged on the basis of evidence presented above, performed at least on par with other systems.[64]

A final article that should be mentioned is Arthur Fraas' "The Second Bank of the United States: An Instrument for an Interregional Monetary Union".[65] Fraas makes an astute analogy between the condition of state banks prior to the establishment of the Second Bank and an international situation in which there are floating exchange rates. He asserts that the benefit from imposing a uniform national currency with the Bank must be weighed against the cost of fixing exchange rates and eliminating price autonomy between regions. He feels the latter hurt economic growth in the Western states.

IV

With the principal tenets of the traditional interpretation refuted, the crucial question becomes: how will all the data and recent findings be synthesized and integrated into a new general overview of the Bank war? Unfortunately, the articles by Engerman, Rockoff, and Fraas all indicate that if any economic theory succeeds the sound banking doctrine, it will be the fiat money doctrine. Rockoff explains, for instance, that lower reserve ratios like those that existed in New England should not be construed as harmful. Just the opposite, they were good because they indicate that banks were using specie reserves more efficiently. "The reduction in the ratio of specie to money would be a benefit to the nation because it took real resources to produce specie reserves."[66] That assumption underlies Engerman's calculation on the cost of the destruction of the Bank. By lowering the currency ratio, the Bank permitted more efficient use of specie. If one follows that reasoning through, the most efficient currency becomes one that uses no specie at all — a completely fiat money supply. That is the standard by which some of the new economic historians are judging the banking of the Jacksonian economy.

At first glance, Fraas appears to contradict the prevailing trend. He raises the question of the cost of uniform currency. But the costs he considers result from fixed exchange rates pegged to specie, and his ultimate preference is a system of state or regional fiat currencies, totally independent of each other and specie. The trend away from the sound banking to the fiat money doctrine is clearly exhibited in a recent article by Richard E. Sylla entitled "American Banking and Growth in the Nineteenth Century: A Partial View of the Terrain".[67] Sylla celebrates the demise of Redlich and his "quest for soundness" school. No longer will banking history be viewed as a "quest for soundness". Instead, it will be viewed in terms of the services banks perform towards encouraging economic growth, and the most important of these is credit creation. Sylla favorably quotes Schumpeter to the effect that "sound money men of all times . . . throw and still 'throw away the baby with the bath water' by condemning popular banking practices".[68] Unsound money promotes growth. What in effect the new approach is coming around to is Schlesinger's advocacy of the soft-money men of the west, only the real soft-money men turn out to have been in the east and with the Bank. Only Temin, when he points to the rapid growth during the deflation following the Panic of 1837, and Williamson, with his long swing that leaves banks passive and irrelevant, have presented ideas that might be developed in a different direction.

One of the problems with the traditional interpretation and the sound banking doctrine that the new fiat money doctrine has not solved is providing an integrated causal explanation for the business cycle. J. R. T. Hughes and Nathan Rosenberg, in an article written fifteen years ago, complained:

> This paper is prompted by the dissatisfaction of the authors with the state of the economic history of business fluctuations in the U.S. up to 1860. The existing literature dealing with the historical origins of business fluctuations is, we feel, dominated by sweeping generalizations which, as they stand, are open to serious question.[69]

Since Hughes and Rosenberg wrote that statement, there has not really been much improvement. Except for Williamson's, most explanations are monetarist, but none show how monetary fluctuations affected business conditions. Those explanations, like Macesich's, that import the cycles from abroad, have just pushed the question into another country.

There is a monetary theory, however, that is an alternative to both the fiat money and sound banking doctrines, that does deal with the business cycle and can be used with great success to reintegrate the history of the Bank war. It is the monetary and trade cycle theory of the Austrian school of economists, most notably Ludwig von Mises, Friedrich A. von Hayek, and Murray N. Rothbard. In policy prescriptions, the Austrian school is unabashedly *laissez-faire* and hard-money, and it has been largely ignored, although not refuted, by professional economists in this country since the Keynesian revolution. However, its insights are essential if one is truly to understand the economy of the Jacksonian era.

Austrian theory views money as a creation of the free market and not a creation of the state. When government intervenes in the sphere of money, it is usually for its own enrichment and always to the detriment of the market. A completely *laissez-faire* approach to money would imply private coinage and no legal tender laws. Government monopolies of the mint eventually result in coin debasement. Legal tender laws usually have the effect of fixing an artifical price between two types of money (e.g. gold and silver or specie and paper) and bringing into operation Gresham's Law (which is merely an application of a general principle about government price fixing). Everyone should be free to use or to refuse whatever form of money they wish, and the market should set exchange rates between coexisting monies.[70]

Sometimes governments intervene in the market by creating money which they force people to use. Banking, to the extent that it involves providing either a money warehouse or a loan service (bringing together prospective creditors and debtors) is a legitimate free market activity. Banking, to the extent that it involves the creation of money through fractional reserves, is fraud and an intervention into the market no different from money creation by government. However, it is not necessary for a *laissez-faire* society to outlaw fractional reserve banking and require 100% reserve ratios.[71] The same result could be attained if banking were totally free in the market sense, meaning that *anyone* could create unbacked money. No one would accept such money unless reasonably certain of redemption. Thus, banks would be limited in their ability to inflate[72] by the size of their clientele. Bank money would tend to depreciate to a level offsetting the risk of non-redemption. Another limit would be competition between banks in the redemption of each other's notes. If Bank A operates at a lower reserve ratio and inflates more than its competitor, Bank B, then more of Bank A's notes will flow through the normal transaction of business into the hands of Bank B than those of Bank B will flow into the hands of Bank A. The resulting specie drain will force Bank A to deflate and bring up its reserve ratio. The operation of such a system of free banking would drive reserve ratios toward 100%. Proponents of the Austrian school differ on whether they prefer the prohibition of fractional reserves as fraud or the free banking approach to achieving 100% reserves.[73]

The question at this point may be raised, if competition tends to drive up reserve ratios and prevent inflation, why didn't it do so during the Jacksonian era? The first part of the answer is that it did — to a certain extent. Sound banking theorists have always deplored the notorious tendency of bank notes to depreciate and banks to start runs on each other during this period. More important, however, was the fact that competition was restricted by all sorts of interventions that were part of the traditional unholy alliance between bank and state. Banks and governments throughout history have entered into a profitable symbiosis where the banks create money for the governments in return for special privileges.[74] Hammond has correctly pointed out that banks owe much of their growth "to government and the need it too had for credit. For governments always have been borrowers, and repeatedly their dependence upon banks has been critical, especially in wartime".[75] War and also the desire of states to finance internal improvements were the two major projects for which governments needed bank money during the Jacksonian era. Again I quote Hammond: "The wild-cats lent no money to farmers and served no farmer interest. They arose to meet the credit demands not of farmers (who were too economically astute to accept wildcat money) but of states engaged in public improvements.''[76]

Among the special privileges received by banks from governments was the legitimacy and acceptability their notes gained by being put into circulation by the government. Chartered banks and state monopoly banks obviously had their competition limited, and we have already pointed out that the ''free banking'' system of the Whigs did not permit totally free entry and was far from free banking in a *laissez-faire* sense. A most important protection from competition occurred in every financial crisis when the states granted the banks the privilege of suspending specie payments. Continually freed from the need to redeem their notes, it is no wonder that banks did not feel obliged to keep their reserve ratios high. Another factor was the general prohibition of interstate branch banking and the frequent prohibition of intrastate branch banking.[77] Finally, usury laws, to the degree that they were enforced and effective, would decrease competition from banks with higher reserve ratios.[78]

The most effective way for banks to protect themselves would be to cartellize and agree not to compete. For instance, Bank A could agree not to redeem the notes of Bank B but hold them as reserves upon which to expand its own notes, and this practice would also permit Bank B to expand. This arrangement can be called a collusive relationship, as opposed to the competitive relationship in which there is mutual redemption. The banks could also agree to inflate at the same rate, so that mutual redemption could continue with neither having to contract. Since voluntary cartels[79] are notoriously unsuccessful, cartellizers frequently turn to government to make their cartels binding and effective. Central banking is a state cartellization of the banking system and as such is the ultimate stage in the alliance between bank and state. It involves a collusive relationship between the private banks and the central bank, in which the private banks hold the central bank's notes as reserves,[80] with central bank control (direct or indirect) over the reserve ratios of the private banks so that all private banks may inflate together. At the same time, the government usually grants legal tender status to the central bank's notes and uses them exclusively in its own transactions, inducing public acceptance.

One of the many difficulties with orthodox schools of economics is that they treat international and interregional trade asymmetrically.[81] According to Austrian theory, the principles of interregional or interlocal trade also apply to international exchange. The problem of the balance of payments is not a problem between nations; it is an example of the competitive relationship operating between competing central banks or banking systems. A drain of specie occurs in one country because that country's central bank is inflating faster than the central bank of the country to which the specie is flowing. Going off the gold standard or devaluing is the international equivalent of suspending specie payments. This analogy between international and interregional trade has even been noticed in a backward fashion by a few of the Jacksonian economic revisionists. Rockoff writes that, ''In other words, one can treat each state as a small country in a gold standard world of fixed exchange rates and free trade''.[82] Willett in his article compares the U.S. banking system of the nineteenth century to the international monetary situation at the time he was writing,[83] and I have already pointed out that the same understanding informs Fraas' article.[84]

Bank inflation has many unfortunate consequences, but the worst is the business cycle. When banks create new money, they do so in the form of credit. By increasing the supply of loanable funds, banks artificially lower the interest rate, inducing businessmen and entrepreneurs to make investments they otherwise would not make. The creates a boom. However, according to Austrian theory, since the interest rate was artificially distorted, the boom consists of malinvestments which are not economically justified. Eventually the malinvestments must be liquidated in a cluster of business failures called a depression. That, in brief, is the Austrian business cycle theory.[85]

The traditional interpretation claims that the Second Bank was a central bank, but describes its functioning as if it were in a competitive relationship with the state banks. That is the meaning of Hammond's statement:

> Its [the Bank's] regulatory powers were dependent on the private banks falling currently into debt to it. The regulatory power now in effect under the Federal Reserve Act depends upon the opposite relation — that is, upon the private banks' maintaining balances with the Federal Reserve Banks. The private banks were then debtors to the central bank; they are now creditors.[86]

In actuality, the Second Bank was only a primitive central bank and its relationships with state banks could be both competitive and collusive. The fact that the reserve ratio did not increase under the Bank indicates, however, that the "regulatory" competitive element described by Hammond was not very strong. Although the reserve ratio did not fall either, the fall in the currency ratio demonstrates very clearly the operation of the collusive element.[87] That explains the Bank's popularity with the state banks. Its popularity was not unanimous. There are always individual firms within an industry, usually the most efficient, that feel they have more to gain outside a government imposed cartel. On the whole, however, the following statement by Rothbard is extremely accurate:

> It is also a widespread myth that central banks are inaugurated in order to *check* inflation by commercial banks. The second bank of the United States, on the contrary, was inaugurated in 1817 as an inflationist sop to the state-chartered banks, which had been permitted to run riot without paying specie since 1814. It was a weak substitute for compelling a genuine return to specie payments.[88]

With a clear understanding of the nature of the Second Bank, the Jacksonian hard-money attack no longer comes across as confused and self-contradictory. No longer can the Jacksonians be dismissed as either ignorant, anti-capitalist agrarians or as greedy entrepreneurs hoping to unleash the state banks. The attack on the Bank was a fully rational and highly enlightened step towards the achievement of a *laissez-faire* metallic monetary system[89] The Jacksonians may not have been totally consistent. The extension of legal tender to foreign coins was a step in the right direction, but legal tender should have been expanded to private coinage as well, or even better, abolished altogether. Instead of expanding the government mint, they should have sold it. Instead of changing the fixed ratio between gold and silver, they should have had no fixed ratio at all. However, Jacksonian understanding of banking was far superior to that shown by politicians today. The war against the national Bank was only the first step in a struggle to eliminate fractional reserve banking entirely. After breaking the alliance between bank and state at the national level, the Jacksonians made a valiant effort to break that alliance at the state level as well.

The Jacksonians unfortunately failed, not only because the Whigs with their neo-mercantilist ideology pushed through "free banking" as a means of rearranging and extending the bank-state alliance,[90] but also because the business cycle was an international phenomenon. America was subject to the monetary expansions and contractions occurring in other countries. When specie flowed into the U.S. from Mexico, it was because of an inflation there fostered by Santa Ana,[91] and the specie stayed in the U.S. because of credit expansion by the Bank of England. When the Bank of England contracted to shore up its reserve position, a depression was precipitated in the U.S.[92]

The Jacksonian attack on the Bank of the U.S. inspired a similar attack on the Bank of England by William Cobbett. He did not succeed, but his intellectual allies, the Currency School, did manage in 1844 to pass Peel's Act, which imposed a 100% reserve requirement on all further note issues. The Currency School was opposed by the Banking School, contemporary advocates of the sound banking doctrine. Ironically, Peel's Act also failed, because its restriction applied only to bank notes and not to money created in the form of deposits.[93] The failure of the hard-money stalwarts in both England and the U.S. left the developing Anglo-American free market economy burdened with the destabilizing effects of the business cycle. That was a tragedy the consequences of which we still suffer.

NOTES

1. William Graham Sumner, *A History of Banking in the United States* (New York: The Journal of Commerce and Commercial Bulletin, 1896).
2. William Graham Sumner, *Andrew Jackson* (rev. ed., Boston: Houghton, Mifflin & Co., 1899).
3. *Ibid.*, p. 438.

4. Charles Grier Sellers, Jr., *Jacksonian Democracy* (Washington, D.C.: American Historical Assn., 1958); and *idem.*, "Andrew Jackson versus the Historians", *Mississippi Valley Historical Review* 44 (March, 1958), pp. 615–634.
5. Sumner, *Andrew Jackson,* p. 265.
6. *Ibid.*, p. 388.
7. *Ibid.*, p. 397.
8. Ralph C. H. Catterall, *The Second Bank of the United States* (Chicago: University of Chicago Press, 1903).
9. *Ibid.*, p. 239.
10. *Ibid.*, p. 476.
11. Reginald Charles McGrane, *The Panic of 1837: Some Financial Problems of the Jacksonian Era* (Chicago: University of Chicago Press, 1924).
12. By Marxist notion of class, I mean a concept of class which defines classes on an economic basis, on the basis of people's relationships to the means of production. I don't mean to imply that all persons accepting such a notion of class are conscious or consistent Marxists. I should point out here that the Marxist economic type of class is an inversion of the original libertarian concept of class, formulated by two French liberals, Charles Comte (not to be confused with Auguste Comte) and Charles Dunoyer. The libertarian concept sees conflict arising out of the employment of a coercive state apparatus for plunder and oppression and thus defines classes on the basis of people's relationship to the state. Saint-Simon twisted the Comte–Dunoyer formulation and passed it on to Marx. See Leonard P. Liggio, "Charles Dunoyer and French Classical Liberalism", *The Journal of Libertarian Studies,* Vol. 1, No. 3 (Summer, 1977), pp. 153–178.

    Much of the confusion about Jacksonian rhetoric would be eliminated if historians could escape the blinders of the Marxist class concept and realize that the Jacksonians are speaking in libertarian terms. For instance, a great deal of energy has been wasted on the argument whether the Jacksonians were pro-labor or anti-labor. They were neither; they were anti-state. To the extent that they viewed labor as a victim of *state* oppression, they will appear pro-labor. To the extent that they viewed labor as employing the state to oppress others, they will appear anti-labor. Similarly with the question of whether the Jacksonians were anti-capitalist or capitalists themselves. Yet, whenever historians encounter the libertarian concept of class in thinkers of the Jacksonian period, they automatically superimpose Marxist categories. Witness Schlesinger's treatment of John Taylor in Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown & Co., 1945), or Hofstadter's treatment of John C. Calhoun, in Richard Hofstadter, *The American Political Tradition* (New York: Vintage Books, 1948). See also my comment in note 14, below.
13. Schlesinger, *op. cit.*
14. Joseph Dorfman, "The Jackson Wage-Earner Thesis", *American Historical Review,* 54 (January, 1949), pp. 296–306. Also see Dorfman, *The Economic Mind in American Civilization, 1606–1865,* vol. II (New York: Viking Press, 1946). Dorfman has been frequently misinterpreted as saying the same thing as Hofstadter. For example, Sellers, "Andrew Jackson and the Historians", p. 628, lumps them together as the "Columbia historians", about whom he says: " . . . the Columbia historians defend the diametrically opposite view that the democratic movement was itself strongly capitalist in spirit and objected only to any limitation on free entry into the game of capitalist exploitation".
15. Hofstadter, *American Political Tradition.*
16. Schlesinger, *Age of Jackson,* p. 218.
17. Hofstadter, *American Political Tradition,* p. 63.
18. Walter Buckingham Smith, *Economic Aspects of the Second Bank of the United States* (Cambridge, Mass.: Harvard University Press, 1953),
19. Thomas Payne Govan, *Nicholas Biddle: Nationalist and Public Banker, 1786–1844* (Chicago: University of Chicago Press, 1959). Also see Govan, "The Fundamental Issues of the Bank War", *Pennsylvania Magazine of History and Biography,* 82 (July, 1958), pp. 305–315.
20. Fritz Redlich, *The Moulding of American Banking: Men and Ideas* (2 vols., New York: Hafner Pub. Co., 1951).
21. Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton, N.J.: Princeton University Press, 1957). For those who wish to avoid plowing through Hammond's book, all his important points can be gleaned from his articles: "The Banks, the States, and the Federal Government", *American Economic Review,* 23 (December, 1933), pp. 622–636; "Long and Short Term Credit in Early American Banking", *Quarterly Journal of Economics,* 49 (November, 1934), pp. 79–87; "Free Banks and Corporations: the New York Free Banking Act of 1838", *Journal of Political Economy,* 44 (April, 1936), pp. 184–209; "Jackson, Biddle, and the Bank of the United States", *Journal of Economic History,* 7 (May, 1947), pp. 1–23; "The Chestnut Street Raid on Wall Street, 1839", *Quarterly Journal of Economics,* 61 (August, 1947), pp. 605–618; and "Banking in the Early West: Monopoly, Prohibition, and Laissez Faire", *Journal of Economic History,* 8 (May, 1948), pp. 1–25. Also see Hammond's review of Schlesinger: Bray Hammond, "Public Policy and National Banks", *Journal of Economic History,* 6 (May, 1946), pp. 79–84.
22. I have called it the Hofstadter entrepreneurial thesis because it is associated with his name. Actually, Hammond developed his synthesis in an article which appeared prior to Hofstadter's book. See Hammond, "Jackson, Biddle, and the Bank of the United States", *passim.*
23. Variants of the sound banking doctrine include the real-bills doctrine and the Banking School which arose in nineteenth century Britain.
24. Hammond, *Banks and Politics,* p. 573.
25. Robert V. Remini, *Andrew Jackson* (New York: Harper & Row, 1966); and Remini, *Andrew Jackson and the Bank War: A Study in the Growth of Presidential Power* (New York: W. W. Norton & Co., 1967).
26. Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829–1861* (New York: Macmillan Co., 1954).
27. George Rogers Taylor, *The Transportation Revolution, 1815–1860* (New York: Holt, Rinehart & Winston, 1951).
28. Arthur M. Schlesinger, Jr., "Review of Walter B. Smith, *Economic Aspects of the Second Bank of the United States*", *American Historical Review,* 59

(October, 1953), pp. 140–141.
29. *Ibid.*, pp. 140–141.
30. Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton, N.J.: Princeton University Press, 1961).
31. *Ibid.*, p. 54.
32. New York in 1838 became the second state to adopt "free banking" and the model for the rest of the states.
33. Of course, Benson did not discover the provisions of the act. Hammond was familiar with them and also knew that in New York it was the Whigs who passed "free banking". Nevertheless, he still places "free banking" within the context of the Jacksonian entrepreneurial drive toward *laissez-faire.*
34. Frank Otto Gatell, "Sober Second Thoughts on Van Buren, the Albany Regency, and the Wall Street Conspiracy", *Journal of American History,* 53 (June, 1966), pp. 19–40. Gatell also treats the issue of pet banks in: Gatell, "Spoils of the Bank War: Political Bias in the Selection of the Pet Banks", *American Historical Review,* 70 (October, 1964), pp. 35–58; "Secretary Taney and the Baltimore Pets: A Study in Banking and Politics", *Business History Review,* 39 (Summer, 1965), pp. 205–227; and John Michael McFaul and Frank Otto Gatell, "The Outcast Insider: Reuben M. Whitney and the Bank War", *Pennsylvania Magazine of History and Biography,* 91 (April, 1967), pp. 115–144. Also on pets see Harry N. Scheiber, "The Pet Banks in Jacksonian Politics and Finance, 1833–1841", *Journal of Economic History,* 23 (June, 1963), pp. 196–214; and John M. McFaul, *The Politics of Jacksonian Finance* (Ithaca, N.Y.: Cornell University Press, 1972). Gatell has directly attacked Benson's allegation that there was no wealth difference between the parties in "Money and Party in Jacksonian America: A Quantitative Look at New York City's Men of Quality", *Political Science Quarterly,* 82 (June, 1967), pp. 235–252. Finally, see Frank Otto Gatell, "Beyond Jacksonian Consensus", in H. J. Bass, ed., *The State of American History* (Chicago: Quadrangle Books, 1970), pp. 349–361, an otherwise excellent article which unfortunately suffers from a misunderstanding of what *laissez-faire* in banking means. See note 90 below.
35. Gatell, "Sober Second Thoughts", p. 39.
36. Jean Alexander Wilburn, *Biddle's Bank: The Crucial Years* (New York: Columbia University Press, 1970).
37. Wilburn, *Biddle's Bank,* pp. 118–119.
38. James Roger Sharp, *The Jacksonians versus the Banks: Politics in the States After the Panic of 1837* (New York: Columbia University Press, 1970).
39. Sharp, *Jacksonians versus the Banks,* p. 321.
40. William Gerald Shade, *Banks Or No Banks: The Money Issue in Western Politics, 1832–1865* (Detroit: Wayne State University Press, 1972). See also the article Shade co-authored with Herbert Ershkowitz: Herbert Ershkowitz and William G. Shade, "Consensus or Conflict? Political Behavior in State Legislators During the Jacksonian Era", *Journal of American History,* 58 (December 1971), pp. 491–621. It is a direct challenge to the no-issue, "electoral machine" view of Jacksonian politics formulated by McCormick in Richard P. McCormick, *The Second American Party System: Party Formation in the Jacksonian Era* (Chapel Hill, N.C.: The University of North Carolina Press, 1966).
41. David A. Martin, "Metallism, Small Notes, and Jackson's War With the B.U.S.", *Explorations in Economic History,* 11 (Spring, 1974), pp. 227–247.
42. The hard-money significance of changing the mint ratio was not pointed out first by either Martin or Schlesinger, but by Paul M. O'Leary, in "The Coinage Legislation of 1834", *Journal of Political Economy,* 45 (February, 1937), pp. 80–94. Martin has written two articles on bimetallism: David A. Martin, "Bimetallism in the United States before 1850", *Journal of Political Economy,* 76 (May/June, 1968), pp. 428–442; and *idem.*, "1853: The End of Bimetallism in the United States", *Journal of Economic History,* 33 (December, 1973), pp. 825–844, in which he claims that between 1834 and 1853 the mint ratio was so close to the market ratio that bimetallism actually worked without driving gold or silver out of circulation.
43. Richard H. Timberlake, Jr., "The Specie Circular and Distribution of the Surplus", *Journal of Political Economy,* 68 (April, 1960), pp. 109–117.
44. Timberlake, "Specie Circular", p. 117.
45. Scheiber, "The Pet Banks", *passim.*
46. Richard H. Timberlake, Jr., "The Specie Circular and the Sale of Public Lands: A Comment", *Journal of Economic History,* 25 (September, 1965), pp. 414–416. Timberlake's other two articles dealing with the Jacksonian era are not revisionist: Timberlake, "The Independent Treasury and Monetary Policy Before the Civil War", *Southern Economic Journal,* 27 (October, 1960), pp. 92–103; and *idem.*, "The Specie Standard and Central Banking in the United States Before 1860", *Journal of Economic History,* 21 (September, 1961), pp. 318–341.
47. George Macesich, "Sources of Monetary Disturbance in the United States, 1834–1844", *Journal of Economic History,* 20 (September, 1960), pp. 407–434.
48. Milton Friedman and Anna Jacobson Schwartz, *A Monetary History of the United States, 1867-1960* (Princeton, N.J.: Princeton University Press, 1963).
49. Jeffrey G. Williamson, "International Trade and United States Economic Development, 1827–1843", *Journal of Economic History,* 21 (September, 1961), pp. 372–388.
50. The long swing and other cyclical concepts have an extensive economic and historical literature, and I will only mention the books by Williamson and North: Jeffrey G. Williamson, *American Growth and the Balance of Payments, 1820–1913: A Study of the Long Swing* (Chapel Hill, N.C.: University of North Carolina Press, 1964); and Douglass C. North, *The Economic Growth of the United States, 1790–1860* (New York: W. W. Norton & Co., 1966). For reasons which I cannot develop here, I consider the concept fundamentally flawed.
51. George Macesich, "International Trade and United States Economic Development Revisited", *Journal of Economic History,* 21 (September, 1961), pp. 384–385.
52. Thomas D. Willett, "International Factors in Specie Flows and American Monetary Stability: 1834–1860", *Journal of Economic History,* 28 (March, 1968), pp. 28–50.
53. Jacob Meerman, "The Climax of the Bank War: Biddle's Contraction, 1833–1834", *Journal of Politicial Economy,* 71 (August, 1963), pp. 378–388.
54. Peter Temin, *The Jacksonian Economy* (New York: W. W. Norton & Co., 1969).
55. Peter Temin, "The Economic Consequences of the

Bank War", *Journal of Political Economy,* 76 (March/April, 1968), pp. 257-274.

56. Edward J. Stevens, "Composition of the Money Stock Prior to the Civil War", *Journal of Money, Credit and Banking,* 3 (February, 1971), pp. 84-101.
57. Stanley L. Engerman, "A Note on the Economic Consequences of the Second Bank of the United States", *Journal of Political Economy,* 78 (July/August, 1970), pp. 725-728.
58. His dissertation, which I have not examined, is on this subject. Hugh Rockoff, "The Free Banking Era: A Re-Examination", (University of Chicago: doctoral dissertation in history, 1972).
59. Hugh Rockoff, "Money, Prices, and Banks in the Jacksonian Era", in R. Fogel and S. Engerman, eds., *The Reinterpretation of American Economic History* (New York: Harper & Row, 1971), pp. 448-458.
60. Hugh Rockoff, "American Free Banking Before the Civil War: A Re-examination", *Journal of Economic History,* 32 (March, 1972), pp. 417-420.
61. Roger H. Hinderliter and Hugh Rockoff, "The Management of Reserves by Antebellum Banks in Eastern Financial Centers", *Explorations in Economic History,* 11 (Fall, 1973), pp. 37-53.
62. Hugh Rockoff, "Varieties of Banking and Regional Economic Development in the United States, 1840-1860", *Journal of Economic History,* 35 (March, 1975), pp. 160-181.
63. Rockoff, "Varieties of Banking", p. 162.
64. Rockoff, "Varieties of Banking", p. 169. Of course, the really interesting question, which no one has yet tackled, is whether the prohibition of banking had any negative effect on economic growth.
65. Arthur Fraas, "The Second Bank of the United States: An Instrument for an Interregional Monetary Union", *Journal of Economic History,* 34 (June, 1974), pp. 447-467.
66. Rockoff, "Money, Prices, and Banks", p. 457.
67. Richard E. Sylla, "American Banking and Growth in the Nineteenth Century: A Partial View of the Terrain", *Explorations in Economic History,* 9 (Winter, 1971-1972), pp. 197-227.
68. Sylla, "American Banking", p. 209. See Redlich's reply: Fritz Redlich, "American Banking and Growth in the Nineteenth Century: Epistemological Reflections", *Explorations in Economic History,* 10 (Spring, 1973), pp. 305-314; and Sylla's rebuttal: Richard E. Sylla, "Economic History 'von unten nach oben' and 'von oben nach unten': A Reply to Fritz Redlich", *Explorations in Economic History,* 10 (Spring, 1973), pp. 315-318.
69. Jonathan R. T. Hughes and Nathan Rosenberg, "The United States Business Cycle Before 1860: Some Problems of Interpretation", *Economic History Review,* 2nd ser., 15 (1963), pp. 476-493. I think that the authors are being overly optimistic in confining their statement to before 1860. It applies with equal validity to subsequent fluctuations, including especially the Great Depression.
70. Austrian monetary theory can be found in: Ludwig von Mises, *The Theory of Money and Credit* (rev. ed., New Haven, Conn.: Yale University Press, 1953); and Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* (2 vols., Princeton, N.J.: D. Van Nostrand Co., 1962), pp. 160-200, 661-764. For briefer introductions see Rothbard, *What Has Government Done to Our Money?* (rev. ed., Santa Ana, Cal.: Rampart College, 1974); and *idem.,* "The Case for a 100 Per Cent Gold Dollar", in L. Yeager, ed., *In Search of a Monetary Constitution* (Cambridge, Mass.: Harvard University Press, 1962), pp. 94-136.
71. Originally, deposits of money within a bank were considered bailments, which meant that the money deposited still legally belonged to the depositor and the bank had to return not only the same amount as deposited but the exact same physical coins or bullion. At some point the law was changed, although no one has looked into the exact details. It is a good topic for further investigation.
72. I am at this point and hereafter using the word "inflation" in its original sense to mean an increase in the stock of money. The modern definition came about because an increase in the price level is frequently a consequence of an increase in the stock of money.
73. Mises favors free banking; Rothbard favors prohibition of fractional reserves. The Austrian definition of "free banking" differs from the regulated system of early 19th century America. It is defined as totally unregulated banking, except that every bank, as in the case of every other firm on the free market, must strictly and promptly redeem its obligations.
74. Sometime, as we have pointed out, governments simply create the money themselves, as with the Continentals during the Revolutionary War or the Greenbacks during the Civil War.
75. Hammond, *Banks and Politics,* p. 39.
76. *Ibid.,* p. 627.
77. On branch banking, see Oliver M. W. Sprague, "Branch Banking in the United States", *Quarterly Journal of Economics,* 17 (1902-1903), pp. 242-260.
78. This factor is hinted at by Sumner, in William Graham Sumner, *A History of American Currency* (New York: Henry Holt & Co., 1874), p. 125. Rockoff, "Varieties of Banking", pp. 171-172, attempts to measure the negative impact of usury laws, but from a totally different perspective to that which I have suggested.
79. Strictly, a cartel is a group of producers who agree to restrict production in order to drive up prices. Since banks collude to do just the opposite — expand credit which lowers interest rates — my use of the word is not strictly correct. However, I believe that my usage is within the spirit of the word.
80. For simplicity, I have been referring to bank notes, although everything I have written applies with equal validity to deposits or to any other form of bank-created money. In a central banking system, the private banks and the central bank will sometimes create different forms of money. For example, under the Federal Reserve System, private banks cannot issue notes; only the Federal Reserve (central) Banks may do so. Such an arrangement has no effect on the nature of the relationship.
81. Donald McCloskey and Richard Zecher, "How the Gold Standard Worked, 1880-1913", in J. Frenkel and H. Johnson, eds., *The Monetary Approach to the Balance of Payments* (Pacific Palisades, Cal.: Goodyear, 1975), point this out, but their new alternative theory contains a basic misunderstanding of the nature of arbitrage.
82. Rockoff, "Varieties of Banking", p. 166.
83. Willett, "International Factors", p. 49.

84. Fraas' logic, in Fraas, "The Second Bank", *passim,* if carried far enough, would show the absurdity of fiat currencies and floating exchange rates. Fraas reasons that if it is a good system between nations, then it must be good between regions. But why stop at regions? Why not, as Rothbard, "Case for a 100 Per Cent", pp. 125–126, suggests, let every individual issue his own freely fluctuating fiat money?
85. For the sake of brevity and clarity, I have greatly oversimplified the theory. For a fuller treatment, see Ludwig von Mises, *Human Action: A Treatise on Economics* (3rd ed., Chicago: Henry Regnery Co., 1963); Rothbard, *Man, Economy, and State*; and Friedrich A. von Hayek, *Monetary Theory and the Trade Cycle* (New York: Harcourt, Brace & Co., 1933). For the best application of the theory to the Great Depression, see Murray N. Rothbard, *America's Great Depression* (3rd ed., Kansas City, Mo.: Sheed & Ward, 1975). There is no work that applies the theory to the Jacksonian era, a gap I hope someday to rectify.
86. Hammond, "Jackson, Biddle", p. 2.
87. Temin, *Jacksonian Economy,* gives a good discussion of whether the Second Bank was a central bank, although he does not employ my categories.
88. Rothbard, "Case for a 100 Per Cent", p. 111.
89. For a discussion of the monetary views of the Jacksonians, see: Sister M. Grace Madeleine, *Money and Banking Theories of Jacksonian Democracy* (Philadelphia: Servants of the Immaculate Heart of Mary, 1943); Murray N. Rothbard, *The Panic of 1819: Reactions and Policies* (New York: Columbia University Press, 1962); Harry E. Miller, *Banking Theories in the United States Before 1860* (Cambridge, Mass.: Harvard University Press, 1927); and Lloyd W. Mints, *A History of Banking Theory in Great Britain and the United States* (Chicago: University of Chicago Press, 1945). The best known contemporary exposition was by William M. Gouge, *A Short History of Paper Money and Banking* (Philadelphia, 1833), but Amasa Walker, *The Science of Wealth* (3rd ed., Boston: Little, Brown, 1867), and Charles Holt Carroll, *Organization of Debt into Currency and other Papers* (Princeton, N.J.: D. Van Nostrand, 1964), both writing later than Gouge, gave lucid presentations that compare favorably with most modern texts.
90. Several authors who have managed to break through the Hammond imputation of "free banking" to the Jacksonians still equate that term with *laissez-faire.* See, for example, Gatell, "Beyond Jacksonian Consensus", and William G. Carleton, "Political Aspects on the Van Buren Era", *South Atlantic Quarterly,* 50 (April, 1951), pp. 167–185. In contrast, as I have already pointed out, Shade, *Banks or No Banks*; Sharp, *Jacksonians versus the Banks*; and Rockoff "Varieties of Banking"; are very clear in their understanding of the nature of "free banking".
91. Temin, "Jacksonian Economy", p. 80, hypothesized that the silver flow was due to an increased productivity of Mexican mining. Rockoff, "Money, Prices, and Banks", p. 454, corrected Temin, offering the explanation I have accepted.
92. Of course, 100% reserve banking in the U.S. would have prevented credit expansion in the U.S., but there still would have been fluctuations in the money stock along with malinvestment induced by capital flows.
93. This misunderstanding of deposits originated because of a meaningless distinction between lodged deposits (which were supposedly backed 100% by specie), and created deposits. The misunderstanding was shared by some, but by no means all, of the Jacksonian hard-money theorists. In fact, the correct understanding of deposits came earlier to American economic thought than it came to England.

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ON THE PARITY OF GROUPS

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I

One sign of the lengthy distance we have travelled away from the liberal, individualist origins of the American political order is the surprising prevalence of that visualization of social discrimination which sees it more as a problem of attaining the proper ratios between *groups* than of attaining justice for the individuals that compose them. Basic to the persuasive force of this view is the failure to recognize the fact that framing social policies in terms of groups actually *damages* substantial numbers of the individuals who compose them, a result exactly contrary to the ostensible purpose of these policies. This comes about because justice-to-a-group can be in fact nothing more nor less than justice to its individual members. Thus, if the component individuals have been treated fairly, then *eo ipso* the group, too, has been fairly treated. And conversely, it is impossible to treat a group *un*fairly without being unfair to at least some of its members. "Group" justice is, then, fully determined by the degree of justice experienced by the separate members of the group. It follows that there is no way of attaining justice for groups that is distinct from securing justice for *each* of the members of the respective groups.

What happens to the component persons of a group when social policies *are* formulated in terms of the overall group rather than of its individual members? Consider the problem of redressing past discriminatory injustice in, say, hiring or university admissions. It is clear from the foregoing that any prior wrongs must have been committed against certain *individuals* by other *individuals*. Hence, the proper moral procedure here, as in torts in general, is to seek restitution for the victims *from those responsible* for harming them. It would seem ludicrous to assess a penalty upon persons *innocent* of inflicting the original injustice, and to transfer these assessments to persons who were *not* the victims of the original discriminatory actions. Yet this latter is explicitly what the widespread advocacy and practice of giving "preference" in jobs and admissions to social groups thought to suffer "generally" from prejudicial treatment seeks to achieve. For here no *specific* acts of discrimination are identified (let alone proven); nor are the precise victims named (let alone indemnified); nor are the particular responsible agents specified (let alone penalized). Instead, certain of the *new* applicants — usually the least favored, marginal ones — for the positions in question, themselves admittedly innocent, are singled out in expiation of a sort of original sin to pay the full cost in terms of denied acceptance of "redressing" (a clear malapropism) diffuse acts of past discrimination committed by *others* (note that these costs are not even *evenly* distributed over the "guilty" group as a whole*). What is the difference between this policy and the early Biblical custom of transferring the sins of a tribe to a goat and sacrificing *it* in a cleansing act of atonement?

And the accuracy of the acts of restitution is no better. Here certain others among the *new* applicants — for whom no claim is made that they were ever harmed *by* the scapegoats and who are hence in no way entitled to compensation from *them* — nevertheless receive it. It surely seems a strange form of "justice", this giving of "preference" at the level of groups.

*This could easily be done. Instead of *replacing* normally admitted students with "special" admittees, the "specials" could simply be *added to* the same number normally admitted. This would dilute the available educational resources evenly over the entire cohort of the "guilty" group.

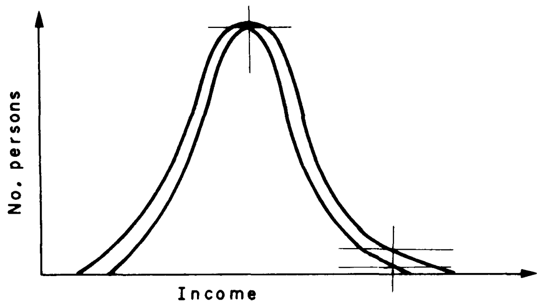
For the original victims have not been compensated, the original perpetrators have paid no penalties, unoffending people are punished, and strangers are benefited. Truly there is only madness in this method!

Furthermore, rather than putting an end once and for all to the bad old practice of not judging individuals by a uniform, fair standard of merit, this policy self-righteously commits brand new acts of this self-same sort. For to the extent that a "preferential" policy actually succeeds in its goal of winning admission for persons different from those under a uniform merit standard, so far does it *continue* the old custom of not judging individuals by the same, universally fair rules. The target of unfairness has been changed to be sure, but not the unfair treatment itself. It is hard to see how a policy that continues to make the same mistakes is a very notable advance. For so fair a purpose there must surely be a less confused solution, and indeed there is: the proper remedy for discrimination against individuals clearly is first, to *stop* doing it; second, to make restitution to those particular persons unfairly treated in the past; and third, to lay on condign punishment for those specific persons responsible.

This instance illustrates how the substitution of the group for the individual as the basic social unit of "justice" can easily be alchemized in actuality into the grossest kind of *in*justice. As Paul Seabury writes, " . . . when access to privilege is defined on ethnic-community lines, the basic issue of individual rights is evaded".[11] But even if one concedes this point — that justice must necessarily be sought at the level of the individual, not the group — one might still imagine it to be valid to *estimate* from disparities from the national average of a group's statistics of income unemployment, and the like, the degree of discrimination faced by its members. This practice is indeed ubiquitous; nothing is more commonplace these days than dutifully to tote up and compare such group statistics and ritually to attribute any discrepancies to the parlous state of justice. Or to utter lamentations over variations in group representation on the upper levels of a job hierarchy. Such arguments are given a certain plausibility by the occurrence of really surprising group disparities, such as the fact that women comprise only some 1% of the tenured faculty at Berkeley. And the very simplicity of this operational approach lends a certain allure — to some irresistible — to the remedial policy it suggests, namely, to rearrange persons so as to make the group ratios come out "even". Yet the key premises underlying arguments of this type — first, that group parameters *do* truthfully and reliably reveal the amount of discrimination experienced by the group's members, and second, that no group differences would be manifest in the absence of discrimination — have rarely if ever been subject to the critical examination they deserve. Could it be that there *are* processes and/or factors at large in society that cause group ratios to diverge for reasons *other* than discrimination? If so, then all such influences must first be ruled out before any suspicion of prejudice arising from aberrant group concentrations can be taken seriously.

There are in fact strong reasons for doubting both of these assumptions. Concerning the first of them, it is obvious that simple group averages combine the effects of current *as well as past* influences, rather in the manner of a security analyst's moving average of stock prices, although in this case it is a time average that spans generations. Such parameters are necessarily insensitive to the state of continuing — i.e. to *new* occurrences of — discrimination, which is the prime target for most remedial legislation. A famous example was Daniel Moynihan's widely cited report that, while the income of blacks overall was only some 60% that of whites, the income of *young*, intact Northern black families was some 93% of comparable white families. The latter statistic of course includes to a much smaller degree the effects of events long past, and it gives a very different picture of the degree of progress being made. (This is, however, not the only cause of the difference in these figures. Also important is that the proportion of black families headed by women (34% in 1974) is much higher than among other groups.)

A second caution to remember in making group comparisons is that what may in fact be only a minor difference in group *averages* will appear as a large difference in the *extremes* of the distributions. Consider the following hypothetical income profiles of two groups:



In the vicinity of the means of the two distributions, the difference in numbers of persons at each income level is hardly noticeable. But a cut at the high (or low) income extreme, as at the position indicated, would show two or three times as many members of one group at that income level as the other. Thus the conclusion one might draw on the need for remedial action would differ greatly, depending upon whether one looked at extreme or average situations. There is, moreover, no necessary reason for the respective distributions to have the same spread (variance) or shape, or to be symmetrical, or even to have only a single peak (one factor that could readily generate multiple maxima would be distinct waves of immigration as in the case of pre- and post-1945 East European immigration.) Thus it would formally be possible for one group to have a *higher* representation in the better positions but a *lower* mean income. Many other combinations are possible. Thus, relative group proportions in rare position at best i.e. assuming profiles of the same shape grossly exaggerate and at worst tell nothing at all about the degree of discrimination confronted by the entire group. Yet inferences of just this type are made whenever one cites group disparities in highly competitive, rare positions — such as the tenured faculty or the entering classes of the best universities and professional schools, or the top management of large corporations, or the highest political offices — as evidence for "pervasive" or "massive" discrimination against an entire group.

Another reason for exercising care in interpreting local group disproportions as representative of the group as a whole is the fact that, while any given selective step might by itself introduce only a small difference between two groups, this effect could be magnified exponentially by passing through a series of such "gates" acting in the same direction. For example, a modest selective differential that would convert a starting ratio of 50:50 to 55:45 in one step would, if repeated 10 times, result in a skewed final ratio of some 90:10. Or to view this in the reverse direction, we might easily find ourselves exercised at a group disparity of this latter size without being able to find, among the multitude of successive selections that everyone is subjected to as they progress through high school, college, graduate school and job-seeking, any single locus responsible for it. And of course, before we could remedy an unfair treatment, we would first have to locate it clearly.

The second presumption in using group ratios as proxies for the degree of discrimination against individuals holds that no material factor differentially correlates with group identity; so that for absent discrimination no differences in group statistics should be evident. This assumption is also risky. An important report appeared recently on discrimination against women in admission to graduate study at Berkeley in the fall of 1973. The composite figures showed about 20% fewer women accepted than would have been expected from equal probabilities of admission for the two sexes. Yet when the university departments, each of which passed independently on its own admissions, were examined one-by-one in an effort to identify the low culprits, only a few were found with significant sex imbalances at all. And among them, those that had admitted an excess of men were *more* than balanced by those with an excess of women! How could this startling result be reconciled with the "excess" of males clearly evident in admissions overall? It was of course well known that it was not equally easy to enter the 101 departments at Berkeley; the proportion of applicants admitted ranged between departments from less than 20% to more than 80%. And as it happened the two sexes had not applied in equal ratios across this range; more of the women had applied to the *more* selective departments. Within such departments men and women had roughly equal though low chances of acceptance. But when these data were combined with those from departments that had turned away a much smaller proportion of their applicants but with far fewer women among them, the process generated the statistical illusion of overall bias against women. In this instance, it would have been a grave error to assume that men and women were identical in all the traits that were pertinent to this selection (i.e. "merit"), since they clearly differed in one *very* pertinent way, namely, their evinced preferences. This difference could itself of course have been conditioned by discriminatory influences *elsewhere* in society (biased undergraduate counselling, pessimistic expectations of getting jobs in certain fields, etc). But at *this* particular locus of selection, no additional bias was introduced, despite contrary appearances.[2]

A related situation was described by Nathan Glazer when he noted that *white* immigrant groups such as Poles, Jews and Italians, despite long residence here in the "melting pot" and having experienced much less discrimination than blacks, are still far from being equally spread across the country in the same jobs and residential areas as each other and as other white groups. Glazer cites a study by Nathan Kantrowitz that demonstrates quantitatively a substantial degree of residential segregation among "foreign white stock" of southern European origin in the New York metropolitan area in 1960, nearly 40 years after the end of largescale European immigration. There thus appears to be a degree of self-clustering *preferred* by the members of such ethnic collectivities even in the absence of severe strictures imposed from without; evidently " . . . some degree of community and fellow-feeling courses through these groups . . . "[3] The Kantrowitz study showed further that residential segregation among blacks was only moderately more severe than among these whites; this would suggest that no more than a modest portion of the segregation observed among urban blacks could be attributed *specifically* to racial discrimination. Glazer concludes: "To attempt to eliminate through public policy all concentrations of blacks and other minority groups would clearly be to attempt to undo far more than discrimination alone has created."[4] We seem to have once again a case where it would be incorrect to presume a oneness among groups in their *internally* generated choices.

This fallacy — of wrongly presuming an identity between groups — recurs in other contexts as well. Tom Sowell teaches us, for instance, that great variability exists between groups in their age distributions.[5] This factor, as estimated by their median age, ranges from 18 (Puerto Ricans and Mexicans) to 23 (blacks) to 29 (Japanese) to 36 (Irish and Italians) to 47 (Russians). This means that parameters such as income, unemployment and crime rates that are themselves independent functions of age must be corrected for differences in the respective age distributions of the groups being compared; otherwise, an impression of discrimination might arise even though age-matched cohorts had the same incomes, the same risks of unemployment, etc. Furthermore, the age distribution can change with time in response to cultural or economic forces, or to new immigration. Another factor that can generate spurious inequalities in certain group statistics is uneven regional concentrations; blacks are still more heavily represented in the south than elsewhere, Chicanos in the southwest, Indians on reservations, Jews in or near large cities, Basques in Nevada, and so forth. And one could well imagine that yet another factor is variations in the reliability of the figures being compared. Income figures for Chicanos, for example, might well be biased owing to illegal immigration and the consequent need for covert (and thus underpaid) employment. Also, groups differ in the ease of "passing" by their most "progressive" members (groups defined by religion or nationality clearly have it easier in this regard than racial ones, and Indians more so than, say, blacks), so that official statistics compiled about the residual members might sometimes suggest a dreary, changeless picture of group progress even though social integration actually was proceeding apace.

Groups also differ markedly in the length of time the bulk of their members has been resident in this country. This is important because the process of group acculturation and assimilation is a slow one that extends over several generations in a sort of "intergenerational relay".[6] Andrew Greeley has shown, for example, that certain cultural attitudes have persisted through several generations of residence here.[7] Naturally all groups are progressing steadily in acculturation, but they have obviously commenced the journey at different times and from different starting points. Thus, a snapshot of society at any single point in time like the present would portray such varying *historical* influences as *current* group differences, even though these would be only temporary and continually diminishing. There would, for instance, be little reason to expect a mainly post-World War II immigrant group such as the Puerto Ricans to have achieved the same degree of social integration by 1976 as have the descendants of a mainly 19th century immigrant group such as the Irish, who originally exhibited many of the same symptoms of social pathology now often associated with Puerto Ricans.

Not merely the time of a group's migration to this country counts; its rate of assimilation is affected also by the "capital assets"[8] its members bring with them, such as whether or not they are already in command of English (or are at least literate in *some* language), their general level of education, the degree to which their originating culture values future rewards relative to immediate gratifications, the extent to which they are already accustomed to urban life and the ways of democratic political power, etc. Variations in such factors can obviously cause *real* (although in the long run transitory) differences in "merit" such as, let us say, in productivity as judged by an employer. Hence, even with a scrupulously fair assessment of each individual's real abilities on the job, one would *still* observe overall group differences in income, representation in the job hierarchy, etc. The constellation of pertinent factors is evidently specific to each group: upper class Cubans would probably already be educated, speak English, know how to run businesses and to cope with city life at the time they arrived, and hence would be in a position from the start to integrate quickly. On the other hand, peasants from Mexico would most likely have to acquire all of these attributes *after* immigration in order to assimilate fully; this could easily take a generation or two for the entire group.

Yet another factor implicated in generating certain group differentials is the varying selective effects of the immigration rules themselves. Both Glazer[9] and Sowell[10] have remarked, for instance, on the relative social and economic success of black *immigrants* (mainly West Indians) compared with native blacks. While opinions differ as to the explanation of this difference (the effects of current racism are assumed to be equal), one plausible interpretation would locate its source in the selection effected by the laws restricting entry of would-be immigrants. These laws might be imagined to have functioned as a sort of cultural sieve allowing only the most motivated or otherwise gifted (especially those already in possession of professional skills) to emigrate. It is no secret, of course, that the degree and quality of the legal stringency confronting applicants for immigration has varied greatly as a function of their national origins (and from time to time for a single group — e.g. the Chinese); Puerto Ricans have faced no imposed selection of any sort, while an Asian, unless a sort of superman, was fortunate to get in at all. (Could this, perhaps, be a factor in the outstanding relative success as a group of our citizens of Japanese and Chinese origin?)

And there are significant average differences between some groups in manifested IQ.[11] There is of course still much dispute concerning the *cause* of these differences, but *that* such differences show up on standard tests of IQ is questioned by no one. And to the extent that the traits correlated with overt IQ (educational attainments, etc.) are differentially rewarded, then this fact alone would give rise to group differences in the distribution of these rewards. Important average differences exist, too, between men and women. Eleanor Maccoby and Carol Jacklin, after a comprehensive review of the relevant literature, consider sex differences in the following traits to be "fairly well established":[12] verbal ability (females superior by about 0.25 standard deviations), visual-spatial ability (males superior by about 0.4 S.D.), math ability (males better but by probably less than 0.4 S.D.) and aggressiveness (males substantially more so). In addition, of course, are those differences associated with the biological facts of motherhood and nurture of infants, and the further fact that women have available to them alternative options for social roles not commonly open to men. Once again, *differences* in group patterns could be generated by these factors alone even with no additionally prejudicial selections. In this regard, Steven Goldberg has advanced a theory based solely on the sex group difference in aggressiveness to account for the finding in all known societies of a predominance of males in the relatively limited number of leadership positions.[13]

This discussion is not meant to be exhaustive but it shows in impressive variety that the presumption of identity between social groups in all the traits that influence statistical appearances is far more likely to be wrong than right. Also, many of these non-uniformities pertain only to one or a few groups, many are hard to quantify, and most are in constant flux (personal tastes, the degree of assimilation, the age distribution, regional concentrations, the effects of new immigration, etc.). Compounding this initial confusion is the fact that even *fair* societal selections can unpredictably magnify a basically small but real difference in *average* group "merit" into greatly aberrant group ratios in rare but highly visible extreme situations of leadership, or of destitution. And too, overall group averages are slow to reflect *recent* advances in the fight against discrimination.

This fundamental, rather more than Talmudic, complexity makes it impossible to project by deduction from first principles what the "ideal" social distribution of groups would be in a state of perfect justice. Recall for instance that even when looking at the composite ratios for only *two* groups that *were* more or less matched in age, regional distribution, period of residence in this country, acculturation, IQ, prior education and other "capital assets", as they passed through only a *single* selection step — the cited instance of graduate admissions at Berkeley — there was an unanticipated intricacy that made it impossible to forecast the proper proportions that would emerge in the absence of discrimination. And this *single* unexpected fact resulted in a seeming "shortfall" of women of some 20% — not at all insignificant! This shows that the attempt, however well meaning, to simplify the fight against prejudice by generously positing the fundamental equality of all social groups in all important traits — only thus making possible the equation of any departure from statistical parity among groups with discrimination against individuals — in actuality merely assumes away the very essence of the difficulty which is how in fact to rectify — to *stop* — discriminatory injustices against *individuals*. Such efforts clearly sacrifice accuracy for a meretricious ease of analysis, and hence merely mock an approach to justice.

In the light of this impasse at the level of exact theoretical or "rational" calculation, several writers have directed their attention to using an entirely different kind of process for combatting discrimination, namely, the operation of the market. By what arcane means do they envision that the market can reveal and implement the "proper" group ratios? This comes about as a consequence of the fact that the market is continually valuing (setting the price of) all of its factors, including the worth of labor. The standard of judgment here is of course economic productivity. This is not determined by *one* person's usually imperfect opinion, but rather is set *competitively* by all the potential consumers of this productivity in bidding for it. Discrimination in this context means making judgments different from what considerations of productivity alone would dictate, and here the market penalizes non-economic decisions through the force of competition. In the job market, for instance, if ". . . there were substantial misjudgments of current group productivity, this would mean an opportunity for some employers to reap unusually high profits by concentrating on hiring members of such low-wage groups";[14] In this way, a group that has encountered discrimination by one employer becomes *preferentially* attractive to any other employer who is merely impartial and fair. And owing to the higher profits that result, such non-discriminatory employers will tend, *cet. par.*, to expand at the expense of their discriminating competitors. There is therefore a considerable *cost*[15] to the person who indulges his taste for discrimination, a cost that will discourage this practice so long as he is not indifferent to his rate of return. Analogous considerations hold in the sale and rental of housing, the capital markets, and consumer sales and services.

Harold Demsetz has set forth[16] a thoughtful analysis of the ways in which the market can be used to oppose discrimination: (a) by offering, especially to a competitor, to work for a lower wage (or, in one's role as a consumer, to buy, especially from a competitor, at a higher price, or not to buy at all) a "non-preferred" person can force a discriminatory merchant to pay a cost (at least an opportunity cost) for his prejudice; (b) members of à "non-preferred" group can concentrate their imposition of costs upon a single merchant, thus confronting him with the threat of a major loss (e.g. bus boycotts). Indeed they can deliberately select a marginally profitable firm that cannot afford to forego *any* potential for raising profits; (c) the market provides the mechanism, in the need of other employers and sellers to meet or forestall this enhanced competition, to spread such local successes beyond the site of initial action, and (d) it is unnecessary in carrying out market operations of this kind to persuade a political majority of its justice (a slow and perhaps impossible task); one can just go ahead and *do* it.

These considerations argue strongly for the presumption that the particular distribution of groups observed in any given situation, where there already exists unrestricted competition and incentives for maximizing returns, is in fact the best possible approximation to the "ideal" that would obtain under the fair treatment of individuals. By contrast, in situations where competition is not operative — as in profit-regulated, legally protected monopolies, non-profit foundations and church organizations, or where workers or professionals can restrict competitive entry into their fields (as in occupational licensure, or some unions), or where price bargaining has been limited (minimum wage laws, "equal-pay-for-equal-work" rules, rent controls, legal limitations on loan interest) — the cost of all forms of discrimination (making decisions on bases other than economic productivity) has been significantly reduced or eliminated. Thus one would expect to find non-economic considerations in personnel selection to be far more common here than in competitive situations. Sowell has adduced evidence that this is in fact the case.[17] Group ratios in these situations, in contrast to competitive circumstances, would by themselves reveal nothing about the presence, or direction, of discrimination against individuals.

Many areas of American society are clearly highly competitive, and it is therefore difficult to accept allegations of large scale discrimination in these areas. Probably no field is more competitive than research in fundamental science at universities, especially in physics and biology, and it strains credence to believe that the *very* scarce resources available in these fields are frittered away on training less than the very best persons available. Yet there *are* wild disproportions evident among the workers in these fields, *if* one takes gross population ratios as the standard of comparison. There are for instance few women or blacks, an excess of Jews and Orientals, and a serious deficit of devoutly religious persons of *any* persuasion. That ratios like these, and indeed, that the ratios (whatever they are) in *all* departments at Berkeley are not notably influenced by discrimination, is strongly supported by a thorough study carried out at HEW's behest comparing group ratios among the faculties of the various departments to those among new Ph.D's in the respective disciplines. The idea was to determine how many new persons should be hired to match the faculty ratios to the "availability pools" in order to carry out the "goals and guidelines" mandated by HEW. The molehill result from this mountainous and tendentious effort was that *no* department needed to hire any Spanish-surnamed persons or American Indians to achieve parity, no department except Social Welfare needed to hire any blacks and it needed only one, and no department other than Civil Engineering and Architecture needed to hire Orientals, and these needed only one each. In short, *no* department displayed a statistically significant underrepresentation compared with what would naîvely be anticipated on the null hypothesis that there was no hiring discrimination whatever against members of these groups[18]. (Quietly ignored by HEW in setting its "goals and guidelines" was the perverse discovery that five departments had one or more Chicanos *in excess* of their "availability", six had one or more excess Asians, and seven had at least one extra black! This proves that HEW *itself* lacks conviction in interpreting disparities in group ratios as *always* due to discrimination!)

Only for women were significant "discrepancies" in the anticipated direction observed at all (31 departments "needed" to take on a total of some 90-odd women), and even this determination was rendered meaningless by the serious flaw that the "availability pools" were calculated *only* on the basis of total Ph.D's awarded nationwide in the respective disciplines and *not* on the basis of how many of the women Ph.D's were actually seeking full-time, uninterrupted jobs and were willing and able to move to Berkeley to get them. In particular, there was no determination of the number of these women who were already married or soon expected to be, a detail that appears to be the single most important factor conditioning the professional ambitions of women. Tom Sowell has shown that *un*married women academics in fact compare rather well in professional standing with their male counterparts. He writes: "Single academic women with a Ph.D. achieve the rank of full professor *more often* than do other academics with similar years of experience .... Moreover, the average 1968–69 academic-year salary of full-time female academics who were never married was slightly *higher* than that of males who were never married. ... [Many indicators] show that the basic difference in pay and promotion was between married women and all other persons. The gross male versus female comparisons are lopsided largely because married women drag down the averages of other women."[19]

The empirical result of the HEW study is, then, entirely consistent with the expectation from the theory outlined above, namely, that academic competition by itself has reduced discrimination to negligible amounts. This then permits us to give an answer to Gertrude Ezorsky's no doubt rhetorically-intended question, "Why does [Paul Seabury — see note 1] believe that this kind of justice [that people are rewarded according to their ability and their works] looms so large in academies? Do professors have so much more integrity than ordinary mortals?"[20] The answer is, "Not at all. But they *do* pay a cost for discriminating, even as ordinary mortals, since there *is* a high degree of competition in the academic contest for prestige, promotions and grants. Thus we have excellent reason to presume that the observed social group ratios, however odd they may strike those unacquainted with the intricacies of the situation, are not to any significant extent the result of discrimination in university hiring."

It is likewise hard to imagine that Chrysler Corporation — which in 1975 lost hundreds of millions of dollars and whose existence has recurrently been precarious — could afford the luxury of discrimination. Or small Polaroid in competition with giant Kodak. Or any computer company fighting IBM. And there can't be very many people who, in trying to realize money from selling one home in order to purchase a better one elsewhere, could afford to forego for reasons of prejudice the highest price offered.[21]

This analysis incidentally points up a fundamental fallacy of design in those "tests" of the prevalence of discrimination in housing which use matched pairs of black and white applicants. For these tests are set up in such a way that landlords suffer virtually *no* cost for indulging their preferences for discrimination, and so it cannot really come as a great surprise that they do. Had the comparison been set up with the two applicants differing *solely* in whether they came from the seller's home town, or shared the same passion for antique cars or French cooking, or had attended the same *alma mater*, the identical result would also have been obtained: people *do* exercise their eccentric personal preferences if there is zero cost to so doing. Naturally, this kind of "test" will *maximize* the amount of "discriminatory" activity uncovered, and it also gives not the slightest indication of what we would really like to know, namely, the degree to which the observed housing patterns *in fact* result from prejudice at this level — or, more importantly, what it would take to induce landlords to forego their racial preferences. For some landlords — not the most moral but those most in need of extra income — this payment would surely be modest. In contrast, in a true market situation where applicants will differ on a *variety* of factors that have to be weighed against each other (family size, job, education . . . "He may be a purple dwarf *but* he's with a U.N. mission", etc.), and are also making competitive financial offers, the *actual* occurrence of discrimination by race would necessarily be much less than in the contrived test situation. Or to put this in another way, what one finds by such means — as in public opinion polls, and indeed as in quantum mechanics — is very much a function of the *way* one structures the inquiry.

None of this, of course, argues that there won't be anecdotal instances of arrant discrimination in competitive markets. There surely will be isolated instances, since the market does allow one to "purchase" such indulgence at the going "price". But one *does* pay a *price* rather than win an economic benefit (as is often and falsely alleged) from so doing. And the market will minimize the social consequences — as revealed, say, in group average incomes — of even these occurrences because the persons who are "non-preferred" automatically become preferred by every other decision maker who is merely impartial. It is this self-correcting feature of the market, coupled with the fact that there are *many* competing assessors of "merit" constantly updating their evaluations, that supports the contention (no doubt surprising to some) that a free market is the best possible way both to discover the "proper" distribution of groups and simultaneously to bring it about. The proper way to defeat discrimination, then, is not to try to formulate an explicit, analytical solution (e.g. defining "availability pools") to the problem of "just" representation of groups and then to adjust the groups until the indicated statistical parity is achieved. Rather it is merely to see to it that the market, whose natural tendency is to treat individuals fairly, can function efficiently. The necessary conditions are: no force, no fraud, no state privileges, freely floating prices that permit the frequent evaluation of the worth of economic factors including labor, no imposed limits on potential returns, no artificial protection against losses, open competitive entry, and the like. Having satisfactorily arranged these conditions, one then has good reason to be confident of reducing the incidence of prejudicial actions against individuals to the lowest possible level; and having achieved this for individual persons, one will *eo ipso* have maximized fairness for the groups they may constitute as well. In this splendid state of affairs, then, " . . . how the figures add up on the basis of whatever measures of group we use may be interesting, but should be no concern of public policy".[22]

II

It is taking exception to the antihistorical and antiabstract spirit of our times to illuminate a newly-posed social controversy such as "affirmative action", with a body of work in political philosophy that reaches far back into the rapidly dimming first half of this century. But readers familiar with the writings of F. A. Hayek will have rightly recognized in this discussion a close parallel with his criticism of "scientism", that attitude in the social sciences that aspires to formulate theories of social kinetics that rival the laws of physics in their analytic clarity and quantitative predictive power. Typical of the scientistic inclination is its penchant for spinning holistic theories that take large social aggregates, or "wholes", as their objects of study, and then seek to explain how these wholes interact directly with each other, as though they have an internal momentum of their own, independent of the persons that happen to compose them.[23] This propensity is widespread. In the interpretation of history, for instance, it gives rise to "historicism",[24] the impulse to arrange history into a succession of "stages" or "epochs" or "economic systems" or "social classes" or "political systems", and to abstract from such progressions the inevitable "laws" of history that by extrapolation will allow one to peer into the future. A familiar example of this is Marxism's "scientific" (though in truth merely scientistic) forecast of the "inevitable" demise of capitalism. Another example in the field of economics is Keynesianism, which seeks to explain the economy in terms of the straightforward interaction of large statistical aggregates (e.g. total demand, unemployment rates, national income, etc.) and advocates the deliberate manipulation of these aggregates to nudge the economy along (e.g. stimulating demand to lower unemployment). Thus Keynesianism is unmistakably suffused with the warm glow of scientism (indeed, this is hinted at in the very name, "*macro*economics"). Also, the latter-day plague of making inferences directly from the *shape* of a society's aggregated income profile about that the degree of society's "social justice", and of then trying to tamper with the incomes of individuals in whatever ways necessary to give the collective profile a "fair" form, is scientism in its purest essence. Advocates of such a policy seldom consider it significant to ask whether or not the elemental economic transactions that generate an income distribution are themselves fair; the property of "social justice" seems to be attached, in a sort of anthropomorphic transfer, directly to the overall aggregate, regardless of the justice of the events that brought it about. It is a characteristic feature of scientistic thinking to lose focus on fairness to individuals in seeking to affect the "wholes" (a classic instance of viewing the forests and ignoring the trees); and it is not an accident that this kind of facile analysis exerts an especially mesmerizing attraction upon those who have little prior conviction of the value of individual liberty.

It is, I trust, obvious that the mode of thought that seeks the remedy for discrimination in establishing an arrangement of social group ratios that is *itself* "socially just", and which then tries to rearrange individuals in any way necessary to bring about these proportions, is squarely in the scientistic intellectual tradition. It therefore shares the flaw, carefully revealed by Hayek, that social "wholes" are *not* in fact objects-in-themselves possessing properties independent of their components, but are merely artificial constructs, or compositions, that are created from elemental units (i.e. individual persons and/or their actions) by the observer according to preexisting theories and beliefs.[25] And, as such, they " . . . can have no properties except those which follow from the way we have constructed them from the elements".[26] It follows that there can be no justice for a group that is separate or apart from justice to the individuals who constitute it.

Also illuminating in this connection is Hayek's insight into the intellectually awesome problem of how, given the complicated variety and endless novelty of modern liberal societies, competing claims upon the same scarce resources can be coordinated. One might at first imagine bringing all the information known to all members of the society into a room with a committee of democratically responsive "experts", and then allowing this committee to make "rational" allocation decisions based on this assembled knowledge of all the relevant facts and of all the people's desires. Hayek points out,[27] however, that this requires the discovery and comprehension of so many diverse and often local and transient details, which interact in unknown and ever-changing ways, that this task is impossible to carry out. One could of course sift the information, distill it, and abstract it until it could be cobbled together into a simple, comprehensible picture, but this only means *losing* most of the relevant information. This is what actually happens in centrally planned economies.

Or alternatively, one could set up merely the simple *rules* of just economic conduct between persons, and then sit back and accept contentedly whatever allocation the people work out for themselves through the consequent operations of the market. Hayek argues that this latter procedure must necessarily result in a "better" distribution — i.e., one that is more efficient and more responsive to the *multiple* wills of the people — because it uses and coordinates through the price system, rather than discards, the full stock of knowledge possessed by the society. This knowledge — e.g. that "of the fleeting circumstances of the moment and of local conditions", which is essential to securing an efficient use of resources — exists after all *only* in fragmented form, dispersed among the minds of all the participants in the economy. And in order to utilize it effectively, it is necessary both to delegate the "particular decisions to those who possess knowledge of their particular situations",[28] and to give them the incentive of potential loss or gain dependent upon the accuracy of their judgments. This, of course, is just what the market is all about. It is mainly for this reason — the superior use of knowledge — that market allocations are intrinsically more efficient than centrally planned ones.

Greater efficiency in allocation means obviously that many more "ends" can be served from the same resource base, and herein lies the explanation for that odd feature so characteristic of centrally planned economies — whether that of India, China or the Soviet Union — namely, that they can usually achieve a *few* selected ends, often of great technical sophistication (such as exterminating "vermin" like flies, rats, beggars, prostitutes and capitalists, or launching satellites, or exploding nuclear bombs) but are famously inept at providing, at the *same* time, a decent living standard for their citizens.

These alternative approaches to the problem of resource allocation are instances of two basically different kinds, or categories, of "order" discerned by Hayek.[29] One kind, which he calls a *taxis*, has its precise form deliberately decided in advance in a comprehensive, "rationally" formulated design. The second kind of order, which he terms a *kosmos*, has only the general rules of conduct of its components predetermined, while its *specific* form spontaneously *shapes itself* by the regularity of the behaviour of its elements according to these uniform rules. A *taxic* order is created by forces *outside* the system while a *kosmic* order derives its particular form from internal forces *within* it. A simple example of a *kosmic* structure is the creation of a crystal, not from a preexisting plan of its final overall shape but from the regular behaviour of its molecules in accord with chemical rules. A more intricate example of a *kosmos* is the mutually coordinated *complexus* of plants and animals, whose profusion and variety of form, according to Darwin at least, have arisen only in response to the general laws of mutation and selection. (To be sure, there *are* those who find these laws unsatisfying precisely because they do *not* allow one to predict that any specific result — say, a horse — will actually evolve, and who thus find it easier to believe that each and every species was purposely created by a divine will. If these persons should be right, then this *would* be an instance of a *taxic* order after all!)

Hayek holds that *taxic* orders are necessarily confined to situations of "such moderate degrees of complexity as the maker can still survey", and hence that *kosmic* sorts of organizing principles are inherently far superior to *taxic* ones for dealing with problems that are fundamentally of enormous complexity, such as how to "design" an ecosystem with its abundance of varied and interacting life forms, or how to "design" an economic system to adjust mutually the diverse claims of multitudinous persons upon limited resources. The market is of course in its essence a *kosmic* arrangement for accomplishing the latter, since only the rules of conduct in market exchanges are established, while people then proceed to make their own mutually satisfactory arrangements. This does indeed lead to a more efficient result than the *taxic* approach of central planning, and has moreover the splendid extra benefit of reconciling a maximum of individual liberty with the maintenance of order.

But the matter of social discrimination is also a problem of vast complexity. There are, as we have seen, a multitude of *ad hoc* and often transitory factors that influence the relative "merit" of a given group: they *do* differ in their preferences, their ages, their degree of assimilation, their cultural predilections, and many other traits. And even *small* differences in such average "merit" can be unpredictably refracted and magnified into large disparities in uncommon situations by *non*discriminatory selections in the society. This makes it theoretically impossible to calculate what "ideal" distribution of groups ought to obtain in any specific circumstance at any particular time. This lack of knowledge necessarily limits us therefore to a *kosmic* rather than a *taxic* approach in dealing with this matter; like the problem of optimal resource allocation, we should confine ourselves to setting up the rules and conditions that encourage just conduct between individuals, and then trust to the wisdom of the market — that *ensemble* of knowledge which is dispersed among the millions — to bring about a distribution of persons as up-to-date and fair to them as individuals, and hence also to the groups they make up, as it is possible to be.

Our operating assumption must, then, change from, "Of course groups *don't* differ in 'merit'" to, "Of course, they *may*" — and unpredictably so, at that! For this reason it is absurd to expect to achieve meaningful justice — that is, one framed in terms of fairness to *individuals* — by setting parity between *groups* as the goal of public policy. That this notion, despite its manifestly soft intellectual core, is nevertheless so fashionable in the salons of the day is a monument not merely to the considerable power of superficial thinking but, more profoundly, to the overall state of desuetude — "sputtering in confusion, empty of resources" — in which political liberalism finds itself in these distressing times.

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24. Karl Popper, *The Poverty of Historicism* (Boston: Beacon Press, 1957).
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26. *Ibid.*, p. 57.
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STATELESS SOCIETY: FRECH ON ROTHBARD

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Various members of the academic community have attempted to attack Murray Rothbard's political and economic theories. One attempt made by H. E. Frech III in "The Public Choice Theory of Murray N. Rothbard, A Modern Anarchist" is quite disappointing in that it deals very superficially with many important areas of Rothbard's work. This paper, however, will examine only one of Frech's perfunctory criticisms — his charge that Rothbard's theory of the stateless society is self-contradictory. The reasonableness of Frech's arguments will be determined.

The criticism which Frech levels against Rothbard's exposition of the stateless society is that of self-contradiction. Frech states that according to Rothbard, "A single, ultimate arbiter of conflicts (e.g. the U.S. Supreme Court) is considered non-essential".[1] Frech replies: "However, as we shall see, Rothbard's own model of a voluntary society contains such a final arbiter."[1] Frech contends that Rothbard's implicit assumption of a final arbiter underlies his entire discussion of anarcho-capitalist society. Its final arbiter is the collection of individuals that comprise the society.

Rothbard's own statements appear to lend credence to Frech's criticism. In explaining the operation of a free market nonmonopolistic judiciary, Rothbard maintains that when the courts rule according to the established procedure, the resultant decisions " . . . may 'then be taken *by the society* (italics added) as binding'".[2] Frech infers that since society must accept both the procedure and the decision for them to be binding, society is the ultimate arbiter in anarcho-capitalism. This is an incorrect inference, however, since Rothbard's statement is quoted out of context.

The arbiters about which Rothbard writes are not the existentially ultimate arbiters — that is, the people who compose the society — but the institutional arbiters — the free market courts. Rothbard contrasts the free market judiciary's decision procedure with the state judiciary's decision procedure. In the free market, two decisions pronounced by competing courts could constitute the accepted legal cutoff point. This deviates sharply from governmental procedures in which there is one final decision pronounced by a single court. In short, Rothbard praises the institutional arrangements of the anarcho-capitalist judiciary as superior to those of a government judiciary. Clearly, this is the context in which Rothbard speaks of anarcho-capitalism as having no final arbiter.

The emphasis which Rothbard places on an institutional contrast to the exclusion of any concern with the populace *qua* arbiter is justified. It is self-evident that all judicial decisions — whether pronounced by state judges or by free market judges — are effective *de facto* only if they are not actively opposed by a significant portion of the population. Any decision would be rendered operationally meaningless if the populace considered it so odious as to refuse to abide by it. It is important to note that the possibility that such opposition could occur in any society — anarchistic or governmental — is not unlikely. Thus, it is evident that the existentially final arbiter, i.e. the final existing arbiter, in any type of society is its component individuals. The people judge the desirability and determine the effectiveness of all judicial edicts. Since both governmental and anarcho-capitalist systems share this characteristic it is hardly appropriate for Frech to make this attribute a point of contrast between them. If a contrast is to be made, some unshared aspect must be used. Therefore, Rothbard is justified in dealing with their respective institutional frameworks — for this is a basis on which the two systems can be contrasted. And it is within this context that Rothbard uses the term "arbiter".

It is possible, however, that Frech regards "society" as an institution in its own right. "However, the agent which applies this law when there is a dispute is 'society', which acts when two courts agree, and accredits legitimate courts, or decides how to initially allocate property on the basis of Rothbard's principle of first use." Does Frech anticipate my argument above and attempt to render it impotent by considering society as an anarcho-capitalist institution? I doubt it, but, nevertheless, I will explore that possibility.

I find that Frech's suggestion is unwarranted. Acceptance of, or at least, passiveness toward the institutions and procedures of a society are necessary preconditions for the existence of that society. The recognition of decisions that result from certain procedures as binding is not a characteristic unique to Rothbard's system, but is a necessity for any system. This necessity constitutes the very foundation upon which the particular institutions of a social system rest. The fact that the survival of institutions is dependent upon the existence of these preconditions demonstrates sufficiently that the preconditions cannot themselves constitute a separate institution within that society. Thus, Frech's construing society as a separate institution which accredits the law, the courts, and the principle of first use with legitimacy, when, in fact, such accreditation is the necessary precondition of the system itself, does not withstand logical analysis.

Continuing his critique of Rothbard's stateless society, Frech utilizes a different approach. He now argues that an anarcho-capitalist society is not really stateless.

> Rothbard's society is simply an unorganized group of individuals who threaten to use force against anyone who violates a widely held principle or interpretation. Further, this group has a monopoly in the sanctioning or use of force. Although this group is unorganized and may vary in composition according to the issue at hand, it meets the definition of a government. Professor Rothbard has provided us with a highly imaginative model of a civilization which has no monopoly in the supply of defence services but it is not a model of a *stateless* society.

The criticism, in short, is that the populace in Rothbard's society constitutes a government in and of itself. Frech's sole criterion in determining whether a government exists is the presence of a monopoly of force — no matter how unorganized this monopoly may be. By logical extension, however, one may also consider a government's citizenry as constituting a government in and of itself. As I have shown earlier, it stands to reason that even the most oppressed citizenry could plague a government with resistance. The populace could effect the downfall of the constituted government by its own efforts. The citizenry is the ultimate judge of whether a given social system should exist, and by virtue of having this power, possesses a *de facto* monopoly of force.

Does it make sense to speak of a nation as consisting of two governments? Only if one accepts Frech's definitions as reasonable. The reason why we do not normally speak in such a manner is because when we speak of governments, we usually refer to governments *qua* institutionalized entities. Likewise, when Rothbard writes about governments he refers to governments *qua* institutions — regularized, legalized and institutionalized channels for aggression. Frech takes Rothbard's argument out of its proper context when Frech uses different criteria in identifying governments. The populace does have an existential monopoly of force, but it does not have an institutionalized, regularized and legalized monopoly of force. If Frech wishes to criticize Rothbard's society on the ground that it is not really stateless, then it is incumbent that Frech demonstrate that claim within the context of Rothbard's argument. Otherwise, Frech has no logical grounds on which to base his assertion that contradictions exist within Rothbard's theory.

Frech's criticisms are flagrant examples of context-dropping. Frech attacks Rothbard's theory of the stateless society as self-contradictory by using two different approaches. First, while Rothbard claims that anarcho-capitalism has no monopolistic final arbiter, Frech contends that the individual members of the society are in themselves the final arbiters. Second, while Rothbard asserts that his system is stateless, Frech replies that the populace in themselves constitute a government by virtue of their possession of a monopoly of force. Both of these approaches are based upon context-dropping and, therefore, are invalid. In addition, any rejoiner maintaining that the people themselves constitutes an anarcho-capitalist institution has been found to be invalid. Rothbard's arguments have withstood Frech attacks regarding their inner integrity. The only alternatives open to Frech if he wishes to criticize validly Rothbard's theory are either to argue using Rothbard's context as a contextual framework or else to attack the context altogether.

NOTES

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PENSION FUND SOCIALISM: A CRITIQUE

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In a provocative book recently published[1], Peter F. Drucker undertakes to show how the generalization of pension funds in the last 25 years has brought about profound changes in the American economy and society. One of the theses developed in the book has in the past received a good deal of attention from economists. It has to do with the problem of separation of ownership from control in the corporate economy. In the treatment offered by Drucker this question is given a new dimension. In the author's interpretation, the emergence of pension funds as an important source of equity capital for the modern large-scale corporation is said to have basically changed the dynamics of the American capitalist system. Drucker argues that with some one-third of equity capital in the hands of pension fund trusts, the divorce of ownership from control is now "final" (p. 82). This result is brought about by pension fund trusts viewing themselves as investors rather than owners. In that capacity, their job is to search for the most profitable investment, not to exercise control on the management or to sit on boards of directors. Because of this lack of concern for control on the part of pension fund trustees or because of their inability to exercise it, corporation managers are supposedly left "without anyone to be accountable to". " . . . the new owners of American business" (p. 83) have no representatives on the board to protect their interests. Two main proposals are suggested by the author to solve this problem. "The first step . . . . is the appointment of 'professional' directors . . . who, as members of the board, can be truly independent of management . . . But, in addition, both business and pension fund need . . . strong, visible membership on the board by people who represent both true 'constituencies', such as consumers and employers, and the future new 'owners', — the country's employees" (pp. 91–92).

The purpose of this note is to challenge Drucker's pronouncement that the shift of ownership from individual and other institutional investors to pension funds has changed anything fundamental about the working of the American capitalist system. As a consequence the author's policy recommendations are viewed as offering a formal solution to a non-problem.

THE PROPERTY RIGHTS APPROACH TO THE MODERN CORPORATION

The suggestion that dissociation of ownership from control in the modern dispersed corporation has had far-reaching implications has received a great deal of attention from economists and others since first raised by Berle and Means and taken up again in 1965 by Kaysen.[2] In recent years it has proved analytically fruitful to redefine the problem in terms of attenuation of the owners' property rights to the residual income, i.e. to the profits of the firm. This outcome has originated not from any changes in the legal claims of shareholders, as is the case for regulated producers and nonprofit, cooperative or governmental enterprises. Rather the stockholders' property rights are attenuated because of the higher cost to the owners of controlling and policing managerial decisions.

Thus in large-scale corporations with a high degree of stock ownership dispersion, the usual benefit–cost calculus of individual shareholders is said to prevent rational investors from becoming well informed, even on such major issues as revising or terminating the membership of the management group. The reason for this apathy is found in the well-known free rider principle. Any loss resulting from bad managerial decisions will be borne in large part by the many other corporate shareholders. And so will the benefits of good decisions accrue to other investors. It thus becomes rational for every shareholder to abstain from attempts to monitor decisions that will affect the value of the firm's resources. To adherents of the separation-of-ownership-and-control school, stock ownership dispersion generates loss of accountability on the part of managers of large corporations.

What are the consequences of this state of affairs on the allocation of resources? For economists the question arises of whether the traditional framework for the analysis of the firm is still relevant, once the profit maximization hypothesis is abandoned. Further developments in the field of property rights economics showed that the answer to that question is yes. Those who attributed great implications to the separation of ownership and control rejected the classical view of managers operating to increase the owners' wealth. On the other hand what was required to salvage the methodology of economics was that the principle of wealth maximization be replaced by that of the managers' utility maximization. In this view of things, the management's behavior becomes an important element in the allocation of the firm's resources. To the extent that the nominal owners lost some of their effective property rights, managers gained an amount of discretionary power which they can use to divert a portion of the firm's resources to their own ends.

It is within this framework of utility maximization by the management that the analytical tradition introduced by Baumol and Williamson[3] is to be placed. In the former's model utility maximization is associated with value of sales maximization, whereas the arguments that enter into the utility function of the Williamson model include the managers' compensation, the level of staff personnel and discretionary investments offering few or no profitability prospects. In recent years this approach to managerial discretion has been applied with great success to the numerous forms of production organizations where the attenuation of the owners' property rights goes even further than in the business corporation. In nonprofit concerns like universities and hospitals, in mutual and co-operative enterprises or in governmental organizations and workers' enterprises of the Yugoslav variety, no one can claim titles to the residual. The purchase and sale of shares to the wealth of the firm are legally prohibited. Anticipated future improvements cannot be capitalized into present wealth. Restrictions on capturable profits are generally combined with publicly established barriers to entry by new competitors. Ample room is thus made for managers to appropriate monopoly rents as supplements to competitive profits.

That profits are converted to the personal benefit of managers (and other parties) in enterprises where shares are not alienable has been empirically substantiated.[4] Utility-generating expenses are incurred which result in unit cost increases. These include fancier offices, generous expense accounts, higher salaries, greater tenure of office, fewer firings, easier life, excess quality, etc. More discrimination by race and age or on the basis of professional affinities is displayed in organizations where legal arrangements prevent profits from being taken out of the enterprise. Bureaucrats and executives of other limited-profit organizations are successfully lobbied. Factor suppliers including union officials are induced to such actions by the prospect of sharing in the surplus generated by the management's ability to gain monopoly rents in the firm. Promotional activities are profusely engaged in by non-owned firms of various kinds. Whether such actions serve to shift the demand for output in ways that raise the manager's rent or are prompted by the manager's altruistic desire to promote "good" causes and "merit" goods, is unimportant. In all cases managerial goals are reached at the expense of the consuming public who could otherwise have had lower prices or output levels more consistent with their preferences.

When applied to business corporations, as is done by Drucker, this approach raises as yet unresolved theoretical and empirical questions. Where purchases and sales of rights to the residual are allowed, shirking by managers is constrained even in diffused ownership corporations. This happens not because owners will scrutinize operations more closely but because investors will not accept returns on their funds which are lower than in less diffused enterprises. Rather than engage in the costly process of monitoring the management's decisions, it will prove more rational for every investor to remove his wealth from the control of those whose policies appear to jeopardize his interests. Capitalization of future events through the purchase and sale of shares implies in turn that the capital market will not ignore the superior performance of the management. In other words devices will be incorporated into compensation rules for rewarding managers who succeed in promoting the owners' interests. Competition in the capital market thus generates competition from would-be managers who seek to displace present management, both within the firm and without. Proxy battles are but one of the visible expressions of the constraints that the corporate structure imposes on managerial discretion. The major implication of the higher cost of policing executive behavior in diffused corporations is that we should expect varied types of managerial rewards, not higher overall remuneration nor lower wealth for shareholders.[5]

The distinctive feature of modern business corporations as opposed to non-owned forms of organizations thus rests on this power of shareholders to capitalize future changes in the firm's performance into present wealth through sale of their shares. In the view of many writers this attribute of the corporate organization has basically retained the effective control of the corporation in the hands of those who possess the property rights to the residual. Therefore the debate has to move from the analytical to the empirical level. Only factual evidence can determine whether the analysis of the classical firm is obsolete or not when carried on to the corporate form of organization.

In this respect it does not appear that the Baumol model of sales value maximization met the empirical test successfully. Authors like Lewellen and Huntsman[6] have found a positive relation between managerial compensation and profits but no relation between compensation and growth or value of sales. For his part, Williamson does provide some empirical support for his predictions that executive compensation is positively associated with the importance of staff personnel, the degree of industrial concentration, the importance of barriers to entry and internal representation on the board of directors. In his own words, "the evidence presented is clearly suggestive rather than definitive". Other implications of the separation of control from ownership have not received empirical support. Despite the presumption that the owners' interests are not adequately guarded, corporations have thrived. In contrast with the nonprofit and government sectors, no greater tenure of office by the management has been observed in the more diffused corporations. Stockholders profits are not lower. As mentioned earlier, executive compensations have been shown to be positively associated with the profit rate.

PENSION FUND CAPITALISM AND THE CORPORATE ECONOMY

I hope the lengthy argument above will not be construed as an attempt to guide the reader away from the main problem discussed in Drucker's work. It is my belief that this analytical detour was essential to prove the contention of this paper that the acquisition by pension fund trusts of a large fraction of total equity capital has not changed in any significant respect the basic rules of the game governing the American corporate economy. Clearly the accumulation of shares in the hands of pension fund trusts has in no way affected the legal property rights to the firm's residual. More importantly shareholders' rights, including pension funds' rights, to capitalize future developments into present wealth remain untouched by this shift in the distribution of ownership. For the sake of analysis, compare present-day property rights of pension funds with those of the employees of the Yugoslav firm or with those of the profit-sharing pension funds idealized by Louis Kelso and others.[7] Workers in these models legally possess the property rights to the residual. In that capacity they also have the power to revise the contractual arrangements of employees, including those of the managers. Yet the content of their property rights differs in one important respect from those of their American counterparts: they are not allowed to sell their rights on the open market or to take them away when they leave the firm. This of course is a radical departure from the American corporate model, with obvious implications for their ability to influence managerial actions decisively. But nothing of this sort has accompanied the advent of pension fund capitalism in America.

As regards the cost to shareholders of exercising control on managerial decisions, it has if anything declined as a result of the shift in the distribution of ownership from individuals and other institutions to pension fund trusts. Again it should be remembered that today, as in the past, the effective exercise of the shareholders' power derives from impersonal competition in the capital and manager markets. No "professional director" can adequately substitute for this mechanism as a guarantee of accountability. Clearly the stockholders' incentive and ability to see to it that their wealth is well guarded can only have been enhanced by the emergence of 50,000 or so specialized asset managers named pension funds. Granted that "today's capital market is dominated by no more than 1000 to 1500 large corporate pension funds" (p. 69), which are subject to an "excess of competition" (p. 70), then both their greater stake and expertise should have induced them to invest more in information on corporate activities than each of the 25 million or so individual American stockholders. In other words, the advent of pension fund capitalism should have reduced the extent of discretion enjoyed by managers and thereby their ability to deviate from the owners' interests.

I conclude that there appears to be no analytical basis for the pronouncement that "the emergence of the pension fund trust makes final the divorce of traditional "ownership" from "control". If analytically significant dissociation ever existed prior to the advent of pension funds, its implications should have been weakened by this development. On the other hand, in the alternative and conventional analysis which views the manager as constrained by competitive forces to operate to increase owners' wealth, then we still have corporate business as usual. Pension fund capitalism followed the rise in life expectancy combined with increasing income. Analytically, this is a shift in the distribution of ownership, clearly a social phenomenon of massive proportion. On the other hand if capitalism and free markets, as a system of penalties and rewards, still have a meaning, equity ownership by pension funds is but a technological step in the evolution of the corporate economy.

NOTES

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2. Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933); Carl Kaysen, "Another View of Corporate Capitalism," *Quarterly Journal of Economics*, vol. 79 (1965).
3. William J. Baumol, *Business Behavior, Value and Growth* (New York: Macmillan, 1959); and O. E. Williamson, *The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm* (Englewood Cliffs: N. J., Prentice-Hall, 1964.)
4. William A. Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine Atherton, 1971); J-L. Migué and G. Bélanger, "Toward a General Theory of Managerial Discretion," *Public Choice* vol. 17 (Spring, 1974), pp. 27–47; J. P. Newhouse, "Toward a Theory of Nonprofit Institutions," *American Economic Review*, vol. 60 (March, 1970), pp. 64–74; Armen A. Alchian and Reuben A. Kessel, "Competition, Monopoly and the Pursuit of Pecuniary Gains," in *Aspects of Labor Economics* (Princeton: Princeton University Press, 1962); Alfred Nicols, "Stock Versus Mutual Savings and Loan Associations: Some Evidence of Differences of Behavior," *American Economic Review*, vol. 57 (May, 1967), pp. 337–346; H. E. Frech III, "The Property Rights Theory of the Firm: Empirical Results from a Natural Experiment," *Journal of Political Economy*, vol. 84 (Feb., 1976), pp. 143–152.
5. For a more detailed analysis of this, see Armen Alchian, "Corporate Management and Property Rights," in Henry Manne, ed., *Economic Policy and the Regulation of Corporate Securities* (Washington: American Enterprise Institute, 1969), pp. 337–360.
6. W. G. Lewellen and B. Huntsman, "Managerial Pay and Corporate Performance," *American Economic Review*, vol. 60 (Sept., 1970), pp. 710–721.
7. Described and ably criticized by Drucker, pp. 36–40.

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PRIVATIZATION OF MUNICIPALLY-PROVIDED SERVICES

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The municipal reform movement of the progressive era succeeded throughout America in establishing local government monopoly in the provision of urban services. Competitive markets in such services as fire-fighting, street lighting, refuse removal, transit, and even policing, gave way to municipal bureaus and departments. That these reforms have resulted in unresponsive and inefficient service delivery systems should occasion no great surprise. Civil service reforms and now the advent of public employee unions have exacerbated the situation by vesting public employees with monopoly power. In recent years the monetary costs of municipally-provided services have increased more rapidly than costs in any sector of the private economy (save construction), yet the quality of these services has not perceptibly improved. The quality of many services, notably education, has deteriorated. With municipal taxes soaring, the majority of city dwellers feel — not without justification — that they are not getting their money's worth.[1]

Poor service at high cost is not the only burden; even as they continue to bear the excessive cost of monopoly municipal services, city dwellers at irregular intervals are subjected to sudden service shutdowns. They find that public employees enjoying monopoly power will occasionally exhibit that power to secure gains for themselves. This too should occasion no great surprise. State laws banning public employee strikes have proven futile, as work slowdowns and mass absenteeism can easily be arranged to achieve interruptions every bit as effective as strikes.[2]

The introduction (or restoration) of private competition in the provision of urban services — the creation of markets for these services — deserves serious and immediate consideration as a strategy for alleviating the headaches caused by the failures of municipal monopolies. With the present system widely regarded as deplorable, analysts, authorities, and the general public may finally be willing to accord this strategy the consideration it deserves. As Robert L. Lineberry has noted, "What once was taken as settled — that public services must be provided by public employees funded by public tax dollars — is now debatable".[3] The debate must be joined on both theoretical and empirical levels. The present paper will discuss what general advantages (or disadvantages) are to be expected from privatization and how best to capture (or avoid) them, will survey the evidence on possible cost savings from privatization as revealed by comparative studies of public and private systems, and will discuss particular services as candidates for privatization in light of the "public goods" question.

The term "privatization" refers not to a single strategy, but to two different strategies for removing the provision of urban services from the hands of municipal government.[4] By "contracting out" a city government can allocate tax revenues to a low-bidding private firm rather than to its own bureau for the provision of specified services. This practice is already commonplace with regard to capital construction projects. On the other hand, by "load shedding" a city government can extricate itself entirely from areas of the service sector. The government simply reduces or

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eliminates its own provision of a service, providing tax rebates or reductions where appropriate, and steps back to allow private entrepreneurs access to the newly-opened market.

Contracting out increases the number of potential suppliers who could be authorized to perform services on behalf of city government, and introduces competitive bidding for such authorization. It retains tax financing, however, and therefore cannot be considered true privatization. The supply of service remains a political issue, as government rather than the individual consumer exercises control over the quantity and quality of service chosen. Load shedding, on the other hand, clears the way for competitive market provision of a service. The price mechanism for rational allocation of resources replaces political control, and consumer sovereignty is introduced. Consumers are no longer restricted to identical service, but each may purchase the level and type of service which suits him individually.

The sharp difference between political and consumer control entails that no case, empirical or theoretical, can ever claim superior efficiency on the part of tax-financed provision. Two delivery systems can be compared on efficiency grounds only if they represent alternative means of pursuing one and the same end. Here the ends are very different. Under political control the ends of those who wield power in municipal government are pursued. Under consumer control each individual is permitted to pursue his own ends.

Most cities are already contracting with private businesses for one or more services, and a wide variety of services are so provided. A broad survey conducted by the International City Management Association in 1963 found that almost 75% of the more than 1000 reporting American cities contract out to private agencies or to other governmental bodies, with cities of 50,000 to 100,000 in population doing so more frequently than either larger or smaller cities. The design, installation, and maintenance of street lighting was the service most commonly contracted out to private firms (43% of reporting cities). Private contract water supply was also common (40%). Refuse removal has long been provided to municipalities on a contract basis; the ICMA study found that 25% contracted with private carters. Also covered by the study were health services (chiefly emergency ambulance service), which 10% of the cities contracted out to private firms, and street cleaning and maintenance (less than 10%).[5]

In other examples of contracting, private firms are being hired by cities to plow snow, maintain parks and public buildings, enforce parking laws (both ticketing and towing), perform data processing operations, patrol public buildings, operate sanitary landfills, and educate students. Firms are actually paying rather than charging New York City for the right to remove abandoned cars from city streets and for the privilege of providing bus shelters (which generate advertising revenue) on city sidewalks. Perhaps the most provocative example of an urban service contracted to a private firm is the provision of fire protection services to the city of Scottsdale, Arizona (population 90,000) by the Rural-Metropolitan Fire Protection company.[6]

The most tangible advantage cities and their tax payers can expect from privatization is substantial cost savings. These savings are due primarily to increased efficiency in production, or what economist Harvey Leibenstein has termed "*X*-efficiency".[7] Privatization increases productive efficiency by transferring production from notoriously sluggish municipal bureaucracies to competitive and profit-motivated private firms.

Without the spur of profit, or some other reward for least-cost production, management has no incentive to hold down costs. F. A. Hayek long ago pointed out with regard to competitive firms that "the task of keeping costs from rising requires a constant struggle, absorbing a great part of the energy of a manager".[8] Leibenstein, characterizing this phenomenon of rising costs as "effort entropy", has argued that the motivation of management to fight effort entropy "depends, among other things, on the environment in which the firm exists and on the pressures for changes the environment imposes on it".[9] Competitive pressure affects the intensity of effort with which firms and their employees work; in its absence effort diminishes in favor of more relaxed interpersonal relations. If Leibenstein's conclusion that secured monopoly "provides a refuge from pressure" is true for the privately-owned firm, it is *a fortiori* true for the municipal department. A privately-owned monopoly is still subject to the constraint of acceptable profitability, while a municipal monopoly is not.

Dennis R. Young has aptly commented that the municipal bureau has "no yardsticks and no profit objective by which to measure and motivate performance". There is no threat from competitors to the bureau's survival or job security. The technical expertise required for evaluation of performance insures that "the bureau is effectively insulated from external pressure to improve productivity". The bureau is typically unable even to identify the actual money costs of its output, let alone to hold them down.[10]

Evidence of effort entropy among municipal monopolies is not difficult to find. E. S. Savas has supplied the following examples from New York City alone. The average New York City Department of Sanitation garbage truck spends more than 30% of its time out of commission, versus only 5% down-time for the trucks owned by private carters in the city. The number of New York City policemen increased by 50% between 1940 and 1965, yet the total number of hours worked by the force was actually lower in the latter year. Shorter weeks, longer lunch hours, more holidays and vacation days, and more sick leave more than made up for the greater number of workers. Similarly a 50% increase in the number of teachers plus the hiring of teaching assistants brought almost no reduction in the average size of the city's classrooms, as teachers shortened their working hours and passed along their duties.[11]

In this context contracting out seems to be a halfway-house between market competition and municipal monopoly. Where contract renewal is automatic (perhaps because the bidding is rigged — a genuine threat), the favored firm becomes a privately-owned monopoly in the market for its municipal contract. Pressure to cost-minimize operates most effectively where bidding for the contract is frequent and openly competitive.

A municipal bureaucracy, unlike a private firm, operates under restrictive personnel regulations intended to prevent the abuses of the spoils system. The system which protects municipal employees from political pressures, Peter F. Drucker notes, "also protects the incumbents in the agencies from the demands of performance".[12] Civil service rules greatly hamper productivity by making it possible for municipal employees to exert minimal effort on the job without penalty. Lyle C. Fitch points out that these rules "tend to freeze employees into positions and to prevent management from disciplining uncooperative employees; only cases of extreme recalcitrance or misbehavior will justify actual discharge".[13] Even when justifiable under civil service regulations, firing a municipal employee requires a great expenditure of managerial time and effort; it is therefore rarely a credible threat. Civil service often prevents employee transfers or high-grade entry, thus obviating the competition for higher-level jobs which motivates employees in private industry. There is clearly little chance that a municipal bureaucracy will be able to recruit ambitious workers.

Talented managers hired from the outside are more likely to generate resentment from career civil servants than to generate increased productivity. The middle level civil servant thus has close to zero motivation to do a superior job: his promotion depends not on performance but on seniority, and his opportunities for higher-paying jobs elsewhere would be minimal even if he could distinguish himself.

The problem of motivating municipal employees has become even more difficult with the advent of public employee unions. The unions typically resist any incentive pay systems (teachers' unions are notorious for this), any attempts even to measure productivity, and indeed any changes whatsoever in work routines. The more costly management finds it to alter work routines, the greater the gap liable to exist between those routines and efficient practices.[14] Under municipal control generally, and especially where unions are involved, the provision of services tends to remain unduly labor-intensive and technologically static in contrast with other sectors of the economy.[15] For example, three men accompany each municipal sanitation truck in New York, while only two accompany the trucks of private firms.[16] Privatization offers a route for escaping the growing demands and strike threats of public employee unions as well as for escaping civil service. Union demands for excessive wages (i.e. wages above the market-clearing level) are more readily met in the public sector than in private enterprise, as the private entrepreneur must hold down costs and doesn't need the union vote to retain his position.

Budgetary controls and attendant paperwork impose further restrictions on the management of a municipal bureaucracy, primarily for the purpose of making it difficult for the bureau chief to line his pockets with more than his stipulated salary. These controls do nothing to encourage the rational allocation of resources, and often discourage it. They do not provide incentives for productive efficiency and frequently do the opposite. Any cost savings by an agency would only be recaptured by the city treasury, and would result in slimmer appropriations in the following year. The rational bureaucrat who sought to maximize his power and influence, on the other hand, might find courting crisis the best way to attract attention and running a deficit — by failing to economize — the best way of ensuring that his budget would grow.[17] Budget size is not related to the quantity and quality of service actually provided, but only to the costliness achieved in production.

The natural tendency of a public bureaucracy to expand and perpetuate itself is not limited (as the tendency of a successful private firm is) by the extent of genuine customer demand for its service nor by its comparative efficiency in meeting that demand. Public agencies face no profit-and-loss test of viability. Never allowed to die, they can persist indefinitely in extensive productive inefficiency. It is the great virtue of private firms, on the other hand, that they are free to fail and are compelled to abandon unprofitable ventures.[18] It is in this manner that the market economy maintains its vitality and flexibility. By load shedding, the provision of service is subjected to the market test, and will be continued only for as long as consumers are willing to pay for it.

While contracting out and load shedding can both achieve substantial gains in productive efficiency, only the allowance of true market provision through load shedding can achieve consumer sovereignty and gains in allocative efficiency. These latter gains are due to the ability of the price system to guide resources into those employments in which they contribute most to consumer satisfaction. The system of compulsory taxes and "free" provision of a service prevents the consumer from expressing the strength of his desire for more or higher quality service relative to his desire for more of other goods and services. The type of service supplied to a consumer bears no relation to the sort of service he individually would be willing to buy. Instead, a uniform type of service, made available to all consumers, is chosen through political mechanisms. In the absence of market pricing those demanding service are not informed of the scarcity value of the resources consumed and have no incentive to limit their demand. Unlimited demand must always exceed limited supply, and thus originates the frequently-heard claim that municipally-provided services are insufficiently supplied.

Tax financing also creates equity problems. Because services are not distributed in accordance with tax payments, some citizens end up subsidizing the consumption of others. Municipal golf courses and basketball courts, museums and sports stadiums, school systems and transit systems, all involve disparities of this sort.[19] Those on the receiving end (city employees included) have an interest in pressing for higher and higher expenditures on their favorite service. "When city-wide taxes pay for an activity", Dick Netzer notes, "there is every incentive for very small groups of beneficiaries to seek expansion of the activity, since the beneficiaries do not pay for the expansion". Netzer provides a pointed example of this incentive structure at work: the New York City Board of Estimate in July 1969 mandated alteration of the route of the Second Avenue subway, so as better to convenience a few thousand riders. The annual costs of the alteration came to between $500 and $1000 per rider, but that cost was shifted to all city taxpayers.[20]

The size of a municipal or contract agency is likely to be non-economic, since its size is determined by political considerations (chiefly the size of the jurisdiction it serves) and not by economies or diseconomies of scale. As any economics text will attest, costs are minimized only when service is provided up to and not beyond the volume at which marginal cost begins to exceed price (or marginal revenue). A profit-seeking producer in a competitive market will try to find and establish the efficient size for his operation, and he has the necessary guidance to do so in the form of price signals. Scale economies are more difficult to locate and achieve by contracting out, since the size of the business is set by the size of the contract. A contractor may be able to produce at lower cost by serving three municipalities — or one-third of a municipality — but there are typically institutional barriers to making such arrangements. In the absence of a true market, moreover, there are no clear data to indicate efficient size.

An objection frequently raised to market provision of what are at present municipally-provided services is that they are "public" services, that is, collective goods whose provision is subject to "market failure". A collective good is a good or service which exhibits non-rivalness in consumption (the classic example being national defense) such that pricing is unnecessary for rationing purposes once the good or service exists. (It is sometimes claimed that exclusion of non-payers by the provider of a public service would be "inefficient" in that it would prevent a costless increase in the well-being of the non-payers. This claim is false; it neglects the cost of foregone revenue or utility to the would-be excluder.) "Market failure" occurs when a collective good or service cannot effectively (or "sufficiently") be provided on an individual user-charge basis due to the costliness of excluding non-payers from use. Tax financing of services, however, contributes nothing to the solution of the problem of exclusion costs. Indeed, it may hinder its solution, as it obviates any incentive for producers to discover and develop lower-cost means of exclusion.

Taxation entails compulsion against those citizens who might otherwise be "free riders", and especially against those citizens whose tastes for the services differ from those of the government. Furthermore, taxation is itself exclusionary: those who are caught not paying taxes are rather summarily excluded from enjoyment of the service.[21] Whether this compulsion is *ipso facto* justified in the case of a collective good is an issue too seldom debated; Robert Nozick, for one, has cogently argued that it is not.[22]

The assertion that certain municipally-provided services are "public" services by nature is a claim which must be examined on a case-by-case basis. Such examinations will be accompanied below by discussions of relevant empirical evidence concerning comparative production costs.

REFUSE REMOVAL

Refuse removal may be a matter of legitimate public concern due to its impact on public health and on neighborhood amenity, but it cannot be considered a collective good. An individual's neighbors (unless they enjoy disease) may be injured by the non-disposal of his trash, and thus laws regarding hygiene may be appropriate to protect neighbors from open putrefaction of waste. These "external effects" are not sufficient to make refuse removal a public good. Removal service does not exhibit non-rivalness in consumption or high exclusion costs, and thus there is no obstacle in theory to market provision.[23]

In practice refuse collection is provided under a number of institutional arrangements. Municipal, contract, and market provision of the service are all common, though market competition is more common for commercial than for residential collection. Less common are franchised provision, wherein a privately-owned firm is granted a monopoly over the sale of removal services within a city, and self-service.

This variety of arrangements, together with the relative ease of measuring service level, has enabled researchers at Columbia University to make credible cost comparisons among municipal, contract, and market provision of residential collection. Their findings are based on a comprehensive 1975 survey of American municipalities lying within Standard Metropolitan Statistical Areas of less than 1,500,000 total population. The 200 SMSAs in this sample contained one-third of the U.S. population by 1970 census figures. Municipal collection was found in 37.4% of the more than 2000 municipalities surveyed, contract collection in 20.5%, and market collection in 38.1%. An econometric model was constructed and fitted by regression analysis to hold level of service (frequency of collection, curbside or backyard pickup, etc.) and other factors (climate, local wage rates, etc.) constant. For a typical city of population 60,000, contract collection was found to be the least costly per household per year. Market collection was estimated to be 31% more costly and municipal collection 61% more costly, taking into account the fees and taxes which private firms must pay.[24]

The high cost of municipal collection is clearly due to its inefficiency in production. The study produced statistically significant figures which indicate the contrast between contract-holding firms and municipal sanitation departments for cities over 50,000 in population. Municipal departments suffer from higher employee absenteeism rates (12% versus 6.5%), use larger crews (3.26 men versus 2.15), and spend more time in picking up a given household's trash (4.35 man-hours per year versus 2.37). Municipal crews also seem to serve fewer households per shift, and seem less often to work under a labor-incentive system.[25]

The comparative costliness of market over contract collection is somewhat surprising. Market pricing should lead to greater economy on the part of consumers and thereby to pressure to hold down costs. Pricing by volume collected provides incentives to reduce the volume of refuse. A 1959 study by the American Public Works Association of twelve cities found the quantity of refuse per capita per year to be lowest (by a significant factor: 794 pounds versus the median 1430 pounds) in San Francisco, the only city in which households and firms were charged for collection on a quantity basis.[26] Pricing also provides incentives to exploit the salvage potential of refuse.

Part of the reported cost difference between contract and market collection is due to the fact that billing costs are not incurred by the firm under contract but by the municipality. Another part of the difference may be due to the greater route density (more customers per mile) enjoyed by the exclusive contract-holding firm. There is disagreement among analysts, with estimates ranging from 3000 to 50,000, as to the service area population size necessary to realize economies of scale in refuse removal.[27] The density factor should be less significant in high-density larger cities (no city larger than 720,000 in population was included in the Columbia survey). The question of scale economies of population is not identical to that of route density, but in either case the only manner in which to ascertain whether a single producer is most efficient is to allow other producers the freedom to enter the market if they can. If a single firm can serve the market most efficiently, a single firm should emerge from the competitive process. There is no need to artificially impose monopoly provision within an (arbitrarily defined) area.

The Columbia survey failed to specify the extent to which market collection in the cities surveyed was openly competitive. It distinguished an exclusive franchise arrangement from market (which it termed "private") collection, but did not consider that in many cities entry into the market is restricted by a regulatory agency. Under restricted entry competitive pressures are lessened and incentives to minimize costs deteriorate. Collusion becomes possible with regard to prices charged and neighborhoods served, since new competitors cannot undercut existing firms. Unrestricted entry is necessary to ensure that competition spurs efficiency.[28]

EDUCATION

The education of a child may confer some indirect benefit upon the general public, but it, too, is a non-collective good. Market provision of primary and secondary education is a well-established tradition in the United States, but at present is available only to those parents willing and able to pay private school tuition on top of local school taxes.

Public schools now consume the largest portion of local taxes in most municipalities, commonly as much as 60%, and their cost has been growing. Public school expenditures per pupil, in constant dollars, were nearly two-and-a-half times greater in 1974 than in 1950. Yet a 1975 survey by the Hudson Institute found educational achievement in public schools actually to have declined during the preceding 10 to 12 years.[29]

Milton Friedman fifteen years ago proposed the much-debated voucher system as a mechanism to achieve load shedding while retaining public finance.[30] With or without vouchers, a market in education, as he argued, would foster productive efficiency in schools and would promote a healthy diversity in schools by better enabling parents to purchase the sort of education they prefer for their children. Residents of central cities, whose schools are notoriously ineffective at instilling even basic reading, writing, and computational skills, seem to have the most to gain from privatization of education. Under local public provision, better education for their children is often a matter of moving to the suburbs. Much more than from decentralization, parents would gain control from privatization over the education their children receive. Only members of the current educational establishment, particularly superfluous administrators, union officials, and poor teachers, have a clear interest in opposing the opening of a market which rewards efficiency and good teaching.[31]

Accurate cost comparisons between public and private education are impossible to make because of the insuperable difficulties faced in attempting to measure the level of service provided. Private and parochial schools in New York City provide an education whose superiority is nonetheless clear, and do so while charging tuition of as little as one-fourth the sum (approximately $2600 per student in 1976–1977) spent by the city.

PROTECTION SERVICES

Police protection is frequently cited as an example of a pure collective good subject to "market failure". Gordon Tullock, for example, argues that were a single homeowner to hire a patrol service to pass by his property at irregular intervals and confront suspicious characters loitering nearby, he would be providing protection to the property of neighboring homeowners who have not paid for the service. The neighbors in such a case would have little reason to hire protection for themselves. If the situation is symmetric with respect to all homeowners in the neighborhood, there is theoretically a danger that none would individually subscribe to a patrol service, leaving the neighborhood defenseless.[32] If the patrol service could, however, ignore criminals preying on non-subscribers without consequently making provision of a given level of protection to the property of subscribers more costly, then non-collective provision is feasible. For relatively isolated or large self-contained properties the necessary feasibility would seem to obtain. Many college campuses as well as warehouse areas, shopping malls, office towers, and other commercial properties already hire their own security patrols. Such properties are clear candidates for immediate load shedding.

Residents of many urban neighborhoods have recently banded together voluntarily to hire private watchmen (sometimes residents themselves serve as watchmen) to provide security services which the city fails to provide at a high enough level. This action may be considered a "micro-collective" response to implicit load shedding. Local merchants' associations in many cities have hired patrolmen and have purchased special street lights for their blocks in a similar effort to provide security.[33]

Non-rivalness in the consumption of fire-fighting services also depends in part upon neighborhood density, and the spill-over in benefits may again be minor in certain cases.

Market fire protection on a subscription basis was the rule in colonial America, and it still exists in several towns today. Roger Ahlbrandt, Jr. has argued, "The consumption of fire services does not fit the description of a true public good because its service flow is localized and can be captured to a large extent by the individual consumer".[34] An important prerequisite for the adequate provision of fire-fighting services on an individual basis, however, is the recognition of strict liability on the part of the individual property-owner for fire damages imposed on the property of others for which he is responsible. Without strict liability the full risks of damage caused by fire on his property are not considered by the individual property-owner in his decisions to purchase protection and insurance.[35]

Fire-fighting services have long been provided under contract to the city of Scottsdale, Arizona by the Rural–Metropolitan Fire Protection Company. The firm began in 1948 as a supplier to residents outside Phoenix city limits on an individual subscription basis and was hired on a contract basis after Scottsdale incorporated in 1952. Ahlbrandt has estimated, based on cost figures from other cities, that bureaucratic provision of fire services for Scottsdale would have cost $7.10 per capita in a year in which the actual cost was $3.78, a savings of 47 per cent.[36] Rural-Metropolitan economizes on personnel costs by retaining paid reservists, who carry paging units while on call, in place of all but a small core unit of full-time firefighters. A similar personnel system is used by the Falck Company, which provides both contract and individual subscription fire-fighting services to municipalities and consumers in Denmark.[37]

Both patrol and fire-fighting services face indirect competition from alarm systems and other protective measures (e.g. locks and fences, fireproofing and sprinkler systems). Bringing police patrols and fire brigades under market pricing wherever feasible would foster allocative efficiency in the mix of these means of protection purchased by firms and consumers. Presently the tax levied on the individual for protection of either sort bears no relation to the level of service provided or potentially demanded. Households and firms presenting high risks are effectively subsidized by other taxpayers.[38]

TRANSPORTATION

Bus and subway rides are clearly not collective goods, as user charges are already imposed by municipal providers. Municipally-operated bus and rail transit systems, as well as municipal parking lots and structures, are strong candidates for load shedding. They are not strong candidates for contracting out, as experience has shown. Cities offering exclusive franchises or contracts for bus operations, often guaranteeing to cover costs in excess of fare revenues, have found costs ever rising in the absence of competitive pressure.

Municipal transit lines are particularly vulnerable to strike shutdowns. Productive and allocative inefficiencies are often blatant. "The most absurdly run New York City monopoly," Savas observes, "is mass transit". He notes that bus drivers for the Metropolitan Transit Authority work eight hours a day but receive pay for fourteen because few drivers are needed between morning and afternoon rush hours but efficient split-shift scheduling is impossible to push through.[39] He also reports that "private bus lines charging the same fare as municipal bus lines in the same area are often able to make a profit, while government lines require subsidies".[40]

The primary reason why private entrepreneurs have not captured more of the transit market is that legal and regulatory restrictions have blocked their path, particularly in introducing innovative para-transit approaches such as jitney service. Flourishing (if illegal) gypsy cab and jitney operations in poor and minority neighborhoods in many major cities demonstrate the ready supply of transit entrepreneurs. Franchising or entry controls commonly restrict the routes private buses may take or the number of vehicles (particularly taxicabs, via the medallion system) allowed to operate within a city. Entry controls do not exist in Washington, D.C., and taxi operations there are efficient and rational (except that price is regulated). Pricing regulations, found in several cities, result in a lack of service at times or in areas where service could be profitably provided at higher prices. Outright regulation of the types of service permitted suppresses potentially viable jitney and shared cab services. Jitney service (unscheduled but frequent small-vehicle service along relatively fixed routes for a flat or zone rate fare) clearly would be profitable in convention–tourist areas, areas not served by bus lines, and between airport and downtown.[41] Where else it might be profitable can only be determined by opening up the transportation market.

The majority of American port terminals are already privately owned, but those still in the hands of local government agencies are good candidates for load shedding by auction. Most airports in the United States, while built and nominally operated by local government agencies, have most of their day-to-day operations effectively contracted out. Passenger facilities are generally leased to airlines by the square foot, while concessions are generally leased on a percentage-of-the-gross basis.[42] Long-range allocative efficiency would be fostered by transferring ownership and ultimate control of airport facilities to the private sector.

HOSPITAL CARE

Hospital care is a private good, yet public hospitals in New York City provide about 40% of its beds, about half of its outpatient care, and slightly more than half of its emergency treatment.[43] It is difficult to measure the output of a hospital, and thus to measure its productivity, but consumer demand provides an indication at least of the relative desirability of municipal care. One result of federal Medicare and Medicaid programs, which in effect are voucher programs for health care, has been to reduce the demand for space in municipal hospitals. Savas reports: "The quasi-governmental agency that runs the municipal hospitals in New York appears to have reacted in classic bureaucratic fashion: it holds on to patients who should have been discharged".[44]

STREET MAINTENANCE

As long as city streets are municipally owned, their cleaning and maintenance is a collective good in the sense that if the city government did not arrange to have its streets swept, plowed, and repaired when necessary, it is difficult to see who would. Under private ownership of streets, these services would presumably be bought or provided for each street by its owner.[45] Under municipal ownership, these services lend themselves to contract provision, as a number of towns in Los Angeles County have found. Under the "Lakewood Plan" these towns normally contract with the county government for municipal services. When the county estimated a cost of $62,000 to sweep the streets of Norwalk, California, the town solicited bids from private firms which ranged from $44,000 to $56,000.[46] The city of Montreal is divided into 52 sections each winter, 47 of which are contracted out, for snow removal. Competition among private firms is brisk for the contracts, which require meeting detailed performance specifications, and there is rivalry in doing the best and fastest job.[47]

POWER

While electrical current is not a collective good, it is generally assumed that its provision is subject to natural monopoly and concluded that power generation must be undertaken by public authority or publicly regulated monopoly. A study by Walter J. Primeaux reveals that in fact 49 cities in the United States had competition in 1966 between two electrical power suppliers, with either new customers or all customers able to choose between them for service. Typically, a private firm competed with a municipal utility, and the competition was vigorous. Through multiple regression analysis Primeaux determined that average cost was reduced at the mean by 10.75% under competition. Proponents of granting monopoly status to electric utilities argue that a monopolist can produce at lower cost than can be achieved under competition. The benefits of greater productive efficiency created by competitive pressure seem to outweigh scale economies from monopolization, however, until very high output levels are reached.[48]

OTHER FACILITIES AND SERVICES

Any number of municipally-provided services and facilities not included in the above survey are also candidates for load shedding or contracting out of operation: water and sewers, ambulance and rescue, libraries and museums, parks and zoos, pools and beaches, golf courses and tennis courts, and still others.

NOTES

1. See Robert L. Lineberry, "On the Politics and Economics of Urban Services," *Urban Affairs Quarterly*, vol. 12, no. 3 (March, 1977), pp. 267–270.
   In historical point of fact, the civil service system was also a product of the same municipal reform movement, so that the shortcomings of municipalized services were exacerbated from the outset. In this connection the remarks made near the turn of the century by Tammany leader George Washington Plunkitt are worth noting. In a talk entitled "On Municipal Ownership", Plunkitt said:
   "I am for municipal ownership on one condition: that the civil service law be repealed. It's a grand idea — the city ownin' the railroads, the gas works and all that. Just see how many thousands of new places there would be for the workers in Tammany! Why there would be almost enough to go around, if no civil service law stood in the way. My plan is this: first get rid of that infamous law, and then go ahead and by degrees get municipal ownership."
   "One more thing about municipal ownership. If the city owned the railroads, etc., salaries would be sure to go up. Higher salaries is the cryin' need of the day. Municipal ownership would increase them all along the line . . . "
   See the delightful collection of talks recorded by William L. Riordon, *Plunkitt of Tammany Hall: A Series of Very Plain Talks on Practical Politics* (New York: E. P. Dutton, 1963), pp. 54, 56.
2. On municipal monopolies and their employees see E. S. Savas, "Municipal Monopoly," *Harper's Magazine* (December, 1971), pp. 55–60.
3. Lineberry, *op. cit.*, p. 270.
4. On these strategies see E. S. Savas, "Municipal Monopolies Versus Competition in Delivering Urban Services", in Willis D. Hawley and David Rogers (eds.), *Improving the Quality of Urban Management* (Beverly Hills: Sage Publications, 1974), pp. 480–482.
5. The ICMA figures are cited by Lyle C. Fitch, "Increasing the Role of the Private Sector in Providing Public Services", in Hawley and Rogers, *op. cit.*, pp. 526–527.
6. "When Cities Turn to Private Firms for Help," *U.S. News & World Report*, vol. LXXXI, no. 7 (August 16, 1976).
7. Harvey Leibenstein, *Beyond Economic Man* (Cambridge: Harvard University Press, 1976).
8. F. A. Hayek, "The Use of Knowledge in Society" (1945), in *Individualism and Economic Order* (Chicago: Gateway Edition, 1972), p. 82.
9. Leibenstein, *op. cit.*, p. 201.
10. Dennis R. Young, "The Economic Organization of Refuse Collection," *Public Finance Quarterly*, vol. 2, no. 1 (January, 1974), pp. 62–63.
11. Savas, "Municipal Monopoly," pp. 55–59.
12. Peter F. Drucker, "The Sickness of Government," *The Public Interest*, no. 14 (Winter, 1969), pp. 16–17.
13. Fitch, *op. cit.*, p. 507.
14. In Leibenstein's terminology, the greater the cost of relocating effort positions, the larger the inert area, and the greater the *X*-inefficiency.
15. See Sudha Shenoy, "Pricing for Refuse Removal", in *Essays in the Theory and Practice of Pricing* (London: Institute of Economic Affairs, 1967), p. 66.
16. Savas, "Municipal Monopolies Versus Competition," *op. cit.*, p. 479.
17. On budget-maximization as the goal of a rational bureaucrat see William A. Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971).
18. Drucker, *op. cit.*, p. 17.
19. Tax financing must *always* create equity problems; see John C. Calhoun, *A Disquisition on Government* (New York: Liberal Arts Press, 1953), pp. 16–18. For an example from transit see Kevin M. Fong, "BART: Taking the Poor for a Ride," *Harvard Political Review*, vol. IV, no. 4 (Summer, 1976).
20. Dick Netzer, "The Budget: Trends and Prospects", in Lyle C. Fitch and Annamarie Hauck Walsh (eds.), *Agenda for a City: Issues Facing New York* (Beverly Hills: Sage Publications, 1970), p. 706.
21. See Armen A. Alchian and William R. Allen, *Exchange and Production: Theory in Use* (Belmont: Wadsworth, 1969), p. 252. See also Alan K. Maynard and David N. King, *Rates or Prices?*, Hobart Paper 54 (London: Institute of Economic Affairs, 1972), p. 37.
22. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 93–95.
23. Judith M. Gueron, "Economics of Solid Waste Handling and Government Intervention", in Selma J. Mushkin (ed.), *Public Prices for Public Products* (Washington: Urban Institute, 1972), pp. 179–180; Sudha Shenoy, *op. cit.*, p. 75; Werner W. Pommerehne and Bruno S. Frey, "Public Versus Private Production Efficiency in Switzerland: A Theoretical and Empirical Comparison", in Vincent Ostrom and Frances Pennell Bish (eds.), *Comparing Urban Service Delivery Systems* (Beverly Hills: Sage Publications, 1977), pp. 222–223.
24. E. S. Savas, "Policy Analysis for Local Government: Public Vs. Private Refuse Removal," *Policy Analysis*, vol. 3, no. 1 (Winter, 1977), p. 71.
25. *Ibid.*, pp. 68–69.
26. Gueron, *op. cit.*, p. 174.
27. For the lowest estimate see John N. Collins and Bryan T. Downes, "The Effect of Size on the Provision of Public Services: The Case of Solid Waste Collection in Smaller Cities," *Urban Affairs Quarterly*, vol. 12, no. 3 (March, 1977). For the highest estimate see Savas, "Policy Analysis," p. 64.
28. Young, *op. cit.*, pp. 51, 56; Pommerehne and Frey, *op. cit.*, pp. 225–226.
29. Robert W. Poole, Jr., *Cut Local Taxes* (Santa Barbara: Reason Press, 1976), p. 13.

30. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 85–98.
31. See Martin T. Katzman, "Pricing Primary and Secondary Education", in Mushkin, *op. cit.*, pp. 371–393.
32. Gordon Tullock, *Private Wants, Public Means* (New York: Basic Books, 1970), pp. 83–84.
33. Savas, "Municipal Monopolies Versus Competition," p. 489; William C. Wooldridge, *Uncle Sam, the Monopoly Man* (New Rochelle: Arlington House, 1970), pp. 111–115.
34. Roger Ahlbrandt, Jr., "Efficiency in the Provision of Fire Services," *Public Choice,* vol. XVI (Fall, 1973), p. 2.
35. Thus, fire insurance should be purchased on a basis much like automobile liability insurance. See R. C. Carter, "Pricing and the Risk of Fire", in *Essays in the Theory and Practice of Pricing, op. cit.*, pp. 23–54. On strict liability (and the concept of causation it implies), see Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies*, vol. 2 (1973), pp. 151–204.
36. Ahlbrandt, *op. cit.*, p. 11.
37. Robert Poole, Jr., "Fighting Fires for Profit," *Reason,* vol. 8, no. 1 (May, 1976).
38. Carter, *op. cit.*, p. 41.
39. Savas, "Municipal Monopoly," p. 57.
40. Savas, "Municipal Monopolies Versus Competition," p. 485.
41. Ronald F. Kirby *et al., Para-Transit: Experience and Potential* (Washington: Urban Institute Working Paper, 1973), pp. 319–330. See also Ross D. Eckert and George W. Hilton, "The Jitneys," *Journal of Law and Economics*, vol. 15, (October, 1972).
42. John G. Duba, "Urban Transport: A Survey of Some Pricing Aspects" in Mushkin, *op. cit.*, pp. 267–282.
43. Sylvester E. Berki, "The Pricing of Hospital Services," *ibid.*, p. 34.
44. Savas, "Municipal Monopolies Versus Competition," p. 488.
45. See Murray N. Rothbard, *For a New Liberty* (New York: MacMillan, 1973), pp. 202–218.
46. Robert O. Warren, *Government in Metropolitan Regions* (Davis: Institute of Governmental Affairs, 1966), p. 227.
47. Savas, "Municipal Monopolies Versus Competition," p. 490.
48. Walter J. Primeaux, "An Assessment of X-Efficiency Gained Through Competition," *Review of Economics and Statistics*, vol. LIX, no. 1 (February, 1977), pp. 105–108.