

m i n d f u l

Undergraduate Journal of Ethics and Political Theory
Centre for Ethics, University of Toronto

Issue 3, Autumn 2008

FEATURE

An interview with the Rt. Hon. Adrienne Clarkson
~ Shahreen Reza

FACULTY CONTRIBUTIONS

Toward an Ethical Critique of Academic Ethics - One Small Community-Based Example
~ John Duncan, Director of Ethics, Society and Law (Trinity College)

How I Stopped Being Afraid of Ethics: Reflections on the CPRE
~ Amit Ron, Director (2006-08) of Community Research Partnerships in Ethics

UNDERGRADUATE CONTRIBUTIONS

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~ Sam Grey

A Critique of Capitalism
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~ Eli Kirzner-Priest

One Amongst Many: Rethinking Locke's Sufficiency Condition
~ Esther Shubert

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University of Toronto

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Mindful is a high-level journal of ethics and political theory for work done by undergraduates at the University of Toronto, and at other institutions where the multidisciplinary nature of ethical thought is respected and encouraged. The mandate of our journal reflects that of the University of Toronto's Centre for Ethics, with which we are affiliated: To foster an exchange of ideas that is especially representative of the many disparate lines of ethical inquiry that are pursued by undergraduates in a variety of different centres, institutes and departments within the University. Our mandate is therefore broadly defined to include both the theoretical and practical dimensions of ethical life, as these pertain to the individual, society and body politic. We will have achieved our goal if we can use *Mindful* as a platform by which to exhibit some of the diversity of modern ethical and political thought.

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Editor's Introduction

Mindful, 3rd Edition has a surprisingly coherent theme. We had not intended that this should be so, expecting that an enthusiastic response to our journal would elicit myriad contributions – and that too on a broad range of topics – but it was not until our editorial decision had been made that we fully recognised the affinities between this year's best papers.

The undergraduate contributions published in this edition all deal with the different kinds of ethical obligation that exist between individuals and the social and economic structures that govern their lives. Two of our undergraduates take up the notion of private property, Shubert in her forthright examination of Locke's justification of property rights, and Kirzner-Priest who renders a comparative analysis of Nozick and Rawls on distributive justice. Tran's paper delves into the dubious justifications of capitalism offered by Utilitarian and Libertarian proponents of the invisible hand, whilst Grey deftly exposes the alarming consequences of Just War Theory for innocent bystanders. All in all, perhaps an oblique commentary on the viciousness of bear markets and the destructive proclivities for which so few are held responsible: Farewell, 2008!

We have also included two reflection papers from faculty whom we have asked to provide a mini-*exposé* of the innovative, community-focused activities they have directed for UofT undergraduates with an interest in ethics. For John Duncan, the ES&L (Ethics, Society & Law) programme at Trinity College has recently been an opportunity to engage undergraduates in dialogue with members of the public. In 'Toward an Ethical Critique of Academic Ethics,' he describes the edifying result of the 'Humanity for Humanity' outreach programme. Amit Ron, the erstwhile director of the CRPE (Community Research Partnerships in Ethics), based in the Centre for Ethics, illustrates how this novel undergraduate programme has guided students away from wearisome disputations towards a more sensible understanding of ethical quandaries as they arise in our communities and in our institutions.

I shall conclude this introduction with a respectful nod towards the feature presentation of this edition. It had been our hope to include an interview with a public figure whose experiences might pepper with practical insight the occasionally bland victuals of academic scholarship. To our delight, we were granted an interview with the Rt. Hon. Adrienne Clarkson, who agreed to speak with *Mindful* about her own experience as a hapless refugee and the ethical dimensions of Canadian citizenship.

J. Morhart (M.A., Cantab.)
Mindful, Editor-in-Chief

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An Interview with the Rt. Hon. Adrienne Clarkson

Adrienne Clarkson served as the 26th Governor General of Canada from 1999 to 2005. She is also a widely acclaimed journalist and has recently co-founded, with her husband, John Ralston Saul, the Institute for Canadian Citizenship.

Mindful's Shahreen Reza met with Mme. Clarkson in October 2008, at St. Hilda's College, to discuss the issue of immigration and Canadian citizenship.

Mindful:

I was reading on your website [The Institute for Canadian Citizenship¹] that you identify yourself as a refugee. I find that very interesting because we know you as the Governor General and as a journalist. How do you feel about the refugee situation?

Clarkson:

Well, having been one myself, I can say that our family would have done anything in the world to escape where we were - we couldn't really go on living under the occupation of the Japanese - and that I have, you know, probably not *rational* sympathies with people who are refugees. I don't look at it as a diplomatic problem or a governmental problem; I feel it viscerally.

I think that people who have to escape from somewhere do it, and ninety-nine percent of them have no other choice, except to die. And so, to say I'm 'sympathetic' is really the wrong word. I identify with it and I do understand it. When people feel that they have no other choice than to do that, it's very hard not to reach out and help them.

I think that [the refugee situation] is going to be, more and more perhaps, the history of the next century, which I won't be around here to see. But I feel that I am example of somebody who was given that chance and who has done everything with it possible. And I hope to do the same for others and I hope to do the same, you know, always as long as I live, because I believe that life does give people more than one chance and also because I believe that we live in a forgiving society that we have created as Canadians. And a forgiving society is one which gives people that second, third, and fourth chance.

¹ <http://www.icc-icc.ca/en/>

I have a certain coherence in my ethical and spiritual make-up, I suppose, in that I believe in more than second chances. I mean, I'm old enough to have fought for the elimination of capital punishment in this country. My feeling always was that if there was room for one mistake, then we should not have capital punishment. We can deal with all the other evil people, lock them up forever, you know, just incarcerate people. If you were to ever know that you had wrongly executed someone by due process of law, then you could not live with that.

Mindful:

As Canadian citizens, we value ourselves for fighting for humanitarian causes. We talk about the importance of multiculturalism and justice, yet at the same time I find that there is a moral dilemma because now in the contemporary political sphere we demonize people in light of what's happening in their own countries. You talk about Japan and their presence in China. Did we not learn anything from the Japanese internment with regard to how we are currently treating Canadian citizens because of their background?

Clarkson:

Well, I certainly think that what we did to the Japanese Canadians in the Second World War was evil. And I use that in the very meaningful sense that it has, which is that the people who did that knowingly did evil. I think it's been documented enough [for us] to know that the bureaucrats who, at the behest of moneyed and powerful sources, and British Columbia, did it for their own self-interest. And it was racially based, of course. They were not happy to see the Japanese doing so well, owning fishing fleets, having farms, not just rubbing around in some ghetto or other - and they saw this opportunity and they just took it. And I think that is perfect evil, an example, really, of perfect evil; and so we had to make that right and I think we have eventually made that right.

Today, I don't see that we done anything as blatant as that, and I think that we would stand up and fight against it now. I think we are all quite aware now. But, at that time, we were not as aware as a country, and the country was not as diverse. The country was really a British and White country that was disturbed by anything that had colour in it. I think it's different now.

Mindful:

What does it mean to be Canadian to you? What does that encompass?

Clarkson:

To me that encompasses an ability to live within a framework which structurally I respect probably because I was brought up with it and because I've seen that it works - which is a tradition of parliamentary democracy, British parliamentary democracy and the common law, and I think those are our two greatest gifts from the country of which we were a colony, of which we are no longer a colony, but which we haven't in anyway abruptly cut off from. But those things are very worthwhile things. We've been very fortunate in our structures, and the fact of having French and English taught us right away to deal with complexity. We had Catholics being Prime Ministers here before they could even have the vote in Britain or be political figures. You realize that is a big deal. We don't think that Catholics and Protestants, especially in this kind of mix that we have in Canada, is a big deal, but it sure was a big deal in the 19th century.

Mindful:

The overarching British culture suited immigrants at the time because it provided a mold into which they've been able to fit. However, times have changed, and we have (to deal with the issue of) integration of immigrants from a plethora of different regions. How do you feel about the integration process, comparing to the European Union?

Clarkson:

Well, I think Europeans are basically tribal. And so, you know, until very, very recently you could not be a German citizen unless you could prove you had German blood. And all of that leads to the worst, as we know, but they had to work their way out of it, nobody could tell them what to do. And still in the back of people's minds is this question, 'How can you be a citizen of a country if you were not born there?' Now, the North American Continent and the South American one throws people into a bit of a tizzy because only the aboriginal peoples were here originally. There were two million aboriginal people here when White people came. My husband's latest book talks about the influence that the aboriginal peoples had on the White people who came, for a good three hundred years. And then, at that point, in the mid-19th century, basically because of conflict between really, really bigoted Protestants, the Orange Order, it had a terrible affect on our whole dealings with the native peoples and the relationship went really not nicely for a hundred years. But for three hundred we were very much helped by the aboriginal peoples. For one thing, we explored in a different way because they said transport here is not going to be by wagon. It didn't matter about having invented a wheel. In North America, in Canada, the important thing was being able to move around and that was by canoe, and that was by

snowshoe, and it was not by rolling wagons around because you didn't have them. The great political economists of the University of Toronto, like Harold Innis, talk about this. Fur trade is the psychic dimension to the whole penetration of the continent and of what we are as Canadians.

To me, being a Canadian means having this nature. Nature is very, very important. Probably one of the most important things about being Canadian, to me, is this sense of space. I happen to very much like the climate; I like having the four seasons. We have this enormous, varied country which we have learned how to move around in.

Mindful:

Now when it comes to our varied country, how do you feel about this divide between urban, metropolitan centres and rural places in Canada?

Clarkson:

Well, I don't think they need to be as divided as people make them. And I think people are quite ignorant of the fact that, you know, you can have access [to nature]. One of the things I feel makes people more Canadian is if they get access to nature, and that's one of the things we're going to work on very heavily in my Institute. I want to make sure that children have access to nature from the time they are little because if you know from the time you're seven or eight that you can go into nature, that you don't have to disturb it, that you can live side by side with what people call 'wild animals', snakes, lizards and various things, and that you can basically be with them and not harm them, and they don't have to harm you if you are aware of them, and that that is their space, we really will teach people something not only about our relationship to nature in Canada but also our relationship as human beings to the whole planet. I think Canada has a whole role to play in that and that we haven't played it yet...The urban and rural division, I think, is only something we have in our minds. I consider myself to be very urban.

Mindful:

I suppose what I meant by 'urban' was the multiculturalism that is prevalent in Montreal, or Toronto or Vancouver in contrast to, let's say, Grimsby, Ontario - i.e., the demographic variation.

Clarkson:

We have not had any kind of policy of helping people to settle broadly into the country. People are funnelled into centres like big cities because there are jobs. They

can work in menial jobs. When I say 'menial,' I mean hourly wage jobs.

I have had the experience of going to a place like Red Deer, which asked me to go there, many years ago when I was the Governor General, to see how they were settling their immigrants and refugees. People go where they go, and it just happens that Southern Alberta, Lethbridge, Red Deer, they're places that have jobs. It was like a microcosm of Toronto: there were people from 24 different [ethnic] groups in this room of some 200 immigrants that had gathered to say hi to me and to tell me their stories. They all said that they really liked Red Deer but that they had at first been very nervous about going because it was such a small place. But they found also that everybody got to know them. So, I'm all for trying to get people to go to smaller places. They can't attract them. Down East it's very difficult because of the economic situation to get people in there, into the countryside.

Mindful:

Now, we work very hard to help our immigrants become a part of Canada –

Clarkson:

- I don't think we don't work hard enough.

Mindful:

Probably not, but we still work harder than we do with the indigenous population. How do you feel about that?

Clarkson:

Well, I'm very, very concerned about the indigenous population, with all the First Nations and Inuit who say, "Okay, you take so much care with new people coming. What about us?" It's a failure of the Government. The Government is to blame because they have the Royal Commission - I never tire of saying this - the Royal Commission on the Aboriginal peoples. It is a perfect blueprint, and they just shelved it.

Mindful:

How can we change this?

Clarkson:

Well, I mean, you can try to change Government. We did, and then the others didn't want to do it either, and there's inertia and there's misunderstanding...

Mindful:

And lack of incentive?

Clarkson:

Well, the thing is, you're sitting here in Toronto and you think, "Ok, things aren't improving". How many first nations people are in post-secondary education in Saskatchewan, where the population is just under a million? How many people in post-secondary?

Mindful:

Very few, I would guess. Five thousand? Six thousand?

Clarkson:

Eight thousand – that's very good! When you consider where they come from and the fact that they live on reserves, et cetera - it's an excellent figure, actually, to have eight thousand in post secondary. About twenty years ago, there were fifteen aboriginal lawyers in all of Canada. They had their indigenous bar meeting on Friday - my husband [John Ralston Saul] spoke to them – [and now they have] five hundred and fifty after twenty years. There are places like the University of Manitoba that has done for twenty-five years the most innovative program. It's called the 'Access Program', which means that native people can come and do their work for their university education in as many years as it takes them, with a structure around them, which includes a mentor. About eighty percent of the first cohort was single women somewhere between eighteen and twenty-five, with two or three children. They had worries about dropping out not because of grades but because of childcare problems. After twenty years, which is when I went to celebrate [the anniversary of the] Access Program, the success rate was fantastic, and the cost was nothing compared to the cost of alcoholism, family abuse, etc. Saskatchewan has a different kind of program than Manitoba, but we should do something like this in downtown Toronto for our downtown aboriginal population. We have tended to ignore it, thinking it will go away, but, in fact, a whole generation of really wonderful leadership, of people your age, is coming up who will not let that go away. And so, I am very hopeful that things will happen and the government will get pushed. All the aboriginal peoples

need to understand that they can keep their way of life, and way of thinking, and yet also participate and be a powerful force in Canadian life. I want to see an aboriginal Canadian Governor General.

Mindful:

Now coming to the issue of legal force, and pushing governments to change, I want to know how you feel about someone like Omar Khadr. This is a moral dilemma in the conscience of Canadians that has been enmeshed in a political quandary.

Clarkson:

I know nothing about the case, except to read the surface things in the news, so I won't comment on Omar Khadr, but I'll comment on Maher Arar whom I know and who I feel had this great injustice done to him. I'm glad that we have come out of it so quickly and it has not dragged on. I think that we have to look at things very closely in terms of what our institutions are doing or saying. I don't believe that institutions are better than the people in them. I think that we always have to be very, very wary when an institution makes a [security] claim. I'd like to have that proof, I don't think we should say, because of what the security system says, that he's like this; we have to look at it very carefully, there's been something dreadfully wrong there and I think that we should be acting on that.

They [governments] have a vested interest in not doing too much, they feel they can make a mistake. I have noticed that governments are less sure of themselves than they used to be. When I was growing up, whether they were conservative or liberal, whether [the Prime Minister was] Louis St. Laurent, Lester Pearson or John Diefenbaker, you knew that these people had moral and ethical centres. When Lester Pearson acted, you knew he had done it from certain principles. When Diefenbaker moved with Nehru to exclude the membership of South Africa from the Commonwealth - South Africa had become a republic and therefore had to reapply to enter the Commonwealth - Canada and India said 'no' because of apartheid. I was never prouder of my country. At that time, people were more willing to act according to principles, but now they tend to talk and hide behind things. That is what causes disaffection amongst Canadians. Unless we have people who have principles in positions of power, there will always be the Khadrs, the Maher Arars, and that's the kind of thing that can happen.

Mindful:

The Government has a prominent role in the transmission of values that we uphold as a society. What do you think is the role of institutions in transmitting culture?

Clarkson:

It's very important that a country continue to be the kind of country that people came to when they needed it. Canada always has to be Canada. It always has to have the common law and the traditions of parliamentary democracy. That should not change, but the fact that you would add translation to different courts, or do things in different ways so that people can understand them, that's ok, but certainly I do not believe that Shariah law should be a part of what we do. It's not part of what we do, and it's not part of what a lot [of Muslims] do who live in secularised societies.

Mindful:

Michaëlle Jean [the current Governor General of Canada] is, like you, a journalist from the CBC. How do you feel about the legacy that you have created in that respect?

Clarkson:

I think it's just by accident. We don't really share a background, and she basically didn't do the kind of work that I did; she's mainly a presenter, [whereas] I worked for 35 years as a producer, director and reporter. And then I went out and did other things, and came back. So I don't think it's because of that necessarily. But it does show legitimacy to the profession of broadcast journalism [versus print journalism]. Just the other day, I was unpacking huge boxes from three and a half years ago when I left Ottawa – now that I've given everything to the archives - and I came across all my awards! There's ten Actra awards, there's three Columbus awards from the States, there's two Christophers – there's all kinds of awards – there's two Geminis. So, there's all these nice little statues, and things of more or less aesthetic value, and I think, 'Well, there it is, you know, that represents something'. And it does represent *something*, because it's not, you know, just about being on television. But I found that I learnt an enormous amount. I did over 4000 television programs in my life, of which over 1000 I directed myself. And so, I'm very proud of that body of work.

Mindful:

Thank you, Mme. Clarkson. This has been very edifying!

Clarkson:

It was my pleasure.

Toward an Ethical Critique of Academic Ethics: One Small Community-Based Example

John Duncan

During the fall term of 2007 the University of Trinity College in the University of Toronto launched an outreach program called Humanities for Humanity—“H4H” as it has come to be called. We invited twenty-five economically disadvantaged members of the community into the college one evening a week for thirteen weeks to listen to lectures and engage in discussion about a selection of texts from late medieval Europe to contemporary Toronto—literature, history, political theory, philosophy, even sociology and economics. Beyond being economically disadvantaged, we imposed no specific criteria for eligibility. Anyone intrigued by the idea of working through the texts was welcome. We covered the costs of the reading material, public transit to and from the college and we provided a hot meal to be eaten in common before each session. We asked the former director of the Centre for Medieval Studies in the University of Toronto, Trinity’s provost and vice chancellor Andy Orchard, to lecture on late medieval literature, philosopher and critic Mark Kingwell to lecture on Machiavelli, and member of parliament and former Ontario premier Bob Rae to lecture on Hobbes, to name some of the better known contributors to the course. Undergraduates served as mentors, facilitating group discussion. All donated their time and the course went very well.¹

One of the reasons for its success, the reason I want to discuss briefly here, is that the community—at least this small sample of its members—had things to say. When we discussed Bartolomé de las Casas’ accounts of the European slaughter of Caribbean Indians in the late fifteenth and early sixteenth centuries we had among our discussants people from refugee communities who had lived through much more recent slaughters in places such as Algeria and Rwanda. Their comments, their very presence, disrupted what might otherwise have been a merely academic conversation. We could not look them in the face and say something merely theoretical or pass along facts or statistics heard second hand about colonialism, exploitation or racism, at least not without feeling we had to be careful—not without feeling we had to care about what we were saying. The faces across the table—into which we were looking—had looked slaughter in the face. This was no longer merely about

¹ Kelley Castle (Dean of Students, Trinity) and I developed and ran H4H with the generous support of Trinity College (especially Derek Allen, Dean of Arts, Trinity) and the University of Toronto. The program is currently gathering funds to continue into the future.

participation grades or writing another damn paper or exam. It was not even about the various theories about what it was about. This was about what it was about.²

I am reminded of Borges' poem "The Other Tiger." In a long first verse, Borges portrays a wonderfully life-like tiger in the morning jungle. We are drawn into the jungle, to the tiger itself. But then, the second verse:

Afternoon creeps in my spirit and I keep thinking
that the tiger I am conjuring in my poem
is a tiger made of symbols and of shadows,
a sequence of prosodic measures,
scraps remembered from encyclopaedias.

Borges goes on to contrast this conjured tiger with the real tiger it is not. It is not

[...] the deadly tiger, the luckless jewel
which in the sun or the deceptive moonlight
follows its paths, in Bengal or Sumatra,
of love, of indolence, of dying.

As readers we understand that the first tiger was conjured, but in making the conjuring itself explicit, Borges turns us away from it, toward the real tiger.

Against the symbolic tiger, I have planted
the real one, it whose blood runs hotly,
and today [...]
a slow shadow spreads across the prairie.

"[S]till," even as we are turned toward the real tiger,

[...] the act of naming it, of guessing
what is its nature and its circumstances
creates a fiction, not a living creature,
not one of those who wander on the earth.³

² "Back to the things themselves" was the rallying cry of phenomenology. It signified both the importance of careful descriptions of things as they are experienced, and the danger of analyses based on theoretical beginnings. The academy needs to be vigilant and work against the tendency to begin and carry on with theories about things rather than with the things themselves. Levinas drank from the cup of phenomenology and explored the "face-to-face" encounter. "First philosophy," he argued, properly begins with the face-to-face and it always already involves ethical possibilities. Being face-to-face with another person, my attempts to provide a relevant theoretical account are repeatedly open to disruption.

Borges reveals how easily we are deceived by word on paper. In his poem, the word itself turns us away from the paper, turns us toward the prairie, and we think we glimpse the real tiger at last, but it is yet another paper tiger.

Of course in academia it is in words, in necessarily theoretical words, that “we live and move and have our being,” to borrow one of the early Hegel’s favourite passages from the *Acts of the Apostles*,⁴ and so we may slide into theoretical posturing more easily and more willingly than Dante’s Paulo and Francesca fell into their barely willed embrace.⁵ But when non-academics, members of the community, many of whom are objects of our theories in one way or another, are invited to the discussion, our fall into posturing is disrupted. One reason for the disruption is that the community is not familiar with the forms of statement that function as various moves in the games of academic discourse (in which we live and move and have our being), so that academically impressive moves fall on deaf ears.⁶ Of necessity, we must address the member of the community on his or her terms, or the discussion remains fake, silencing, likely oppressive. If we are compassionate, we feel compelled to drop our theorising—we might even feel embarrassed by it. We ought to first find out what the other is saying, and then begin the discussion from there.

When we discussed Marx and Engels’ *Communist Manifesto*, discussion turned into debate, and then the debate got very heated indeed, and we had to think quickly to keep it civil. Some of our discussants were living through classism in some of its worst forms in this country and they had intense views about it. When we discussed Max Weber on bureaucracy we were treated to passionate testimonials about experiences with bureaucracy, some of which indicated gratitude for the delivery of basic support services, whereas others indicated severe mishandling. The results were similar when we discussed Simone de Beauvoir on sexism, Frantz Fanon on racism and colonialism, and Dionne Brand on both of these.

Our mentors—Trinity and University of Toronto undergraduates—said repeatedly that what they learned from their involvement in H4H was irreplaceable. Not because of the texts and lectures, but because of the community participants’ engagements with the material.⁷ It was no longer just another course of readings in

³ Borges 81-82.

⁴ Harris 9.

⁵ Because Paulo and Francesca were overcome by desire, which in itself is a natural, good, and formidable force, their transgression comes down to incontinence. Although I am suggesting that falling into academic posturing is analogous to succumbing to desire, because it appears to be driven by intellect it would be a much more voluntary and therefore a much more serious transgression for Dante and his authorities (Thomas and Aristotle), creating a much deeper hell for those who choose it (*Hell*, Cantos V and XI).

⁶ See Foucault’s methodological analysis of the specific regularity of each discursive formation he examines in intellectual history.

⁷ Feedback from mentors and participants was reported in the Toronto press—see Brown. Also see reports in the college and university press: Loeb, Nayyar and Webb.

stuff that might be interesting if one were not being forced to wiggle through four other such courses of readings at the same time in a challenging competition for grades, itself part of an even more challenging competition for the nicest cog-holes in the machinery of late modern capitalism, administration and spin. The participants were not theories. They were some of the real people most impacted by the ideas, structures and forces conceptualised by many of our theories. They had experience-based things to say that immediately brought unexpected reverberation to the theories. The sessions were both eye-opening and sobering, and they allowed each of us briefly to get out of ourselves, to get to know others, and to get to know ourselves through others, advancing one of the explicit goals of the course—to know ourselves. “Know thyself” is perhaps the most famous saying of the Oracle of Delphi, and one often repeated in the humanities—we ought to know who we are. As Beauvoir argued, following Hegel, “to be” is “to have become” something.⁸ Seeking to know who we were as participants, mentors, faculty and citizens of twenty-first century Toronto, together we discussed rich texts that expressed the realities that had made us who we had become.

There is something called the community out there. It is amorphous, but in many respects sections or subsections of it can be engaged. When that occurs, if we are fortunate and attentive, our career-serving academic machinations might be suspended for a few moments, we might be able to open ourselves to the voices of others, and ethics as an end in itself might begin.⁹

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⁸ Beauvoir xxx.

⁹ Toward the end of H4H, interested participants are directed to other relevant learning opportunities, but not only is each text looked at as an end in itself, the course as such is meant to be an end in itself. It is not a for-credit or qualifying-year course—it is not a means to an end more worthwhile. It is meant to be worthwhile all on its own.

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How I Stopped Being Afraid of Ethics: Reflections on the Community Research Partnership in Ethics (CRPE)

Amit Ron

For many years throughout my academic training, I was afraid to come near questions of ethics. I couldn't see how such questions can be answered. I felt humbled, even scared, when confronted with the dilemmas presented to me. Should we allow the killing of one person to save three others? Would it be permissible to torture a possibly innocent person to prevent a nuclear disaster? Is it better to die or to live with severe pain? How would I know? Even now, while typing these questions, I have a chill in my spine just from thinking about them.

I was forced, so to speak, to engage in ethics. While studying politics and political philosophy, I gradually realized that the study of politics and society cannot be value free. Social dilemmas do not have a mathematic solution, and there is no litmus paper that will turn red if a policy is bad. It is moral all the way down. However, the questions that I was confronted with in studying politics did not look like the classical moral dilemmas. They were the kind of questions that you confront in your daily life, not in an episode of '24'. For the most part, our everyday personal dilemmas and our collective social dilemmas are not pure or simple. They are cluttered with relevant empirical facts: we typically have more than two options (some options we might not be aware of) and we don't know what would be the probable outcome of each choice. In many cases, we don't even know how to specify the precise nature of the ethical dilemma. What are my ethical responsibilities in choosing a major: solving world hunger, curing diseases, helping my country, helping my family, choosing a topic I am good at, practical importance, theoretical significance? The list can go on and on. The real world of ethics is muddled, confused, and unruly.

Empirical complexities are of scarce interest to moral philosophers. For them, they are an unnecessary added confusion, and they try to move them out of their way. Therefore, they love it when they find in real life a pure and insoluble moral dilemma, the kind that good dramas are made of. Pure moral dilemmas take away the need to grapple with empirical complexities and force us to face our ethical intuitions in their pure form. When philosophers see empirical cases that appear to approximate the case of a pure moral dilemma – two kids and only one kidney, the very expansive drug that has small likelihood of increasing the quality of life of the ill, torture and ticking bombs – they tend to focus on them as case studies. The problem is that while some of these textbook dilemmas are coming from real life experience, most of our real life problems do not resemble these cases studies.

On the other side of the fence stand the empirical social scientists and policy experts. For them, the answers to policy questions can be found, for the most part, in more empirical data. Instead of belabouring a textbook moral dilemma regarding the implementation of an expensive, risky, and painful medical procedure, they would measure the survival rate of those who undergo this procedure, and compare it to what survivors report about its affect on their quality of life. Similarly, instead of asking whether torture can be justified, they would first ask if it works. In short, the inclination of empirical social scientists is to turn moral problems into empirical ones.

Looking for more empirical data is always laudable. The problem with empirical policy analysis is that a lot of time policy “experts” make claims that appear to be empirical but are based on a mixture of unsupported evidence and hidden moral assumptions (claimed to be obvious and well-known truths). In this vain, it is many times claimed that we all know that free trade improves the condition of everyone, that private enterprises handle business better than state bureaucracy, and that it is mistaken to negotiate with tyrants. Do we?

In my view, the wonderful and innovative approach of the Community Research Partnership in Ethics is that it forces students to begin their study from concrete ethical questions, in the form in which they present themselves in real life situation. Thus, the first challenge that students are facing is how to characterize the problem that the work of the partner organization pose. Most of the scholarly literature “out there” is scarcely helpful in this respect. This explains, I believe, the partial paralysis that students confront when they are conducting the literature review. They often find themselves between the Scylla of moral philosophy and the Charybdis of empirical social scientists/ policy analysts.

On the one hand, when they conduct a literature review they can quickly come by highly philosophical works that seeks to represent problems in an abstract form as moral problems. Those who studied food-shelters, for example, must have found those endless discussions about whether the state has a duty to provide for the needy. But in themselves, philosophical ‘proofs’ are not sufficient. Suppose that we come by an article that convincingly show that the government has a moral duty to feed the hungry. We can say “Amen,” but other than that it is not clear that in itself this conclusion tells us something useful about our political reality here and now. If there is such a moral duty, why the government is not implementing it: are the heads of government evil, ignorant, corrupt? We still need to fill in the gap between the abstract principles and everyday experience.

On the other hand, students can find equally endless discussions about what “works.” To continue the same example, there is information about what methods of

food distribution are practiced in other places, whether they achieve certain goals, or how well they measure on different scales of the well-being of participants and communities. Many of these are likely to be reports by governmental agencies of non-governmental agencies. Others will be methodological debates about how to measure and compare different policies. Both genres of empirical works will typically have little reflections on the ethical dimensions of the problem (many of the Government's report simply hail successes, many of the NGOs reports count failures without weighing policies against realist alternatives).

My heart goes to the CRPE students who have to navigate their way in the sea of literature, philosophical orientations, and conceptual frameworks. I understand and in fact share the confusion and frustration that they must feel. But I believe that going through the confusion and finding their own voice is a valuable experience. In fact, I dare saying it might be the most valuable experience of the entire undergraduate education. Having served as the editor of the CRPE Working Papers Series, I can report that when the CRPE students find their own voice, and they all do, the results are innovative and the contribution that they make is real.

I stopped being afraid and started enjoying ethics when I finally realized that there is no one way to do ethics but that there are multiple approaches to address the ethical dimensions of social life and when I learned to assess the scope and limits of each of the ways. The papers that I read as an editor demonstrate that the students, as a group, have learned to use effectively variety of approaches: they examine the history, or genealogy, of social problems asking how we came to think about them through certain moral categories and not others, they apply hermeneutic approaches to study and assess the meaning the ethical culture of publics and the system of beliefs of individuals, or they reflect on the question of whether democratic procedures may yield more legitimate decisions. They are not afraid of ethics. They tackle it right on, and in a sophisticated way. I can only regret that there was no CRPE Program when I was an undergraduate.

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IN HARM'S WAY: JUSTIFICATION, EXCUSE AND CIVILIAN SAFETY IN JUST WAR THEORY¹

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ABSTRACT: Just War Theory asserts that armed conflict can be fought in a way that safeguards moral and legal norms while responding to pragmatic/military imperatives. One of the ways in which it seeks to safeguard justice is through specific provisions for the immunity of, and due care for, the vulnerable and innocent. Unfortunately, two doctrines within Just War Theory – the Doctrine of Double Effect and the Doctrine of Supreme Emergency – suspend or vacate these provisions. The net effect is to render justifications inaccessible, leaving only excuses, the use of which establishes that no one is truly accountable, no meaningful guidance is available, and sheer self-interest may be allowed to underwrite terrible harms. This paper explores the implications of excuses and excuse-making for the laws of war, arguing that unless key doctrines are re-oriented, 'Just War Theory' risks playing out as merely 'Excusable War Theory.'

Just War Theory attempts to establish that armed conflict can be conducted in a way that safeguards moral and legal norms while responding to pragmatic imperatives. It sets out the conditions of a 'just war,' striking a middle position between no-holds-barred Realism and absolute Pacifism. Just War Theory is, for most nation-states that have a European philosophical heritage, the same as the 'laws of war,' which customarily² consist of *jus ad bellum* (providing justification for entering into armed conflict) and *jus in bello* (providing justification for conduct during war). One of the ways in which the laws of war seek to safeguard justice, and thus to express society's treasured moral and legal norms, is through specific provisions for the immunity of, and due care for, the vulnerable and innocent. Unfortunately, two doctrines within Just War Theory – the Doctrine of Double Effect (DDE) and the Doctrine of Supreme Emergency (DSE) – suspend these provisions. The DDE offers justification for killing civilians in war, so long as those deaths constitute (foreseeable) accidents rather than intentional acts, while the DSE vacates non-combatant immunity in situations where the military acts as the agent of a nation-state facing total annihilation. However understandable 'accidental' and 'emergency' actions may be, vacating a moral or legal norm is a perilous endeavour,

¹ The author would like to thank Dr. Christine Freeman-Roth for her continuing support and valuable input during the researching and writing of this paper.

² *Jus post bellum*, which governs peacemaking, exit strategies, and how wars end, also exists. In some cases it is considered a part of the laws of war. It is not, however, traditionally part of the canon, and is not a part of the analysis contained in this paper.

since it renders justification inaccessible, leaving only excuse. In the case of warfare, excuses are often offered up against gross violations of human rights, which themselves make up the bedrock of contemporary political and legal morality.³ The implications of excuses and excuse-making for the laws of war are therefore quite serious. Indeed, the DDE and DSE reveal the potential for ‘Just War Theory’ to become merely ‘Excusable War Theory,’⁴ in which no one is accountable, no guidance is available, and self-interest is allowed to underwrite terrible harms.

LEGAL AND MORAL DEFENCES: DIFFERENTIATING BETWEEN JUSTIFICATIONS AND EXCUSES

Both justification and excuse are defensive postures, but each represents a distinct rationale. A defence can be understood as either “qualifying a *prima facie* norm (hence conceptually a justification) or as foreclosing punishment for violation of a norm (hence conceptually an excuse).”⁵ Justification asserts that an act is *not wrongful*, while excuse asserts that an act is wrongful but *not blameworthy*. Generally, justification makes this assertion by addressing the quality of an act, making it transcendent, while an excuse speaks to the status or (in)capacity of an actor, making it particular. A more robust framing of the justification/excuse distinction would include the fact that excuse is more sympathetic, oriented toward individual pardon, while justification is more aspirational, aiming for the common good. Specifically, though not exclusively, the former involves acting in one’s own self-interest, typically because one’s will has been overcome⁶ by the illegitimate threat of another actor; in other words, the act for which one is asking to be excused was performed *under duress*. The latter, by way of contrast, involves action for the greater good, often in response to naturally-arising circumstances; in other words, the act for which one is asserting justification was *a necessity*. Thus, at least conceptually, a justifiable act vindicates the actor’s rights while not violating those of the individual who is affected – “it is not merely an understandable though regrettable human reaction.”⁷ Ontologically, legally, and ethically, excuses are typically formulated around the absence of a justification,

³ Brian Orend, *The Morality of War* (New York: Broadview Press, 2006), 129.

⁴ David Rodin, “Defending the Indefensible?” *Journal of Applied Philosophy* 23.3 (2006): 381.

⁵ Mitchell N. Berman, “Justification and Excuse, Law and Morality,” *Duke Law Journal* 53.1 (2003): 18.

⁶ This is not measured subjectively for reasons of difficulties surrounding verification and because a tailoring of norms to individual capacity is seen as patently undesirable.

⁷ Larry Alexander, “Self-Defense, Justification and Excuse,” *Philosophy and Public Affairs* 22.1 (1993):

seen as precluding justification,⁸ analysed after the bounds of conduct have been set by justification, and are commonly felt to be an inferior defence. Justifications are thus both logically and normatively prior. Moral absolutes bound justification, while justification, in turn, sets the boundaries of excuse. Found somewhere between justification and mere explanation, then, “[e]xcuse acts as a normative safety valve, which allows for [pardon] based on just deserts while preserving the integrity of objective and transcendent truth reflected in justification.”⁹

Finally, there is a temporal distinction between justifying and excuse-making that feeds into the normative function of the former. “[J]ustifications serve to qualify the norm for purposes of *ex post* [after the fact] evaluation and *ex ante* [offered beforehand] direction. They supplement the *prima facie* norm so as to instruct the addressees regarding what conduct the discourse allows.”¹⁰ Excuses, by way of contrast, function strictly *ex post*, foreclosing the actor’s responsibility.”^{11, 12} Therefore justifications, both legal and moral, provide normative accounts which both prescribe and proscribe behaviour:

When the law says that certain conduct is justified, it grants its imprimatur and encourages the conduct. It tells all who are similarly situated that they ought to engage in the same behaviour, as doing so is objectively beneficial. Justified conduct is not only the legally permitted thing to do; it is the moral and socially responsible thing to do. On the other hand, when the law says that certain conduct is excused, it announces that the conduct harms society and others ought not to freely choose to do the same. The law communicates that the conduct is wrong, legally and morally.¹³

In justification, then, otherwise objectionable acts are deemed either a benefit to society or socially useful; they are openly (if subtly) encouraged. In excuse, by way of

⁸ Some authors go so far as to equate “justified and excused” and “a married bachelor” in terms of logic. Douglas Husak, “On the Supposed Priority of Justification to Excuse,” *Law and Philosophy* 24.6 (2005): 560.

⁹ Eugene R. Milhizer, “Justification and Excuse: What They Were, What They Are, and What They Ought to Be,” *St. John’s Law Review* 78.3 (2004): 850.

¹⁰ Berman 18.

¹¹ Berman 19.

¹² The definition of the word itself helps to explain why excuses are incapable of providing guidance. To act in the hope of being later excused is irreconcilable with the fact that excuses are specifically offered against objectionable actions performed under duress (i.e. while the will is incapacitated).

¹³ Milhizer 856.

contrast, thoroughly objectionable acts are deemed non-beneficial, but are pardoned due to extenuating circumstances; they are openly (if subtly) discouraged. The relationship between law, morality, society, and individuals thus creates excuse and justification as statements about – or more specifically, statements about harmonies between – the actor/act and the broader social order.¹⁴ Social actions and legislation are here involved in a feedback loop of behavioural norms and conceptualizations of the greater good. The result is that, through justifications, the individual is aligned with the act, the law, and the social order, while in excuse-making he or she is distanced from all three.

THE DOCTRINES OF DOUBLE EFFECT AND SUPREME EMERGENCY

Because determination of what is ‘just’ becomes more difficult when additional norms are in play, cases involving the protection of innocents provide a particularly useful test of the excuse/justification division within Just War Theory. Coincidentally (or not), two of its more excuse-oriented doctrines deal with civilian harm. Found within the ambit of *jus in bello*, the Doctrine of Double Effect (DDE) and Doctrine of Supreme Emergency (DSE) have special implications for non-combatants, the former because it allows non-combatant deaths as by-products of otherwise beneficial action, and the latter because it suspends the laws of war, including the specific protections afforded to civilians.

UNINTENDED HARM: THE DOCTRINE OF DOUBLE EFFECT

The DDE attempts (and succeeds, some would say) to provide justification for the *unintentional* killing of civilians in war. Under this principle, the harm to non-combatants is a side effect of – never a means to – an act that aims at some other defensible end, with a good intention underwriting the dual outcome. Such a defence describes the classic ‘collateral damage’ scenario. There are four conditions that must be satisfied in order for the DDE to impart justification for harm done to non-combatants: 1) the intended outcome must be morally acceptable; 2) the means employed to that end must be good, or at least neutral; 3) the intended effect must be immediate; and 4) there must be a grave reason for undertaking the action itself.¹⁵ Boyle asserts that even the Catholic theorists who fathered the DDE were themselves

¹⁴ Richard B. Felson and Stephen A. Ribner, “An Attributional Approach to Accounts and Sanctions for Criminal Violence,” *Social Psychology Quarterly* 44.2 (1981): 138.

¹⁵ See, among others, Joseph M. Boyle, “Toward Understanding the Principle of Double Effect,” *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 164.

foggy on whether or not the doctrine constituted a justification or an excuse.¹⁶ Theoretical confusion aside, it is most often presented as plainly justifying civilian casualties in the context of a morally principled war. Walzer, in fact, asserts that the doctrine as written provides a ‘blanket’ justification, subject only to the overarching *jus in bello* rule that any force employed be proportional to the goal sought. This has raised the issue about the right amount of force and the ‘balancing’ of civilian casualties against military advantage.¹⁷ The Doctrine of Double Effect does not endorse targeting civilians, it merely acknowledges the fact that war almost always takes place in close proximity to non-combatants. The DDE thus comes up whenever debate turns to the issue of the potential or actual deaths of civilians.

LAST RESORT: THE DOCTRINE OF SUPREME EMERGENCY

The Doctrine of Supreme Emergency (DSE), on the other hand, addresses the *intentional* targeting of non-military personnel. Orend characterizes this doctrine, which provides a complete exemption from *jus in bello*¹⁸ and yet is entirely absent from international legislation, as “probably the most controversial, and consequential, amendment to just war theory ever proposed.”¹⁹ Defence through the DSE posits the classic ‘backs to the wall’ scenario. It allows a nation to defend itself without any form of legal or moral restraint on action, provided that conditions such as the following have been satisfied: the nation has been victimized by an aggressor; there is public proof of imminent military collapse at the hands of that aggressor; and there is similar proof that the aggressor’s victory will bring about widespread massacre or enslavement. The DSE can be compared and contrasted with the DDE by looking at the means/ends distinction in each:

[T]he DDE (among other things) only lets one perform actions which are otherwise permissible, and in which the unintended bad effects are *not* the means to producing the intended good ones. But in supreme emergencies, the actions contemplated are *not* otherwise permissible

¹⁶ Boyle 165.

¹⁷ Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006).

¹⁸ “[J]us in bello contains a number of general moral rules within which the stunning number of legal conventions and prohibitions can be located. These abstract rules include 1) non-combatant immunity from direct and intentional attack; 2) benevolent quarantine for captured soldiers; 3) due care to civilians; 4) use of proportionate means only against legitimate military targets; 5) no reprisals; 6) no prohibited weapons; and 7) no use of means ‘mala in se,’ or ‘evil in themselves’ [...]” Orend 140.

¹⁹ Orend 141.

(e.g., deliberately killing civilians), and the bad effects *are* the means to producing the good [...].²⁰

Controversy arises from the fact that the suspension of *jus in bello* presents a particular risk of harm to civilians. Two of the seven rules of conduct in war deal with the immunity of, and due care to, non-combatants, while other prohibitions (in particular, those against *mala in se* and disproportionate means) are meant to decrease the risk of serious human rights violations within this same population. Orend writes that “[t]he requirement of discrimination and non-combatant immunity is the most important *jus in bello* rule. It is also the most frequently, and stridently, codified rule within the international laws of armed conflict.”²¹ Actions in violation of these rules are rightly associated with the worst war crimes on record, while invocation of ‘supreme emergency’ is additionally linked to the erosion of civil liberties at home. Furthermore, there is something quite illogical about closing off the threat of the massacre of one group of non-combatants (namely, our civilians) by undertaking the massacre of another group of non-combatants (namely, their civilians). Granting ‘just’ status in warfare involves looking at precisely those actions which *differentiate* the aggressor from the defender, rather than those they share.

THE IMPORTANCE OF JUSTIFICATION TO THE DOCTRINES OF DOUBLE EFFECT AND SUPREME EMERGENCY

Defence accounts are considered acceptable insofar as they are seen as normative explanations of actions.²² Although strong excuses *are* normative, *all* excuses reference a disabling condition, and personal responsibility both shifts and shrinks when behaviour is seen to be subject to mitigating circumstances more than to individual choice. Intentionality thus becomes a central issue, since outcomes that are unanticipated or unintended are rightly seen as having a lesser tie to personal accountability – and accountability is perhaps the most critical factor in assessments of crime, punishment, and reprieve. When one offers a justification, one accepts responsibility while denying that the act itself was wrong. When one offers an excuse, one denies responsibility while accepting that the act itself was wrong. Justifications, therefore, seek to preserve accountability, either explicitly or implicitly.

²⁰ Orend 147.

²¹ Orend 106.

²² Catherine A. Riordan, Nancy A. Marlin and Ronald T. Kellogg, “The Effectiveness of Accounts Following Transgression,” *Social Psychology Quarterly* 46.3 (1983): 213.

More pragmatically, ongoing use of similar excuses lessens their perceived validity, while repeated use of justification carries no such risk.²³ Here one is considering an oft-overlooked idea: the *utility of legitimacy* – in the case of Just War Theory, with regard to the opinions of individual soldiers and the people on whose behalf they are fighting. There is more at stake than mere appearance, though, since the bastardization of the law and the ability (or propensity) to bastardize the law appear to be mutually constitutive. As Milhizer asserts, “[t]he [...] law’s actual and apparent incoherence reinforces unprincipled relativism and opportunism. It legitimizes moral loopholes.”²⁴ In the courts of public opinion, then, the benefits of justification in the DDE and DSE include assuaging anger and cynicism about civilian deaths in wartime, which are correctly perceived as an evil to be avoided whenever and wherever possible. Excuses for these acts make us uncomfortable, perhaps because we realize that a public record of successful excuse-making may actually provide a kind of negative influence. In other words, we rightly worry that an actor may have intentionally committed an objectionable act knowing, in advance, that there was a chance of an after-the-fact pardon. Purposeful distancing from excuses and excuse-making would thus do much to ameliorate the perception of Just War Theory as rhetoric used to disguise nationalistic and anti-humanitarian ambitions. In the courts of law, justification curbs the malleability of legal and moral principles – malleability that excuse-making more readily allows, and which often renders legislation unprincipled and self-contradictory.²⁵

Remorse or regret, imposed upon oneself, and stigma, imposed by society, are the price paid by the individual when excuses supplant justifications. The effects can be considerable, both on society and on that individual. To begin with, a lack of accountability prevents reunion with the community by closing off the dialogical space necessary for justice through norm clarification.²⁶ In addition, a significant wrong ensues when one is denied justification because of a lack of commitment (or

²³ Paul Woodruff, “Justification or Excuse: Saving Soldiers at the Expense of Civilians,” *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 285.

²⁴ Milhizer 861.

²⁵ On the domestic front, this can be seen in the recent, marked increase in mistake, insanity, and disability excuse defenses in criminal courts, including polemical claims such as steroid rage, serotonin syndrome (the so-called Zoloft/Prozac defense), ‘gay panic,’ monosodium glutamate-induced delusions, etc. Many such claims stretch the idea of ‘duress’ well beyond what the original framers of the law intended, and most are controversial both from the perspective of legal experts and the general public.

²⁶ It is important to remember that reconciliation is possible, while ‘making amends’ may be plainly necessary, even in fully justified action.

imagination) on the part of those responsible for drafting, challenging, and revising the law. Wherever and whenever possible, excuses should be re-framed as justifications, since it is important to remember that ‘accountability’ includes *both praise and blame*; in other words, it encompasses not only holding a man responsible for a wrong act, but holding a man responsible for a right one.²⁷ Similarly, the political tactic of obfuscating blame is foreclosed by justification. This protects not only individuals, but also the law itself, since “[t]he law is debased when it is used as a means for chastising the blameless to advance extraneous ends.”²⁸

Effective cross-cultural laws of war also call for justifications rather than excuses, since only justifications have characteristics of universality and immutability (versus culturally relative and pragmatically tailored excuse-making). With justification, although the application of transcendent norms can be adapted to specific contexts, “[o]bjective truth remains unchanged, for if it changed with the times and circumstances it would be neither objective nor true. [Excuse, however] is intertwined with the particulars of a culture in ways that are irrelevant and even illegitimate with respect to the objective underpinnings of justification.”²⁹ Similarly, there are implications for humanitarian intervention associated with justified (rather than excused) action in and around war. Although first party justification does not necessarily justify third party intervention, the robustness of the reasons underlying that initial action can certainly help strengthen subsequent calls to aid.

THE DDE AND DSE: JUSTIFICATIONS OR EXCUSES?

If justification is critical to the DDE and DSE, the pathway through which it is secured is of particular importance. Some thinkers assert that, within Just War Theory as a whole, the broader rules provide blanket justification for individual doctrines. Overarching justifications (*jus ad bellum* and relevant tenets of *jus in bello*), however, do not completely cover the DDE and DSE. This explains why these doctrines are set apart and continue to present a conceptual problem within the Just War tradition. These doctrines are, as it stands, the principles appealed to when the rules of non-discrimination against civilians and protection of non-combatants are abrogated. They must therefore provide justification in and of themselves, rather than borrowing it from some other norm, value, or authority – particularly the one that actually *upholds* the very rules that the DDE and DSE seek to bend or break.³⁰

²⁷ Richard N. Bronaugh, “Freedom as the Absence of an Excuse,” *Ethics* 74.3 (1964): 161.

²⁸ Milhizer 883.

²⁹ Milhizer 853.

³⁰ Felson and Ribner 137.

There are good reasons to assert norms in warfare that are congruent with those in domestic society. Such an assertion is, in fact, a central part of the legalist paradigm that underscores Just War Theory. Clarity may therefore be gained by focusing this issue through the lens of a domestic analogy, according to which a serious harm on the domestic front (homicide) may be equated with one on the battlefield (civilian deaths). For the purposes of this investigation, the primary relevant characteristics that serve to differentiate justification from excuse in cases of fully defensible homicide are the attacker/innocent divide, the necessity/duress distinction, and the provision of *ex ante* direction in addition to *ex post* evaluation.

SELF-DEFENCE AND SELF-PRESERVATION: THE QUESTION OF ‘ATTACKERS’

Broadly, both DDE and DSE fall under the rubric of self-defence (be it of a soldier or a nation-state, or both) or other-defence (i.e. military action on behalf of persons being harmed by an aggressor). Here, the domestic analogy proves quite useful. Homicide, defined as the killing of another human being, is an exceedingly serious act on the domestic stage, invariably classified (when wrongful) as a capital offence in those jurisdictions that retain the death penalty. In a domestic court of law, derogation of the ‘victim’ helps to underwrite justification of homicide. In Just War Theory, *jus ad bellum* may accomplish this at the national level, but it fails to spill over to characterize civilians as legitimate targets.³¹

At home, the law typically allows one to kill an attacker provided that attacker’s death is a prerequisite for one’s own survival; in all other situations the killing of another person gravely violates his or her basic rights. Such a position in domestic law is very much in line with the prohibition against targeting civilians in wartime, since doing so would amount to intentionally killing a non-attacker – an act that is simply not part of the legal concept of self-defence. Domestic law also recognizes the validity of other-defence, or killing an individual who has attacked someone else, in order to save that other individual’s life. Unfortunately, civilians, by definition, do not qualify as ‘attackers’ in either situation; they are technically ‘innocents’ vis-à-vis the conflict at hand.³² Woodruff points out that in a scenario bereft of an attacker, “the principle of *self-preservation* applies indifferently to acts reasonably deemed necessary for the survival of the agent, and so may extend to acts against the innocent.”³³ The rub here is that self-preservation is classified as an excuse, while self-defence is classified as a justification, meaning that an intentional act that

³¹ Riordan, Marlin, and Kellogg 213.

³² “This is the clearest sense of who is ‘innocent’ in wartime: all those not engaged in creating harm.” Orend 110.

³³ Woodruff 286.

brings about the death of a non-attacker, even if that death ensures the actor's survival, remains *unjustified*.³⁴ Further, a claim of self-preservation, as a defence levied by a soldier in the context of war, is significantly weakened by the fact that the individual making that claim is a designated combatant in a violent conflict.

The relationship between the combatant and the non-combatant is patently asymmetrical, with the potential to *cause harm* stacked up on one side (the soldier's) and the potential to *suffer harm* borne disproportionately by the other (the civilian's). Civilians are more 'innocent,' less aggressive, and less threatening, while the absolute right to safety of person (key to claims of self-defence) is much diminished in the case of the soldier by virtue of his very occupation in a time of war. It is because of this, in part, that civilian lives are given special value.^{35,36} Orend, after Nagel, clarifies that the separation between combatants and non-combatants is determined by whether or not they are *immediately* threatening; further, any action in response to an immediate threat must be both direct and relevant.³⁷ Non-combatants would seem to be exempt from any such classification, however, since "it is not the enemy civilians who are threatening us, it is their military machine, and so it is impermissible to strike out deliberately at the civilians, because [...] it is not they who are the direct and active agents of the brutal force."³⁸ There is perhaps, at first glance, an opportunity to counter this assertion by classifying civilians as attackers in the communal sense, as elements of the same totality,³⁹ or as being *de facto* contiguous with the enemy by virtue of their political or economic support for their government. Upon closer examination, however, this logic does not hold. The state apparatus is the only legitimate target because it is (and has always been), as Orend points out, "the main organizer and focal point of warfare."⁴⁰ It is also relevant that, although there is a distinction made between combatants and non-combatants in warfare, and between aggressor (unjust) and defender (just) combatants, there is no separation of aggressor and defender non-combatants. Thus killing one set

³⁴ This is, of course, assuming that one should go ahead and kill innocents even if such an act may be excusable.

³⁵ Michael Walzer, "Double Effect and Double Intention," *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 198.

³⁶ Further, the two would seem to be non-equivalent in even the most basic sense: being in the line of fire is part of the basic definition of 'soldiering.'

³⁷ Orend 149.

³⁸ Orend 149.

³⁹ Walzer, *Just and Unjust Wars* 261.

⁴⁰ Orend 113.

to save another does not make sense even in terms of a purely utilitarian calculus; even if the numbers are highly unequal, this amounts to “bizarre accounting.”⁴¹

NECESSITY AND DURESS: THE QUESTION OF FREE WILL AND THE GREATER GOOD

Determinations of personal responsibility, and hence defensive accounts, look carefully at causal and volitional criteria.⁴² In domestic law, necessity and duress are defences relating to some form of incapacitation of free will, in which there is either a lack of control over the action that brings forth harm, or a lack of intent to produce the harm *per se*. These defences orbit the classic ‘reasonable man in unreasonable circumstances’ scenario. Necessity is strictly framed as a justification, while the idea of duress arises only in excusing action. There is thus a clear divide between necessity and duress, with the bar of ‘necessity’ placed quite high. “For conduct to be necessary, it must satisfy both temporal and substantive criteria. Conduct fails under the temporal prong if the need to engage in it is not yet ripe. [...] Conduct fails under a substantive prong of being ‘necessary’ if the interest at stake can be protected with the use of less force or the infliction of less harm.”⁴³ These two criteria mirror the structure of the laws of war themselves: *jus ad bellum* demands that the resort to war be timely, while *jus in bello* requires that a war entered into justly must also be fought justly. The two together “[insist] on a *fundamental moral consistency between means and ends* with regard to wartime behaviour.”⁴⁴ A just war is thus, strictly speaking, a *necessary* war. Yet the necessity of the war does not itself furnish the necessity of individual actions undertaken in war, each of which carries its own motivations and outcomes.

From both a legal and a moral standpoint, there must be a “high or presumptive threshold for an excusing encumbrance for volition as this pertains to free will.”^{45,46} The threshold rises with the severity of the act in question. The end result is that, in domestic law, there is simply no accepted duress account (i.e., excuse) for lethal force exerted in self-defence, even if one’s actions are wholly in line with what could be expected of any reasonable person in the same situation. This reflects, among other

⁴¹ Walzer, *Just and Unjust Wars* 262.

⁴² Dennis F. Thompson, “Moral Responsibility of Public Officials: The Problem of Many Hands,” *The American Political Science Review* 74.4 (1980): 905.

⁴³ Milhizer 813

⁴⁴ Orend 153-4.

⁴⁵ Milhizer 796.

⁴⁶ This is not measured subjectively for reasons of difficulties surrounding verification and because a tailoring of norms to individual capacity is seen as patently undesirable.

things, the tremendous value placed on human life, as well as the significance of free will in determination of fault. Many legal theorists assert that the availability of *any* excuse defence for homicide, because it entails allowing killing to be motivated by mere interests (however important), would be morally untenable no matter how extraordinary the circumstances. Furthermore, the legal and moral acceptability of a 'duress' claim would be likely to escalate, or at least contribute, to those circumstances, by disproportionately inflating the sense of urgency attached to protecting one's interests.

The DDE only lightly considers the issue of civilian worth and entitlement, balancing out harms to non-combatants through appeals to military utility, while providing no real requirement that due care be taken to minimize those harms.⁴⁷ The result is a standard of conduct that is far too low, and which categorizes the fulfillment of moral obligations as heroic. It is thus Walzer's opinion that the single intention is not elastic enough to cover the double effect of the DDE. "Simply not to intend the death of civilians is too easy," he writes, "[w]hat we look for in such cases is some sign of a positive commitment to save civilian lives."⁴⁸ The remedy, according to Walzer, is a *second* intention: not only must the good be achieved, the bad must be minimized. What is actually being said here is that the current incarnation of the DDE fails on the 'substantive prong of necessity' by sheer indifference. The upshot of such a claim is that if a single intention is insufficient, so too is the single justification via necessity. Even if the primary (good) outcome is a function of necessity rather than duress, that fact does not itself permit *any* means to that end. Here the proportionality rule is insufficient, as is the condition within the DDE that the means employed be at least neutral, since these caveats establish only a *vague minimum of harm*, rather than an *aspirational maximum of protection*. The second intention criterion, calling for 'due care,' is thus a call to turn the Doctrine of Double Effect away from excuse and toward justification, satisfying the aforementioned 'substantive prong of necessity.' Such a turn would be characterized by exchanging the consideration of important interests (such as cost efficiency or lowering risks to soldiers) for consideration of the greater moral good (in particular, the special status afforded non-combatants and what, by virtue of such a status, they are entitled to). It would acknowledge that military utility is not the paramount consideration, and that "[t]he point is not to minimize the casualties while pursuing policies designed to advance majority interests regardless of whether there is a rights violation or not. The point is to minimize casualties while pursuing policies, and using means of war, that do not violate human rights."⁴⁹ One sees this reflected in the assertion that 'acceptable risks' to soldiers must be reconsidered, and

⁴⁷ See, among others, Walzer, *Just and Unjust*.

⁴⁸ Walzer, *Double Effect and Double Intention* 196.

⁴⁹ Orend 143.

roughly fixed at a point where additional risk-taking either dooms the operation outright, or else renders it too costly to be repeatable.⁵⁰ This is not an extraordinary or controversial declaration; the concept of ‘due care’ is itself implicit in the laws of armed conflict, while risk is what a soldier accepts by virtue of being a soldier. Any lesser position on the issue is unacceptable since, as Orend asserts, being willing to risk another’s life but not your own, being willing to kill but not die, is “a violation of the warrior ethos.”⁵¹ Walzer echoes this sentiment when he writes that, “[i]t is simply not the case that individuals will always strike out at innocent men and women rather than accept risks for themselves. We even say, very often, that it is their duty to accept risks [...]. We make this demand knowing that it is possible for people to live up to it.”⁵²

The DSE would, by the very definition of ‘supreme emergency,’ seem to satisfy the temporal prong of necessity. This being said, “the mere recognition of such a threat is not itself coercive; it neither compels nor permits attacks on the innocent, so long as other means of fighting and winning are available.”⁵³ Furthermore, in the least disputed case of successful invocation of the supreme emergency exemption – that which took place in Britain in the early 1940s – targeting civilians could not be proven to have had any negative effect on the enemy’s morale, or to have been the cause of any change in his tactics.⁵⁴ Without knowing whether strategic destruction of civilian targets will reverse (or even delay) an imminent military defeat, violation of *jus in bello* simply cannot be justified on the basis of “stav[ing] off the threat posed by the aggressor.”⁵⁵ The DSE is here incapable of satisfying the second (substantive) prong of

⁵⁰ Walzer, *Double Effect and Double Intention* 197.

⁵¹ Orend 117.

⁵² Walzer *Just and Unjust Wars* 253.

⁵³ Walzer, *Just and Unjust Wars* 251.

⁵⁴ The planned invasion of Britain by Nazi forces during World War II was thought, by the British government, to constitute a threat of annihilation (meaning that they feared both total loss of sovereignty and massive loss of life). During the Battle of Britain, this ‘supreme emergency’ was used to justify the Royal Air Force’s bombing of cities such as Dresden, which had no military significance, in order to demoralize the German people. The hope was that withdrawal of popular support at home would force the Nazis to abandon their plans to invade the British Isles. Although Germany did decide against invasion in the wake of the Battle of Britain, and despite the fact that Winston Churchill portrayed this as proof of the success of targeting civilians, in the end there is simply no non-subjective way of determining whether and to what extent this tactic proved an advantage over targeting military installations, militarily significant infrastructure (e.g. fuel production and transportation, communications, dams, etc.), and actual combatants (i.e. Luftwaffe planes and their pilots).

⁵⁵ Orend 145.

necessity. There is, as well, an overarching conceptual problem: because the rules of *jus in bello* were themselves formulated in order to address military necessity, it can be cogently argued that “no appeal to necessity can override the rules.”⁵⁶

***EX ANTE* DIRECTION AND *EX POST* EVALUATION: THE QUESTION OF GUIDANCE**

Berman asserts that “[e]xcuses don’t grant permissions. They tell judges when persons who have acted without permission ought to be punished.”⁵⁷ Because they provide strictly *ex post* evaluation, excuses are incapable of helping one to evaluate the comparative worth of behavioural alternatives in advance of action. Justifications, on the other hand, *are* action-guiding. *Ex ante* direction is provided, in part, by the very framing of justification, which allows the individual to ask ‘under what conditions does justification arise?’ The mechanism of guidance is rooted in the fact that judgment herein is not as case-specific or vague as with excuse-making – specifically, because “actor-specific justifications are largely irrelevant, [...] the subject matter upon which [one] will base [one’s] determination is far more tangible, [and decisions] can be more readily evaluated using quantitatively objective criteria.”⁵⁸ The subjectivity of excuse, by way of contrast, raises the number of relevant variables and lowers confidence in one’s assessment of them. More importantly, in this context guidance goes beyond minimally acceptable conduct, which is the only relevant standard in excuse-making. The difference between the merely permissible and the morally best (available) action is key to justification – further, there is nothing undesirable about a higher standard of conduct for individuals facing a difficult moral choice, a standard that is “an idealization of their epistemic situation.”⁵⁹ One is also entitled to forewarning that there exists a line that must not be crossed, creating a natural link between the action-guiding properties of justification and the ‘educative function’⁶⁰ of law, and making the provision of such direction, whenever possible, an ethical requirement. Clarity is critical in any system of law and legal norms, in order that transgressions be accurately mapped out, enforcement be ethical, and the system itself be tied to principles greater than itself. It can also be said that justifications, formulated in utilitarian terms and insofar as they provide guidance, actually help to preclude harms.

In terms of the Just War tradition, “the upshot of [the] theory, after all, is precisely to devise coherent rules that statesmen and soldiers can refer to as they make

⁵⁶ Orend 151.

⁵⁷ Berman 31-3.

⁵⁸ Milhizer 851.

⁵⁹ Berman 56.

⁶⁰ See Berman.

choices under pressured wartime conditions.”⁶¹ As currently framed, though, the Doctrines of Double Effect and Supreme Emergency fail to provide substantive *ex ante* direction, and thus lack a key characteristic of justification. With reference to the DDE, considering the deadly force now at the disposal of individual combatants, that guidance is not merely valuable, but absolutely necessary – and, unfortunately, utterly lacking. Here, asserts Walzer, the laws of war are silent, “they leave the cruellest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve.”⁶² Although it could be said that the proportionality rule provides some form of *ex ante* direction in battlefield decisions, it stands as “more of a limiting factor, a negative condition – [...] setting outside constraints [...] – than it is a positive condition which adds new content to the just war equation.”⁶³ In terms of the DDE itself, ‘you may not intentionally harm civilians’ is *not* guidance; indeed, as a statement of soldierly conduct it is virtually a tautology. ‘You have a positive obligation to take every precaution to actively minimize harm to civilians, including exposing yourself to greater risk’ does constitute guidance, and could be further fleshed out with specific situational procedures taught by the military to its personnel.

In the DSE, a particular course of action is decided upon not by individual soldiers, but by military commanders and statesmen. *Ex ante* direction should therefore be positioned somewhat differently. Unfortunately, because the doctrine simply suspends the laws of war pertaining to engagement, specifically abrogating the human rights of non-combatants, *every* available option amounts to a violation of the most deeply-held principles. This makes guidance pointless. The simple, awful truth is that “there is no supreme emergency exemption, where such is conceived as a *moral* exemption, permission or loophole [because] [*t*]he whole thing is a wretched moral tragedy and, no matter what you do, you’re wrong.”⁶⁴ Attempting to leave the matter unresolved – writing it off to extreme moral complexity, and endorsing the supreme emergency exemption nonetheless – is perhaps the natural (default) position, and is in keeping with the knowledge that “the world is not a fully comprehensible, let alone a morally satisfactory place.”⁶⁵ But this is a less than completely coherent philosophical stance, since it is basically a claim that it is our moral duty to vacate a moral duty. In addition, such a principle is not in the least action-guiding. Orend offers a way to better navigate the ‘tragedy’ of supreme emergency by providing pragmatic (rather than

⁶¹ Orend 153-4.

⁶² Walzer *Double Effect and Double Intention* 193.

⁶³ Orend 119.

⁶⁴ Orend 153.

⁶⁵ Orend 153.

moral) *ex ante* direction to decision-makers. He asserts that in a state of supreme emergency, choice *does* still exist and should be made rationally, employing both ‘rules of prudence’ and international ethical and legal norms. These choices orbit enacting specific measures, namely the determination of last resort (exhausting standard tactics); appeals to the international community; maintenance of right intention (stripping away imprudent motivations); and probability of success (determining the utility of civilian harm). By virtue of this approach, one is able to assert that meaningful guidance could be made available even in situations of supreme emergency, but only if the existing DSE exemption were revised to provide that guidance.

CONCLUSION

Certain key elements of the laws of war appear to appeal not to Justification Theory, endorsing action, but instead to Excuse Theory, pardoning transgression. Excuses present a thorny issue for two principal reasons. First, they assert that there is a potentially limitless number of situations in which no one is accountable for grave harms suffered, and in which there can thus be neither retributive nor reconciliatory justice. Second, they establish that no substantive guidance is available to those unfortunate individuals who find themselves facing the most dire choices, increasing the potential for further miscarriages of justice through politically-motivated blaming, ‘bad luck,’ and simple ignorance. Only justifications provide a positive norm of proper conduct that renders acts intelligible, reasonable, and answerable.

The domestic analogy, a central part of the legalistic paradigm, and thus Just War Theory itself, speaks clearly to the necessity of re-orienting excuse-based doctrines. Some opt to dismiss the analogy with Sherman’s simple truism, ‘war is hell.’ In war, the claim goes, the socially-seated legal and moral norms of human interaction are vacated – but this claim is unconvincing. If war vacated the social order, all bets would be off, as it were, and distinguishing combatants from non-combatants would be unnecessary.⁶⁶ If this were the case, the laws of conduct in war would themselves be optional, since “[i]f war is hell however it is fought, then what difference can it make how we fight it?”⁶⁷ The presence of well-defined *jus in bello* and the firm distinction between civilians and soldiers in the laws of war are an acknowledgement that just war is not, in fact, a *suspension* of the social order but an *affirmation* of it. Applying the domestic analogy one last time: where a police-mediated peace is the ordinary condition, war is martial law, not anarchy. Just war is thus the social order in its truest form, albeit society *in extremis*, because one fights or endures *for the sake of the social order*. One does not aim for survival at any cost, but one’s highly conditional survival; one desires life *in situ*, within a society that one has reason to value. It is for this reason

⁶⁶ This, of course, is very close to the Realist position on warfare.

⁶⁷ Walzer, *Just and Unjust Wars* 265

that the aggressor is forcefully repelled, because the alternative norms he represents are untenable. Actions during a just war therefore need to be incorporable into a society's self-image. They must be justified rather than excused.

Even those who feel that the Just War tradition already furnishes justifications must agree that it cannot hurt to shore up those instances in which it does so only weakly, since this would allow a more robust defence against charges of excuse-making. It is not inconceivable that weaker component doctrines – those that incline toward excuse – could be revisited and reframed so as to have key characteristics of justification. The task need not be viewed with an 'all or nothing' attitude, since hybrid defences are, on the face of it, possible. Huzak writes that, in domestic law, "[c]omplete defences preclude liability altogether; partial defences lessen the punishment a defendant deserves."⁶⁸ In application of the laws of war, it is perhaps more important to note that the hybridization of excuse and justification, shifting specific aspects of the DDE and DSE as far toward justification as possible, would better preserve accountability and greatly enhance *ex ante* direction. Hybrid justifications may, for example, not qualify as full justifications by failing on the substantive prong of necessity – and here one is reminded of the pure moral tragedy of a supreme emergency – but could nevertheless provide meaningful guidance to soldiers and statesmen.

No matter what the outcome vis-à-vis legislation, significant benefit could accrue from even modest gains in clarity and coherence. Revisiting the DDE and DSE addresses a subject that has been ignored in the Just War tradition: what Orend calls "reflection upon war's tragedy,"⁶⁹ the omission of which has had a deleterious effect on the quality of the discourse. It also brings the explicit focus back around to moral responsibility, since excuse suspends accountability (fixed at the level of the individual), while justification carefully weighs accountability in the broadest sense. Finally, because the issues here intersect firmly with human rights, the stakes become massive in a military age characterized by weapons of unparalleled and indiscriminate destructiveness. Reframing aspects of the laws of war offers clear benefits in both guiding and evaluating action – which is, in point of fact, the very purpose of Just War Theory. Unfortunately, until this task is undertaken, certain key elements of the Just War tradition will continue to appeal not to bringing about justice through engaging human moral agency, but to facilitating pardon, vacating accountability for some of the most serious crimes and moral failings of which man is capable.

⁶⁸ Husak 577.

⁶⁹ Orend 155.

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A CRITIQUE OF CAPITALISM

Quy Tran

ABSTRACT: Capitalist thinking rests on individualist motives, endorsed and defended most rigorously by Adam Smith and Ayn Rand. From a Utilitarian perspective, it is often argued that capitalism raises the overall utility of society. From a Libertarian perspective, respect for individuals requires that we allow them to make their own choices and compete freely in an open market, undisrupted by government interventions. In this essay, I investigate these claims and argue that these particular Utilitarian and Libertarian views are distorted and unfounded. Moreover, that such conclusions lead to unethical and unsustainable consequences. Capitalism, taken seriously emphasizes selfishness and individual rationality, and advocates an absolute notion of property rights, endorsements that are problematic in both theory and practice.

The argument for capitalism has often been defended on both Utilitarian as well as Libertarian grounds. From a Utilitarian perspective, the argument is that self-interested individuals motivated by profit will lead to capital growth and productivity, benefiting society as a whole. From a Libertarian perspective, capitalism allows individuals to make their own choices, which are reflective of personal goals and social values. In what follows, I shall argue that this individualistic, ‘every man for himself’, approach of capitalism is erroneous, being far too idealistic and simplistic: any approach that deals with only individual interests, without concern for the collective interest of society, is bound to fail in the long run. An investigation into the theoretical and practical implications of capitalism will show that this individualism is neither necessary nor sufficient for promoting the ‘greatest good for the greatest number’, and is, furthermore, incompatible with the advancement of liberty for all. In this paper I shall argue that both the Utilitarian and Libertarian justifications of capitalism are unaccountable to the majority of people affected by it, and yield ethical problems in theory as well as in practice.

From a theoretical perspective, capitalism rests on the assumption that property rights exist. John Locke, for instance, points out that we come to own certain things as part of our necessities to life (e.g., food, clothing, and shelter). Other things we come to own as objects of our labouring.¹ That is, if an individual works hard to cultivate land, the fruit that she has cultivated is rightfully hers. Similarly, if a firm spends time and resources manufacturing goods, the goods rightfully belongs to the firm to keep or sell as it pleases. However, this only seems to justify entitlement to the added value of labour, but not to the rights over the land

¹ John Wolff, *An Introduction to Political Philosophy*. New York: Oxford University Press, 2006. pp.139.

itself, since this would have been there regardless.² Land ownership, by appealing to a ‘finder’s keepers’ argument, does not work either, for it does not take into consideration that land is scarce. Those born to later generations will be unable to find land and will be at the mercy of those who have inherited it. How then do we justify the vast inequalities in land ownership that are predominant in capitalist societies?

From a Utilitarian standpoint, defenders of capitalism assert that we should concern ourselves less with the acquisition of property, and focus on the benefits. That is, if the benefits of property ownership outweigh the costs, then capitalism is justified. Hence, they argue, people will only work earnestly to cultivate, produce, and maintain property when it is in their best interest to do so, when it is their land. If self-interested individuals are given the rights to own, save, inherit, and trade, they will inevitably yield the most productive and efficient use of resources, bringing us to a higher standard of living than otherwise possible. They claim that if specific members of society do well, the disadvantaged can benefit. Not only can they take pleasure in innovations that arise as a result of productivity and efficiency, but also goods and services will be in abundance and prices will be low. They will, in effect, enjoy and experience many more things in a capitalist society than in any other alternative. Even if they do not all fare better, inequalities make the goods produced superior qualitatively and quantitatively. If inequalities can spark competition, motivating people to be efficient and productive, why shouldn’t we tolerate them? Furthermore, Utilitarians strive for ‘the greatest happiness for the greatest number’. Hence if the suffering of some individuals can bring about disproportionately higher utility to society, then these inequalities are morally permissible, and arguably obligatory.

Firstly, in criticism of this Utilitarian account, the unjustified acquisition of land should at least give us reason to be sceptical of capitalism, and in particular, of property rights. Secondly, it is unclear if capitalism does create a higher standard of living for everyone. Even a prosperous, efficient capitalist economy will have the poor, the handicapped, and the diseased. A purely capitalist society would leave these people at the mercy of altruistic individuals who are assumed under capitalism to be self-interested, and, as Adam Smith puts it, self-loving.³ Surely, then, voluntary charity is not taken seriously under capitalism. By relying on these self-interested individuals, can the misfortunate really be at a higher standard of living than they otherwise might be in a socialist or mixed economy? Evidently, the Utilitarian defenders of capitalism seem to err precisely because there are alternatives that better approximate the greatest good for the greatest number. For instance, the mixed economies predominant in most Western countries have extensive social

² Ibid, pp.141.

³ Adam Smith, “The Invisible Hand”. *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp.26.

policies implementing education, welfare, healthcare, and a variety of other social programs without sacrificing efficiency and productivity. Even from a Utilitarian perspective, it seems that the utility gained from taxing members of society to redistribute to the less fortunate greatly exceeds the utility gained from keeping our taxed dollars and spending it individually. This is because Utilitarianism embraces the concept of diminishing marginal utility. This is the idea that people have a certain threshold of satisfaction, and as we consume more of a particular good, the utility we get from the additional consumption of that good will diminish. Hence, the utility (or happiness) we get from basic liberties are valued disproportionately higher in comparison to any luxuries. No doubt, we can say that a hungry person having a bit to eat enjoys and appreciates it more than any wealthy person having a three course meal. In general, providing such basic services as healthcare, welfare, and education to the less fortunate increases more overall happiness than any luxury items can bring to the fortunate. Thus, it seems, such social systems and policies would precede capitalistic justifications on the Utilitarian calculus.

Libertarian defenders of capitalism assert that, since people do not voluntarily engage in unpaid labour, if we tax society and redistribute the money to help the less fortunate, the people that are taxed are being forced to labour,⁴ a consequence which seemingly violates individual liberty and autonomy. Capitalism, on the other hand, is the only system that recognizes and safeguards the interests and judgments of every individual person, “the sum of what they value, each in the context of his own life”.⁵ Capitalism and Libertarianism converge because they both emphasize the values and ideas of the individual. Evidently, they claim, it is these values and ideas of the world’s inventors and producers which allow us to enjoy luxuries, an abundance of food, medical innovations, and information technology, to name but a few. Behind these achievements is a self-interested individual, a business person of sorts, someone who figures out how to produce the products in quality and quantity, someone to cut costs, to determine how to market and distribute the products, and someone to initiate and maintain growth and prosperity for society.⁶ At the heart of capitalism is a respect for the business people, allowing them to be free to act, un-coerced by governments, and to be guided by other free individuals in the ‘free-market’. Government regulations only serve to thwart personal values and goals, subordinating man’s judgments to the decrees of the state, to what is politically convenient.⁷ Since governments do not use their own money and property, but make

⁴ Mark A. Michael, “Redistributive Taxation, Self-Ownership, and the Fruit of Labour.” *What’s Wrong? Applied Ethicists and Their Critics*. Ed. Boonin, David. and Oddie, Graham. New York, New York: Oxford University Press, 2005. pp.585.

⁵ Ayn Rand, “What is Capitalism?” *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp.31.

⁶ Robert W. Tracinski., “The Moral Basis of Capitalism”, *The Center for the Advancement of Capitalism*. 29 March. 2008.

<http://www.moraldefense.com/Philosophy/Essays/The_Moral_Basis_of_Capitalism.htm>

⁷ Ibid.

transactions using the public purse, they can invest in inefficient and unproductive projects. In a free-market, on the other hand, people are driven by the ambitions for wealth and success. Since people deal by voluntary choice, through reason and mutual benefit, no one demands the work or money of another without offering something of value in return.⁸ Although this may seem selfish, this is reflective of individuals taking their life seriously, pursuing their own happiness. Ayn Rand furthers this claim by asserting that man is neither the property nor the servant of his society, he works for himself, to support his own life, his rational self-interests, personal goals, and values.⁹ A system that “sacrifices the self to society is a system of slavery,”¹⁰ and “misfortune is not a claim to slave labour”.¹¹

Since the core value of Libertarianism is respect for the individual, a closer examination of societal practices would reveal that it is social policies and communal efforts that work best to advance individual liberty, by accommodating the abilities, goals, and desires of individuals. Without socialist policies implementing and subsidizing education, healthcare, welfare, and the like, the disadvantaged could never effectively compete for jobs and be financially stable. They would, in effect, be forced to labour for the fortunate, those with education, property and capital. Even if we suppose that taxation limits our own personal liberty, it provides aid to the liberty of others, giving them more choice, opportunity, and freedom. Furthermore, the distribution pattern that defenders of capitalism find so intrusive is much similar to the sort of taxation and welfare systems predominant in most Western societies, not so alien to our commonsense morality. As “unpleasant though it is to pay tax, it hardly seems to amount to a grave interference in one’s life.”¹² Evidently, welfare programs and redistributive taxation, in reallocating resources, help to inject expenditures into the economy, thus indirectly helping everyone and increasing the welfare of society in general. Furthermore, we can imagine a potential Einstein or a potential Michelangelo whose skills and talents are thwarted due to a lack of educational and financial support. This would not only constrain the liberty of the individual, limiting personal growth and development, but also would limit societal growth more generally.

To further reject the atomistic approach of Utilitarianism and Libertarianism, and to emphasize the idea that basic liberties and fairness are rationally pursued by

⁸ Rand, “What is Capitalism?”pp. 28.

⁹ Ibid, 32.

¹⁰ Tracinski, “The Moral Basis of Capitalism”

¹¹ Rand, “What is Capitalism?”pp. 31.

¹² Jonathan Wolff, pp. 175.

all, I appeal to John Rawls' hypothetical contract. In this thought experiment, we are placed behind what Rawls calls the *veil of ignorance*, in which we do not know our own social and economic positions, particular interests, gender, race, abilities and strengths. Behind this *veil of ignorance*, we are to lay down the rules of society, the principles of justice. Because we do not know our own particular situation, we would not choose a principle which is biased towards a certain demographic and risk being disadvantaged. Hence, we would rationally ensure that each person has equal rights to the most extensive basic liberties and that social and economic inequalities are arranged so that they could reasonably be expected to benefit all.¹³ Furthermore, he claims, just as many misfortunate people are born handicapped or poor, many fortunate people are born with talents, brains, and money. Since these people have done nothing to deserve their lot in life, these inequalities are undeserved and should be compensated for.¹⁴ Rawls suggests that rather than looking at skills and talents as individual gifts, and handicaps as individual problems, we should look at the former as communal assets and the latter as collective harms. In short, we should "agree to share in one another's fate".¹⁵ If property rights in particular, and capitalism in general, are defended under an appeal to advance society, seemingly, it is not through the selfish motives of individuals and the fierce competition to the top that society will grow and prosper, but rather through social policies advocating equal liberty and opportunity, a claim quite contrary to the atomistic standpoint of a purely capitalist society.

Perhaps more serious are the practical implications of the self-interested "every man for himself" mentality of capitalism. Capitalism, with its primary drive for profit and its emphasis on private ownership is simply incompetent in dealing with externalities. Left to its own devices, it is unsustainable, leading to scarcities, starvation, and ecological disasters. While the 'invisible hand' can adjust prices relative to the market forces of supply and demand to relieve scarcities in renewable resources, it does not fair as well when it comes to non-renewable ones. For example, trees and other natural resources can regenerate in time as demand falls due to soaring prices, but non-renewable resources such as petroleum and natural gas can only increase in price in the long run. Even more devastating is when the resource that is being depleted has no substitutes. The demand for freshwater and air are prime examples. Since many components of the environment cannot be bought and sold, there seems to be no way of giving value to these goods through market processes.¹⁶ These market failures, along with the capitalist emphasis on individual

¹³ John Rawls, "An Egalitarian Theory of Justice". *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp.35.

¹⁴ *Ibid*, 37.

¹⁵ *Ibid*, 38.

¹⁶ Rogene A. Buchholz and Sandra B. Rosenthal, "Elements of the Market System". *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp. 22.

self-interest, have led to serious problems, among which toxic waste and carbon monoxide emissions are prominent examples. In a purely capitalistic economy, firms have little impulse to avoid producing externalities when doing so would generally impose a direct cost on them. Consumers as well try to avoid extra costs when making their purchases and will tend to buy cheaper products even if it means that the production process creates more pollution or that the product itself is environmentally harmful. It seems that, because the environment cannot be owned, people feel free to use and abuse it as they please. From a purely capitalistic and self-interested point of view, it would be irrational to care because caring means extra time, money and effort. Abuse of the environment may mean cheaper production methods for firms and cheaper products for consumers in the short run, but it is the future generations who ultimately will have to pay the consequences, an implication unjustified on both Utilitarian Libertarian grounds.

In response, defenders of capitalism point out that our self-interested motives - through a desire to save our money at the gas station, on hydro bills, a need to preserve our health, and the health of our children and grandchildren - have inspired more environmentally friendly products: hybrid cars, more efficient light bulbs, and renewable energy to name a few. Furthermore, it is through self-interested motives for profit and a drive for success that technological innovations and medical progress are made. With compounding technological advances, coupled with the market's growing trend to efficiency and preservation, is it not reasonable to assume that pressures on population growth, production, consumption, and diminishing natural resources will be relieved and sustained in the long run?

But it seems evident that technology has negative effects as well, being responsible for pollution, the loss of biodiversity, climate change, health concerns, and looming nuclear threats. Hence the claim that technology can lead to sustainability has not been borne out by history. On the contrary, history suggests that technological advances have been made to the detriment of the environment. Furthermore, even the capitalists must admit that innovations and advancements do not occur in a vacuum, and require a communal framework, social endeavours, schools, and laboratories to name but a few.¹⁷ The same can be said of our goals and values, our stride toward efficiency and preservation. Without social programs and educational awareness, environmental problems would not be at the forefront. We can readily see this in Third World countries, where people are rationally more worried about their next meal than any environmental concerns. When environmental problems are at the forefront, the selfish motives of capitalism create

¹⁷ Trudy Govier, "The Right to Eat and the Duty to Work". *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp.50.

powerful incentives to become *free riders*. For instance, if members of society worry about their health and decide to drive more expensive, but less polluting cars, and achieve cleaner air as a result, the *free rider* will buy the less expensive car that pollutes more, while still enjoying the cleaner air brought about by others.¹⁸ But if everyone thought this way, then no one could enjoy cleaner air. Consequently, the individualistic approach is plagued with theoretical as well as practical problems, and any proposed remedy would require collective rationality and communal solidarity, which are inconsistent with the capitalist position.

Thus, capitalism is unethical because it is severely biased economically and socially, not taking into account the welfare of the poor, the environment, and indefinite future populations. On Utilitarian grounds, ‘the greatest good for the greatest number’ is best achieved not through the self-interested motives of individuals, but on the basis of equal opportunity, fairness, and numerous social endeavours. On Libertarian grounds, it is precisely capitalism which makes slaves of the poor and beggars of the disadvantaged. Socialist policies, on the contrary, work to break the chains of misfortune, and as Rawls puts it, “to redress the bias of contingencies in the direction of equality.”¹⁹ Sadly, the starvation, water shortages, living conditions, and easily treatable diseases seen in Third World do not reflect present problems of scarcity, or a lack of resources, but our atomistic, capitalistic views. When the majority of people in developed countries enjoy luxuries, and where billions of dollars are used to fund wars, the only rational explanation for third world poverty is the self-interested motives of individuals. If our selfishness hinders our ability to transfer resources across geographical dimensions to alleviate the needs at present, it would be foolish to believe that we could transfer resources across temporal dimensions to sustain the needs of the future. Capitalism is unethical because it “demands selfishness at every turn”,²⁰ putting social interests and global needs secondary to drives for profit and power. Even if we admit that capitalism brings economic growth and prosperity, all the money in the world does not add up to sustainability. In this case, a capitalistic notion of progress simply means progression towards our own demise.

¹⁸ Buchholz, and Rosenthal, “Elements...” pp.22.

¹⁹ Rawls, ““An Egalitarian..” pp.37.

²⁰ Carl Cohen, “Socialist Democracy”. *Business Ethics: People, Profits, and the Planet*. Ed. Kevin Gibson. New York: McGraw Hill, 2006. pp.40.

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Rawls and Nozick: Individual Choice and Society as System

Eli Kirzner-Priest

Abstract: This essay will consider the question of whether a just conception of the basic structure of society must include state redistribution of property even if that property was acquired in accordance with the institutions of private right. I will try to make contributions to a debate between Nozick and Rawls on this subject. I will look at arguments made on both sides, for and against the idea of distributive justice, and will provide arguments in favour of the conception of a state in which redistribution plays an important role. In particular, I will try to show that the alternative to theories of distributive justice, namely Nozick's entitlement theory, does not adequately match our moral intuitions because it focuses too much on discrete individual choices and ignores the injustices that can arise from those same choices when interacting in a system of social cooperation.

This essay will consider the question of whether a just conception of the basic structure of society must include state redistribution of property even if that property was acquired in accordance with the institutions of private right. In particular, I will try to make contributions to a debate between Nozick and Rawls on this subject. I will look at arguments made on both sides, for and against the idea of distributive justice, and will provide arguments in favour of the conception of a state in which redistribution plays an important role.

First I will provide a summary of the two theories in question, the entitlement theory, and justice as fairness. I will then argue, contrary to Nozick, that there are important normative differences between social cooperation and analogous cases of non-cooperation, which force us to consider the problem of distributive justice. Lastly, I will attempt to show that Nozick's entitlement view of natural assets entails ethical claims that are in conflict with our moral intuitions. My main claim is that Nozick fails to show that the entitlement theory is a plausible alternative to justice as fairness because he views society as a collection of discrete individual choices, as opposed to a complex system of choices, and so cannot account for the way unintended injustices can arise from this system as a whole.

Justice as Fairness and the Entitlement Theory

In Rawls account of distributive justice—namely ‘justice as fairness’—the second principle of justice, which is to serve as part of the basic constitution of

society, concerns the distribution of wealth, power and opportunities.¹ It consists of two parts. The first part is called “the difference principle”, and ensures that inequalities in wealth and power are only tolerated if this benefits the least advantaged representative person in society.² The second part is “fair equality of opportunity”.³ It ensures that not only are people with the requisite skills allowed to attain any position as is guaranteed by their formal rights, but everyone is guaranteed the means to develop their talents and attain the matching position.

In opposition to Rawls’s two principles, Nozick develops an alternative conception called the entitlement theory.⁴ This theory is divided into three parts: The Principle of Acquisition, which specifies rules for turning unowned objects into property; the Principle of Transfer, which specifies rules by which people can transfer property to others; and lastly, the Principle of Rectification, which specifies how failure to abide by the first two principles is to be rectified. These principles are justice-preserving: In other words, if you start from a just distribution of property, and any change from that distribution to another distribution abides by these principles, the new distribution is also just. There is simply nothing more to the justice of distribution than abiding by these principles.

Although the details of these principles are left vague, Nozick provides an abbreviated slogan which helps make sense of the second principle: “From each as they choose, to each as they are chosen”.⁵ In other words, the most important factor in deciding property rights is consent. If someone decides to transfer some property that they are entitled to, and another decides to accept, then this is a just transfer. Aside from the original acquisition and the cases where past injustices must be rectified, freely chosen exchanges between consenting persons are all that just social cooperation consists in.⁶

¹ Rawls John, *A Theory of Justice*, Rev. ed. Harvard UP, Cambridge (1999): 5. I have omitted the first principle for simplicity's sake.

² Ibid, 68

³ Ibid, 63

⁴ Nozick Robert, *Anarchy State and Utopia*, Basic Books, USA (1974) 150-2

⁵ Ibid, 160

⁶ I will put aside the Lockean proviso for the purposes of this essay. For details of this view see Ibid, 180.

Social Cooperation and Robinson Crusoe

Now that I have summarized these two opposing theories of justice, I will turn towards an argument made by Rawls in support of the idea that a just society requires redistribution.⁷ Rawls argues that inherent to social cooperation is both an identity and conflict of interests. There is identity in that social cooperation increases the amount of benefits available to all, but there is conflict in that people do not agree about how these greater benefits are to be distributed. Due to this conflict, principles of social justice are required to decide upon a particular social arrangement to distribute these benefits.

In response to this, Nozick argues that there are no salient features of social cooperation as opposed to a state of non-cooperation that give rise to the need for principles of social justice.⁸ To make this point clear, he proposes a thought experiment in which ten Robinson Crusoes are stranded on ten separate islands, which have differing amounts of natural resources. Each of them has a radio so they can communicate with each other, and there is some method by which they can transfer goods. The one with the least amount of resources, argues Nozick, could make claims of justice on the others, urging them to transfer resources to him. Our intuitions about this thought experiment tell us that the other 9 Robinson Crusoes have no *obligation* to make a transfer. In other words, the claims of justice are without merit. This is because, argues Nozick, the entitlement theory best matches our intuitions about the Crusoes. We think that each Crusoe is entitled to what he can acquire by his own efforts, and this accords perfectly with the principle of acquisition.

Nozick argues further that there are no salient features of social cooperation, which distinguish it from this non-cooperative situation, and thus justice claims in society are equally without merit. In social cooperation, we can always identify what people are entitled to either from the agreements they have freely made with others or by calculating their marginal product (the amount of output they produce given the amount of inputs they are provided with). Since people are freely choosing to make exchanges with each other, and we can always calculate what they are entitled to, there is no reason why the problem of how to divide up the larger distribution produced by cooperation should ever arise. In other words, there are no ethically relevant features of the non-cooperative situation that distinguish it from the cooperative situation, and no one deserves anything other than what they are entitled to under the entitlement theory, whether cooperating or not.

⁷ Rawls, 4

⁸ Nozick, 185-186

The Invisible Hand of Inequality

Adapting an argument of Rawls, I will attempt to respond to Nozick's argument. Rawls attempts to provide an "invisible hand explanation" of how inequalities might arise in society.⁹ An invisible hand explanation describes some process, which appears as though it arose as the result of some intentional choice or design, as the result of a series of discrete events none of which were chosen or planned to generate that process.¹⁰ In a system of social cooperation, even if every individual makes free choices on exchange under terms that appear fair to all parties, over time, unintended large-scale inequalities, even oligopolies, will inevitably arise.¹¹ In other words, an essential characteristic of social cooperation governed merely by the entitlement theory is the high probability of large-scale inequalities.

Now I will use this invisible hand explanation of inequalities to scrutinize Nozick's arguments about distributive justice. Nozick's argument that a person's justice claims on particular *individuals* are invalid both in social cooperation and outside it seems to be basically correct. In the case of the Crusoes, the inequalities were not caused by the choices of the individuals involved but arose from an impersonal causal process and thus the particular individuals bear no responsibility for these inequalities. In a similar way, the individuals making exchanges freely in society did not *intend* to generate a particular distribution nor did their actions taken alone create the distribution and thus particular individuals cannot be held fully responsible.

However, just because *individuals* cannot be held responsible in both cases, this does not necessarily mean that there is no normative difference between inequalities arising as a result of non-cooperation and those resulting from cooperation, *if we can assign responsibility to society*. Since the inequalities arising from non-cooperation are the result of an impersonal process, there is no way to assign any responsibility for these inequalities. But social cooperation, is not an impersonal process but a personal process. It arises as a result of the choices of a group of persons. The inequalities arising from social cooperation are the result of the system of individual choices which constitute society. The existence of a particular political structure is caused by the choices of individuals, and a particular configuration of choices that occurs on the basis of this structure can lead to inequalities. Since society is a system of choices made by persons and not an impersonal process, this might serve as a distinction upon which to base responsibility for inequalities that arise out of social cooperation. Thus just because

⁹ Rawls John, *Political Liberalism*, Exp. Ed. Columbia UP, New York (1993): 267

¹⁰ Nozick, *Ibid*, 18

¹¹ Rawls, *PL*, 267

our intuitions about individual responsibility for inequalities appear to be the same when we consider cases in both the state of cooperation and non-cooperation, this does not mean that the two states are normatively identical in this way when we consider them more holistically. In the case of non-cooperation, there is an impersonal process to which no responsibility can be assigned, and in the other case is society, towards which justice claims can reasonably be raised.

Reductionism and Societal Responsibility: More Crusoes

A response to this argument, which flows easily from Nozick's individualistic account of society, is to deny that there is any such entity as 'society'.¹² What is society but a way of talking about the sum of a group of individuals and their actions? If we can explain 'society' by reference solely to these individuals and their actions, then the notion of an entity that is separate from these more fundamental entities becomes superfluous. And if society is nothing other than a convenient label for some collection of more fundamental entities, then no responsibility can be ascribed to it, since it does not exist. What follows from this is that, since particular individuals are not responsible for distributions in society, and society is nothing other than these individuals, justice claims in social cooperation are just as irrelevant as in non-cooperation, since in both cases nothing or no one is responsible.

Although I doubt the plausibility of this reductionist account of society, I will not attempt to refute it on *metaphysical* grounds, but will instead provide some thought experiments to show why this account of society is *normatively* inadequate. Let's consider a modified version of the Crusoe example in which the 10 islands all initially have equally abundant amounts of the same resources. Now imagine that one of the Crusoes goes and intentionally destroys the resources on several of the islands, generating inequalities—say by building a boat and burning down some trees. The entitlement theory tells us that the Crusoes who lost resources are entitled to make justice claims on this malicious Crusoe.

Now consider an analogous case, under the same assumption of equal resources, except this time the unequal distribution arises as the result of the choices of a group of individuals. A community of individuals is engaged in a form of social cooperation in which everyone chooses to drive to work everyday. Every individual knows that if everyone drives to work everyday enough greenhouse gases will accumulate to cause a rise in temperature and thus an increase in the probability of forest fires, especially on certain Pacific islands.

According to the reductionist account of society, which underlies the entitlement theory, this example has the same normative implications as the original

¹² For a more in depth understanding of what I mean by "Nozick's individualistic account of society" than I provide in this paper see Nozick's account of how society arises from a state of nature in *Anarchy*, Ch 1.

Crusoe case constructed by Nozick, since, in both cases, no one bears any responsibility for the inequalities. In this case, since no individual alone caused the inequalities and there is no collective entity to which responsibility can attach, no one is responsible. Likewise in the original Crusoe example, since no individual is responsible for the inequalities, justice claims are without merit.

Given that these two cases are so different, it seems strange that they would have the same normative significance. In Nozick's example, the unequal distribution was generated by an impersonal and thus unchosen causal process. Thus no person is responsible under the entitlement theory. In the case of the malicious Crusoe, the unequal distribution was generated by the choices of one individual without the consent of others, and thus full responsibility attaches to him. The application of entitlement theory in these two cases seems consistent with our intuitions. But if full responsibility attaches to one individual's choice, and no responsibility attaches to an unchosen process, why does no responsibility attach to a process constituted of the choices of a group of individuals? Nozick cannot provide a satisfying answer to this question. Our intuitions about these examples tell us that an adequate normative conception of society must contain some notion of responsibility that can help us make a normative distinction between the results generated by the choices of a group of people, those generated by an unchosen causal process, and those generated by the choices of an individual.

Societal Responsibility and the Entitlement Theory

The two most promising ways in which we might develop a conception of responsibility for society is either to spread responsibility throughout the individuals participating in the social cooperation that constitutes society or to assign responsibility to society as a whole. The former is both practically and theoretically implausible. It is often practically impossible to disentangle the consequences of each individual action (as, for example, in the case of global warming).¹³ Assigning individual responsibility on the basis of these consequences presents an even more formidable theoretical challenge.¹⁴ It is much simpler and more consistent with our

¹³ If person A drives his car more often than person B, that does not necessarily mean that person A's actions contribute more to global warming. It is an elementary idea in systems sciences that complex systems are non-linear: i.e., inputs into complex systems are not necessarily equal to their effects on the system. See Gleick James, *Chaos: Making a New Science*, Penguin Books (1987) for a simple explanation of this idea.

¹⁴ If person A drives his car more often than person B, does that necessarily mean that he has a greater share of responsibility than person B for global warming? In both cases, if everyone else in society had not driven their car, global warming would never have happened, so why should responsibility be assigned differently? I do not pretend to have definitive answers to these complex questions, but our intuitions about group responsibility do raise such questions. Nozick does not even consider them.

intuitions to assign responsibility to society as a whole. It might then be up to society to distribute the burden of that responsibility amongst its constitutive citizens.

But whichever means of assigning responsibility we choose, we are already admitting that responsibility attaches to society in some way. It is only a question of whether responsibility should be somehow dispersed throughout the parts of society or whether it is indivisible and applies only to society as a whole. In either case we are admitting that distinguishing between individual and group responsibility requires that the cumulative consequences arising from a group of individual choices interacting in the context of social cooperation can be the subject of reasonable justice claims by those affected by such consequences. In other words, the system of choices constituting social cooperation can bear responsibility for the state of affairs it produces, which means that the reduction of society to individuals is normatively inadequate. Since the entitlement theory presupposes this reductionist account and allocates responsibility only on the basis of individual choices considered in isolation from other individual choices, it is clearly not an adequately comprehensive theory for social cooperation, even if it does seem to match our intuitions when applied to situations of non-cooperation.

If it is correct to say that society can bear responsibility for the cumulative effects of the individual choices that constitute it, then I return to my original point: Contrary to Nozick's position, there is a normative distinction between social cooperation and non-cooperation when we consider inequality. If we compare my example of the community causing inequalities amongst the Crusoes through its interaction with the environment with the normal case in which inequalities arise within a society due to freely chosen exchanges, then there are reasons to think that society is responsible for the inequalities that arise in this second case as well. In my example, inequalities were generated by the choices of persons, and when these choices are added together, they contribute in the long run to the generation of inequalities amongst individuals. In the case of regular social cooperation according to the institutions of private right, inequalities arise within this system of social cooperation from the choices of its members, which, when considered not individually but as a system, will lead to inequalities. Given this structural similarity between the two cases, if we wish to hold on to any notion of human responsibility for problems that result from the cumulative choices of individuals in particular cases such as global warming, then without strong arguments to the contrary, we have good reason to hold society responsible for inequalities that result from the system of free choices that arises in accordance with its rules of private right. And if we are to hold society responsible for such inequalities, then we need an account of how it is to rectify them. Without an alternative account of such rectification, theories of distributive justice such as justice as fairness might well be the best candidates.

Entitlement to Natural Assets

Before launching into a discussion of another of Nozick's criticisms of Rawls, it is necessary to introduce some terminology. Nozick characterizes the entitlement theory as an historical principle.¹⁵ In deciding whether a particular distribution of property is just, this principle considers only the causal history of that distribution, ensuring that it was arrived at by individual consent in accordance with the principles of entitlement. In contrast to this are end-state principles.¹⁶ End-state principles judge whether a distribution is just based on whether the distribution tracks some structural principle, which itself tracks a natural dimension. In the case of the difference principle, a distribution is just if it tracks what is to the benefit of the least advantaged, irrespective of the causal process that generated the initial distribution.

I will now consider one more argument that Nozick makes against Rawls. Rawls argues that because natural contingencies in general, and natural assets such as talents and abilities in particular, are morally arbitrary, a political system that allows them to influence shares improperly is unjust.¹⁷ Nozick presents an alternative account of natural assets, which he believes, escapes Rawls's argument:

1. People are entitled to their natural assets.
2. If people are entitled to something, they are entitled to whatever flows from it
3. People's holdings flow from their natural assets.
Therefore,
4. People are entitled to their holdings.
5. If people are entitled to something, then they ought to have it (and this overrides any presumption of equality there may be about holdings.)
(Nozick 225)

Nozick is not arguing here that distributive shares *should* track natural assets because, insofar as the entitlement theory is historical, it does not track any natural dimension. But in saying that people are entitled to their natural assets, Nozick argues that if shares happen to track natural assets to any degree, even to the point of perfect correlation, and such a distribution results from some process in accordance with the principles of entitlement, then that distribution is just.

Natural Assets and Injustice: The Case of Beauty

¹⁵ Nozick, *Ibid*, 53

¹⁶ *Ibid*, 155-6

¹⁷ Rawls, *Theory*, 62

I will now attempt to show that a particular interpretation of Rawls's argument does provide us with reasons to reject Nozick's entitlement view of natural assets. I will follow Scheffler and interpret Rawls claim that natural contingencies are a morally arbitrary basis for inequalities as an attempt to point out how unjust society looks if we allow distribution to track these factors too closely.¹⁸

A political system in which people are entitled to whatever flows from their natural assets, absolutely, without exception, will lead to situations in which people with few natural assets die as a result of the free choices of others. Let us assume now that beauty is a natural asset. Consider the case of the person U, who is considered to be the most physically unattractive member of society. Every time he goes to a job interview, there is at least one other person there with the same job qualifications. The particular members of this society are so aesthetically inclined that other things being equal, they prefer to work with someone better looking. Thus they always choose this more attractive person over U. Let us say that U never gets hired and starves to death.¹⁹ What was it that caused people to make choices that brought about this person's death? It is fairly clear that it is the contingent fact about this person's appearance. If this person had been better looking, then people would have hired him and he would not have died.

Let us interpret this example in the context of Nozick's view. Since U was entitled to whatever flows from his natural assets (premise 1), and what flows from his assets is nothing, he is entitled to nothing. If a person is entitled to something, then he ought to have whatever flows from that (premise 5). Thus since U's natural assets, in this case, his lack of beauty, entitled him to nothing, and death flowed from his entitlement, U ought to have died. Thus it is on the basis of his appearance that U ought to have died.

¹⁸ Scheffler Samuel, "What is Egalitarianism?" *Philosophy and Public Affairs*, 31, no. 1,(Winter 2002): 63

¹⁹ Letting person U starve to death might make this example seem extravagant, but in fact this example is based on a common fact. In societies without any kind of support mechanisms for their unemployed citizens, starvation is a real possibility and a daily political reality all over the world. Furthermore, the tendency for human beings to make snap judgments about each other based on such arbitrary factors as physical appearance is well documented (see Gladwell, 2005) and will often lead someone to deny another employment. Given that unemployment is unavoidable in actual politics, this example implies that if Nozick's libertarianism is realized in some actually existing state, it could mean death for many of its unattractive citizens. A basic political structure is not merely a theoretical entity but can mean the difference between life and death for many people who have meant no harm to anybody.

Most of us do not think that a physically attractive person ought to die because he is physically attractive. We might even say that if someone dies because he is physically attractive, that is a morally arbitrary reason to die. Furthermore, if our intuitions tell us that a political system that allows the free choices of individuals to cause the death of someone because of that person's degree of beauty is unjust, then we would also agree that a political system in which people are unconditionally entitled to what flows from their natural assets is likewise unjust. This would suggest that a just political system requires the mitigation of the undue effects of natural assets on distributive shares, which is precisely what Rawls's claim about the arbitrariness of natural assets is meant to establish. To put it another way, if we consider the entitlement theory in the context of the entire system of choices constituting society instead of merely considering discrete individual interactions, we see that this theory goes hand in hand with systemic injustice.

Conclusion

This criticism of Nozick's view of natural assets is analogous to the first criticism I raised. In the first argument, we saw that reduction of society to individual choices makes it impossible for us to assign responsibility for the joint effects of this system of choices, which is problematic because there are situations in which we feel responsibility should be carried but that it cannot be carried by individuals. In the second argument, we saw that Nozick's entitlement account of natural assets conflicts with our moral intuitions when instituted across a society because it will have a tendency to generate injustices. Both of these arguments support the following claim: the reduction of society to individual choices fails to account for the way injustices become an essential characteristic of the system these choices form. In other words, Nozick focuses only upon the agreements and decisions of individuals on a micro scale but fails to consider the macro implications of these micro choices. The fault in this viewpoint is that merely looking at the relation between individual choices and private right without considering the system of choices as a whole prevents one from seeing the normatively relevant effects of these choices. This suggests that if a plausible alternative to distributive theories such as justice as fairness is to be found, it must not only consider individual choices, but must also examine the normatively relevant consequences of those choices considered as a whole.

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ONE AMONGST MANY: RETHINKING LOCKE'S SUFFICIENCY CONDITION

Esther Shubert

ABSTRACT: This paper is an examination of Locke's justification for private property, the proviso of leaving enough and as good for others, otherwise called the sufficiency condition. I use Gopal Sreenivasan's arguments as a model for exposing the responsibilities that come with private ownership under the Lockean framework, and these arguments are then extended to examine the responsibilities that are incurred in a situation of aggregate appropriation. Specifically, I consider a situation in which individuals each appropriate legitimately from the commons by satisfying the proviso, yet an injustice results, namely, that someone is left without access to the means of subsistence. While it may seem that no individual is responsible for this injustice, I will argue that in fact all proprietors are responsible and must make compensation to the injured commoner. I will argue further that the sufficiency condition must be reinterpreted to capture this situation and prohibit this type of injustice.

Introduction

John Locke famously defends the institution of private property as a natural right. In *The Limits of Lockean Rights in Property*, Gopal Sreenivasan examines the nature of Locke's arguments for private property and exposes the responsibilities entailed by individual appropriation. These involve maintaining a certain standard of living for all people: one that is, at a minimum, consistent with the natural state of pre-appropriation. The limitations and responsibilities this imposes are conditions of the legitimacy of private property, and if they fail to obtain then those who are reduced below the minimum standard can be said to have suffered an injustice. Sreenivasan's treatment of Locke's argument focuses on the responsibilities of individuals who transgress the natural limitations on appropriation and the corresponding obligations they acquire. This paper will extend his conclusions to show how the *aggregate effects of individual acts of appropriation* that can reduce any individual below the minimum standard entail compensatory responsibilities for all appropriators, even when each of their individual appropriations does not, on its own, cause the injustice.

Sreenivasan on the Sufficiency Condition

Sreenivasan gives the following interpretation of Locke's argument. The pre-political and pre-propertarian state of nature is one of positive communism, in which land is held in common. This stems from the natural right to life that each person

enjoys by virtue of being alive, and the corresponding right to the material means of self-preservation. More precisely, each individual has a claim-right “not to be excluded from the use of the common materials from which the direct means of support can be produced.”¹ Private property, by its very nature, excludes everyone but the owner to a right from using the item that is owned; it thus seems to dissolve the original right that everyone else had to use it. But how is this dissolution possible? The problem that Locke’s theory faces is how to reconcile initial communism with justified private appropriation, without recourse to universal consent.

Sreenivasan argues that the mechanism by which individual appropriation is made legitimate is what he calls the “sufficiency condition,” better known as Locke’s proviso on leaving “enough and as good”² for everyone else. Sreenivasan explains that, “Previously, it had been assumed that [universal] consent was necessary because an appropriative act took something from the other commoners which belonged to them.”³ However, an appropriative act that leaves enough and as good for everyone else does *as good as* take nothing from the other commoners. The reason that the natural resources were owned in common was due to everyone’s equal right to access the material means of preservation. Because the commoners are not injured by acts of individual appropriation when their rights to the means of preservation are not violated, acts that respect this right will be legitimate. Leaving enough and as good materials for everyone else to produce the means of subsistence does not, therefore, harm the other commoners because they can still exercise their right to self-preservation. Thus, the common can be legitimately individuated without universal consent when the sufficiency condition is satisfied.⁴

When appropriating land, satisfying the sufficiency condition does not necessarily mean “leaving enough and as good” in kind. Either there must be enough unappropriated land left to provide the means of subsistence for everyone else, or the appropriated land must be sufficiently productive to sustain, at a minimum, as many people it would have if it had not been appropriated.⁵

The first version of the sufficiency condition is that enough and as good must be left in kind. Leaving enough unappropriated land to secure the means of subsistence for everyone else amounts to taking nothing at all because the appropriative act leaves the other commoners in the exact same position as they would have been had the land not been appropriated. The appropriation did thus not

¹ Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford University Press: New York, 1995), p. 49.

² John Locke, *Second Treatise of Government*. ed. C.B. Macpherson (Hackett: Indianapolis, 1980), p. 19.

³ Sreenivasan, p. 48.

⁴ *Ibid*, pp. 48-9.

⁵ *Ibid*, pp. 50, 54-5.

injure them or make them any worse off than they would have been otherwise. Therefore, leaving enough and as good land clearly satisfies the sufficiency condition.⁶

The second version of the sufficiency condition, that as much and as good does not have to be left in kind, is twofold: first, land that is privately owned must meet a certain standard of productivity. This standard is determined by the original carrying capacity of the land. In other words, the owner must make the land productive enough to support at least everyone who, in the pre-propertarian state, had a claim to be supported by it.⁷ Second, it is necessary that those commoners who have a claim to sustenance from that land be guaranteed access to its products.

As Locke famously argues, appropriated land *will* satisfy the first condition because privately owned land will in fact be many times more productive than land lying in waste in the commons.⁸ Landowners recognize their ability to make a profit from surplus goods, and thus have a vested interest in making their land more productive. This incentive is lacking when everything is communally owned. Furthermore, Locke argues that increased productivity also enables those landowners who make a profit to live above subsistence level. In contrast, in the pre-propertarian state of nature, everyone was more or less forced to remain at subsistence level.

However, increasing the productivity of the land does not, on its own, legitimate private ownership. The landowner's profit cannot come at the expense of the destitution of those he excludes from the use of the land, because the legitimacy of his appropriation is contingent upon maintaining the basic standard of living to which all commoners have a right. In other words, "appropriation is only legitimate where *enough and as good direct means of subsistence are available for others.*"⁹ It is only legitimate to hoard land when its productivity is increased in such a way that people can still derive basic sustenance from this land. Thus, the further necessary condition is that, when appropriation of land denies commoners access to the land itself, they must nonetheless be guaranteed access to the product of the land.

Because a landowner has exclusive control over his land, he effectively takes away the natural guarantee to the means of preservation that existed in the state of positive communism. Thus, in appropriating land, the landowner also inherits the responsibility to guarantee the sustenance of those who are left landless due to his private ownership. He fulfills this responsibility by granting those commoners access to the product of his land. If he fails to provide for them, he will be guilty of committing an injustice. Landowners who take too much must therefore rectify the

⁶ Ibid, p. 50.

⁷ Ibid, pp. 54-5.

⁸ Ibid, p. 56.

⁹ Ibid, p. 55.

situation by offering some sort of compensation to the landless commoners they injure.

Under the Lockean framework, this compensation must take a very specific form. For Locke, the foundation of private property lies in an individual's labour; thus, commoners become landowners by mixing their labour with the land. In the same vein, the landowners' responsibility is not to just hand over their surplus goods to the landless commoners in order to secure the latter's subsistence; rather, the landowners have the responsibility to ensure subsistence employment on their land for everyone that the land, if left in common, could have otherwise supported. Thus, the landless commoners' rights are not violated when they are given the opportunity to labour in exchange for a wage with which to purchase the material means of subsistence.

An interesting question arises when a landowner owes compensation to a certain number of people, and yet needs less than this number of people to work his land. In other words, what happens when the landowner has all the laborers he needs, but there remain commoners with a claim-right against him? There seem to be two possible solutions. The first is that he hires them whether he needs them or not. The second is that he pays them whether he hires them or not. The question as to which of these solutions is more appropriate will not be addressed here. The important point is that the commoners be guaranteed the right to their preservation by the landowner whose act of appropriation effectively cuts them off from accessing the means of subsistence. When the landowner does not need any more people laboring on his land, this is a problem for the landowner, and not for the commoners who have a claim-right against him.

The Sufficiency Condition and Aggregate Appropriation

It is now evident that an individual can be responsible for committing an injustice through a single act of appropriation, and that there is an accompanying obligation to make compensation. This raises a further concern, however. Consider a situation in which an individual, X, appropriates land from the commons, and the plot of land that he now owns is not so large that, on its own, it reduces anyone else below the minimum standard of living. It seems as though this individual has committed no injustice and that he has not incurred any corresponding responsibility to make amends for his act of appropriation. Consider further a large number of people, each appropriating in the exact same manner as X. The result of their collective action, or more precisely, the result of the sum total of their individual actions, is that some commoners are excluded from access to the means of subsistence, and therefore, that their rights have been violated. It seems as though no single individual has committed any injustice, and yet an injustice was committed.

Who is responsible? I will now extend Sreenivasan's argument to examine how individual acts of appropriation are related to the global context in which they occur. I will argue that, in the situation of aggregate appropriation described above, every individual involved incurs a responsibility to compensate the other commoners; those who do not are guilty of committing an injustice. This conclusion will require a more subtle and nuanced understanding of the second sufficiency condition. I begin by looking first at the nature of the deprivation, because this holds the key to correctly understanding sufficiency.

Responsibility in Collective Action

There are many instances in which individual and collective acts cannot be considered separately. The following example will help to illustrate this point.¹⁰ Imagine that an old woman's car has broken down, and needs to be pushed up a hill. Getting the car to the top of the hill will produce 100 units of good. This task requires the cooperation of five people; if only four people push the car, it will not make it to the top of the hill. Thus, if four people are trying to push the car, there will be zero units of good produced because they will not be successful in achieving their goal. If a fifth person joins the group such that the car successfully reaches the top of the hill, it seems that he is responsible for producing the 100 units of good. Although he did not push the car to the top of the hill by himself, he was an indispensable for the successful completion of the task, and, without him, there would have been no benefits produced. Thus, he should be praised because the 100 units of good is attributable to his actions.

The same thing can be said about each of the other four people. Each of them was responsible for the completion of the task in the same way as the fifth person that joined the group. Again, it is not the case that any one of the five got the car to the top of the hill by themselves; yet the moral praise for the completion of the task is attributable to each person. It would not be correct to attribute to each person one-fifth of the credit for completing the task, because the contribution of each person was necessary for getting the car to the top of the hill. In other words, each person was responsible for the production of all 100 units, rather than the production of twenty. None of the five individuals could have gotten the car to the top of the hill on his own; but it is also true that if any one of them had not helped, the car would not have gotten to the top of the hill. Thus, while the successful completion of the task was a result of the collective action (or the sum total of the individual actions), each individual deserves complete moral praise for the completion of the task.

This example shows how individual actions that contribute to a collective result can entail full responsibility for each contributing member. It seems that the

¹⁰ This example captures the same idea expressed by Derek Parfit's revised Share-of-the-Total View. See Parfit, *Reasons and Persons* (Oxford University Press: Toronto, 1984), p 68.

same must be true of moral blame, in cases where the collective action causes harm rather than benefit. We can imagine that instead of helping an old lady, the people pushing the car to the top of the hill are trying to steal it. All the other conditions of the example still hold. Thus, if four criminals try to push the car to the top of the hill, they will be unsuccessful. The fifth person who comes along is the missing link, and, with his help, the car will be stolen. Because the fifth person was necessary for the completion of the robbery, he can be fully credited with moral responsibility for having stolen the car, since without his help it would not have budged. And again, the same is true of each of the other four people involved in the robbery.

Thus, rather than diffusing responsibility among them, let us say that each person is completely responsible for the theft. Had any one of those five people been pushing the car on their own, they would have been unsuccessful and there would have been no crime. Thus, no single person is *by himself* responsible for the car robbery, because it could not have been completed without the help of the others. However, no single person can evade responsibility by arguing that the others did it, because *if he had not also done it, the car robbery would not have been successful*.

This principle can be applied equally to the case of land appropriation. A single individual, X, might legitimately appropriate land because the amount that he takes, on its own, does not reduce any other person below the minimum standard of living. His action, other things being equal, does not entail any moral responsibility because it did not directly violate anyone's rights. However, if a number of people accumulate in the same manner as X, and this causes some commoners to be deprived of the means of subsistence, then those commoners have the right to be compensated. Like the car example, it looks as though we can attribute complete moral responsibility for the situation of the landless commoners to *each* of the individual landowners, and their ownership is unjustified unless compensation is made.

Consider a finite amount of land that is held in common between ten people. Nine people simultaneously appropriate one-ninth of the land each, such that there is no land left for Person Ten.¹¹ Since he has been cut off from all the land, and thus

¹¹ If a landowner takes 1/9 of the land, then he is taking a greater share of land than he needs to survive. The land originally supported ten people, so each commoner could survive off of 1/10 of the land. Thus, by taking 1/9, he is taking more than he strictly needs to live. However, I find this to be a trivial decrease in the amount of land that is left for the other commoners. In appropriating 1/9 rather than 1/10, the landowner takes only 1/90 more than what he was using in the state of pre-appropriation. This is an insignificant amount because 1/90 of the land was not enough to support any single commoner in the first place, so each landowner that takes 1/9 of the land does not single-handedly reduce any other commoner to destitution (as against a landowner who takes, for example, 99 per cent of all the land). It is true, though, that if nine commoners each take 1/90 more land than together they have taken 1/10 of the land, which is enough to provide the means of subsistence to one person. The question is, Who is responsible for excluding this person from the means of subsistence?

from the possibility of accessing the means of subsistence, Person Ten has a claim-right to be granted access to the produce of the appropriated land (i.e., by being given the option of labouring on it). But which landowner is responsible and has an obligation to provide support for Person Ten? Considered on its own, each individual act of appropriation did not result in the injustice, because the amount of land that was taken by any single landowner was not enough to reduce the other commoners to destitution. If no one else had been appropriating land, then the act of taking one-ninth of the land would have left enough and as good land for the rest of the population to subsist. However, the sum total of the individual acts of appropriation had the effect of producing an unjust result. Moreover, each person's act of appropriation was indispensable to this result, because had any single person not appropriated that amount (i.e., less or none), there would have been some unappropriated land left for Person Ten.

Thus, all nine landowners are completely responsible. No single person can evade responsibility by saying that the others did it, because if any of them had not appropriated as much land, or any at all, the injustice would have been avoided. In other words, none of the landowners can appeal to the effects of their *single* appropriative act (each legitimate, had everything else remained neutral), because the ability of one to appropriate legitimately from a finite plot of land is contingent upon how others are appropriating, too. Any person who appropriates, therefore, plays an indispensable role in the outcome and correspondingly incurs moral responsibility for that outcome. Unless compensation is made to the landless commoner, the landowners will be in illegitimate possession of their land.

The Question of Compensation

Although all nine landowners are morally responsible for contributing to the position of Person Ten, it remains to be seen how compensation should be made. The victim has a claim-right against all the landowners to be compensated, but this does not mean that each landowner ought to pay the full value that Person Ten is entitled to, as if each were solely responsible. This would generate the odd conclusion that Person Ten is entitled to nine times his actual due compensation.

There seem to be two logical possibilities. First, Person Ten has a claim to support from whichever landowner(s) he chooses. Any landowner(s) that are not chosen by person ten are excused from their obligations. Once person ten has received full compensation from the landowner(s) of his choice, the injustice will be rectified and the victim can no longer make claims against any of the landowners. This, however, seems to be to be entirely arbitrary and unfair. In this instance, the principle of first possession, or "first come first served," has no relevant application, because appropriation is done by all nine people at the same time. As I will discuss later, the principle may be relevant in a case in which there are multiple acts of appropriation that take place at different times.

In this case, however, all nine landowners are responsible for the outcome; yet, some would escape facing the consequences of their actions, while others would be forced to make up for the actions of those who got lucky and did not have to provide compensation. The victim cannot, therefore, simply decide on his own initiative who should compensate him for his loss. Therefore, this does not look like a satisfactory solution for deciding how compensation should be made amongst the landowners.

A second, and much more plausible solution is that person ten has a claim to one-ninth of his total due compensation against each of the nine landowners. This follows from the fact that each landowner owns exactly one-ninth of the total available land. Keeping in mind that private property entails exclusive use rights, it follows that each landowner is responsible and owes compensation insofar as he excludes others from the use of the natural resources he appropriates. It is not arbitrary, because the landowners' responsibilities lie in direct relation to the amount of property they own. In this case, the landowners all owe equal amounts because they own equal amounts of land. This solution can be extended to any case of appropriation. Even when land is appropriated in unequal amounts, those who are left landless as a result can make a claim against the landowners in proportion to how much each one owns. Thus, the more you own, the more compensation you owe to those whom your ownership injures.

For comparative purposes, we can examine the example of the car robbery and consider the results yielded by the principle of proportional compensation. Suppose that the car was destroyed during the robbery. It would follow in this case that each thief is responsible for paying the owner one-fifth the value of the car. According to the law, however, this is not the case. The law recognizes that all the thieves are morally responsible, and that the owner has a claim against all of them; however, the procedural question of how to satisfy this claim does not follow the principle of proportional compensation. Rather, each thief is "jointly and severally liable", and the car's owner can recover the full amount of the car from any one of them. It is then a matter for the thieves to sort out how to divide payment among themselves.

This measure is taken to protect the car's owner. For example, if four of the thieves have no money, or run away after the robbery, this should not be a problem for the owner but for the thieves. If each thief were only obligated to pay one-fifth the value of the car, then the fifth thief, having paid his due, would be off the hook, while the car's owner would not have been given the remaining four-fifths of his due compensation. Therefore, in order to ensure that the owner of the car is compensated fully, the law does not apply the principle of proportional compensation in these types of cases.

This does not mean, however, that the principle of proportional compensation is not the correct one to apply in the case of the landless commoner. It simply suggests that this case differs from the car robbery in some important respects. First,

unlike the case of the stolen car, where protection of the victim under law is based on the possibility that one or more of the thieves may have no resources with which to reimburse the owner, in this case, the nine landowners by definition have the necessary resources. If they do not have the resources with which to support themselves as well as Person Ten, then they fail to satisfy the first part of the second sufficiency condition. This is the requirement for landowners to keep their land productive enough to support all the commoners who have a claim to subsistence from it. Person Ten has a claim to be supported by each one of the nine landowners, to the extent that their ownership of land eradicates his ability to access the means of subsistence. Therefore, any landowner who cannot properly compensate Person Ten due to lack of resources will fail to satisfy the sufficiency condition and be in illegitimate possession of his land.

Second, in the case of land, the nature of resources is such that even should one or more of the landowners run away, the land remains in place. Thus, it would be left available for Person Ten, satisfying the sufficiency condition.

The Question of Temporality

It has now been established that landowners owe compensation to the landless in direct proportion to how much they appropriate from the commons. However, it might be objected that the conclusions generated from the first example hinge too much on the simultaneity of the appropriation. To show that temporality is an irrelevant consideration to the illegitimacy of appropriation that fails to satisfy sufficiency, let us consider a slightly different scenario. As before, there is a finite plot of land and ten people who own it in common. However, this time the appropriation is not simultaneous. One individual appropriates a portion of land, and his act does not violate any of the other nine commoners' rights to preservation because there is still enough good land that, among them, they have access to the means of subsistence. The other commoners begin to appropriate in the same way, until there is only one small portion of land left, and two landless individuals. The ninth person appropriates this last bit of land, which leaves nothing for the tenth person. Since he has been cut off from all the land, and thus from the possibility of accessing the means of subsistence, Person Ten has a claim-right to be compensated by being granted access to the produce of the appropriated land. But which landowner is responsible and has an obligation to compensate Person Ten?

At first glance, this case seems to call for an application of the "first come first served principle." According to this rule, the ninth person is solely responsible because, in appropriating the last plot of land, he did not leave enough and as good land for Person Ten, thus single-handedly failing to satisfy the sufficiency condition. In contrast, at the time that they appropriated their land, the other eight did satisfy the sufficiency condition, thus making their acts of appropriation legitimate at the times they took place. The "first come first served" principle would seem to make them

immune from claims of compensation when sufficiency subsequently fails to be satisfied given Person Nine's appropriation.

However, this is not the case. Had this been the only piece of appropriated land, it would not have restricted the rest of the landless population from exercising their right to life. In itself, it would not have deprived anyone else of access to the basic means of subsistence. It was only given the communal prior appropriation by the others that the single act of appropriation by Person Nine resulted in Person Ten's exclusion from the means to subsistence. Thus, just because there was nothing left after Person Nine took his land does not mean that he is solely responsible for depriving Person Ten of access to the means of subsistence.

In the example of the car robbery, the fifth person who joined the group was considered to be morally responsible because without his contribution the final result would not have obtained. However, the same could be said of any of the other four thieves, regardless of the fact that they started pushing the car before the fifth person got there. The fact of the matter is that they continued pushing the car when the fifth person joined in, such that the car was successfully stolen. Although they started pushing earlier, and at the time of their initial involvement the car was not stolen, this does not lessen or annul their implication in the final outcome, because any one of them could have just stopped pushing the car at any time so that there would have been no crime.

Similarly, the first eight landowners, at the time of their appropriation, were not guilty of any injustice because there still was enough good land left for the two landless commoners. At this time they were acting like the first four car thieves who were pushing the car but not successfully stealing it, because their appropriation was already excluding Person Ten from their land, although not yet leaving him in a position of destitution. Person Nine's appropriation is like the addition of the fifth thief to the car robbery. The fifth thief's contribution gets the car up the hill just because four other thieves were already pushing it. Analogously, the addition of Person Nine's appropriation generates the result that Person Ten is left landless, only given the fact that the first eight landowners were already excluding Person Ten from their land.

Therefore, the permanence of the first eight landowners' title to their land is like the continued exertion of force on the car by the first four car thieves. It is the addition of the fifth thief that gets the car moving; however, he is not solely responsible because if, at any time, any of the other thieves had stopped pushing the car, it would not have been stolen. Similarly, if any of the first eight landowners were to give up the claim on their land, then Person Ten would have some land to access. This responsibility does not fall *necessarily* on Person Nine, even though he appropriated last, since it could just as well be fulfilled by any of the other eight landowners. Thus, the order of appropriation is an irrelevant concern; all the landowners are responsible for contributing to the situation of Person Ten, and owe him compensation in proportion to how much property they own.

Rethinking the Sufficiency Condition

This conclusion requires that we rethink the meaning of the sufficiency condition. As has been stated up until now, the sufficiency condition has implied that appropriation from the commons is legitimate only when each appropriator's specific act leaves enough and as good for everyone else. However, this makes it seem as though the last appropriator (Person Nine) in the situation described above is the sole culprit, since his single act of appropriation, which left no land for Person Ten, seems to have clearly offended against this requirement.

I believe that this mistake can be attributed to a misinterpretation of the sufficiency condition. It should not be interpreted to mean that any single act of appropriation must leave enough and as good for everyone else at the time that the appropriation takes place, although injustices can result when this fails to be the case. For example, if the first person to appropriate took 99 per cent of all the available land, and the remaining population could not survive on the one per cent of land that was left, this would seem to be an injustice. It is also a case which fails to satisfy the sufficiency condition so understood. But this interpretation is too narrow; rather, the important point of the sufficiency condition is that, despite acts of appropriation, *at all times there must be enough and as good* land for everyone else, and anyone who *could make this the case* by giving up a portion of their land, but does not, incurs an obligation to compensate the landless.

As the discussion above has shown, the failure to satisfy the condition that *at all times there be enough and as good* oftentimes cannot be traced to any single act of appropriation, because in most cases it is the aggregate effects of individual appropriation that contribute to a situation in which there is not enough land left to sustain the landless population. This means that sufficiency does not merely apply at the moment of appropriation, but also throughout the duration of private ownership. When sufficiency fails to obtain, this undermines not only the legitimacy of the final appropriative act, but also of the established landowners' title to their previously appropriated land. The permanence of this title is thus equally subject to the sufficiency condition.

This interpretation of the sufficiency condition captures the reason why Person Nine is not solely responsible for compensating Person Ten. The fact that there is not enough land left at the time of Person Nine's appropriation is not purely the result of the ninth landowner taking the last bit of land; it is just as much the result of everyone else appropriating land before or alongside him, such that when he appropriates there is no land left. It is therefore true that if Person Nine did not take his land then Person Ten's right would not have been violated, but it is also true that if any of the other eight landowners had not taken their land, then Person Ten's rights would not have been violated. Thus, satisfying the condition *that at all times there be enough and as good* (in this case, for Person Ten), does not necessitate that Person

Nine specifically give up his land; it could be satisfied by *any* of the nine landowners giving up their land. Because it is the aggregate effects of all the landowners' appropriation that render Person Ten landless, they are all accountable for the violation of his rights. They all, therefore, fail to satisfy the sufficiency condition. Thus, even though at the moment of the first eight people's appropriation sufficiency was satisfied, the title to their land is contingent upon sufficiency continuing to be satisfied *at all times*. At the moment that it is not, Person Ten has a claim-right against each one of the landowners in proportion to how much they own.

Moreover, this interpretation of the sufficiency condition also explains why the landowner who takes 99 per cent of all the land owes compensation to the rest of the population. The fact that there was not enough and as good land left after his appropriation was the case only because of how much land *he* took. It is not, as in the case described above, also due to the fact that any other person's ownership added to the situation to cause the injustice. This landowner cannot evade moral responsibility because no one else is responsible; the injustice could be rectified only if he were to give up his land. He is therefore singularly responsible for compensating the landless commoners.

There is thus an asymmetry in these two interpretations of the sufficiency condition. On the one hand, understanding the sufficiency condition to mean that appropriators must leave enough and as good at the time that they acquire land captures the injustice that can be caused by single acts of large scale appropriation, but generates the wrong conclusion in cases that are determined by the cumulative effect of smaller scale individual appropriation, especially when these do not occur at the same time. On the other hand, the condition that *at all times there must be enough and as good* captures situations in which any single large act of appropriation does not leave enough and as good, and also cases in which there is not enough and as good due to the aggregate effects of individual appropriation, whether this happens simultaneously or consecutively. The second interpretation is more robust and should be adopted over the first.

Conclusion

Once we understand the sufficiency condition in this way, we get a much better picture of how the aggregate effects of appropriation generates obligations for individual property owners. There must be enough and as good for others *at all times*, not just at the moment of appropriation; the legitimacy of the appropriative act, as well as the permanent title to private land, are both subject to this condition. When it fails to be the case that there is enough and as good for everyone else, *all* landowners owe compensation to the landless, not just the one who happens to have appropriated last. However, it is not up to the landless to choose arbitrarily how much and from whom they will claim their compensation. In cases of aggregate appropriation, their claim is not against any one landowner in particular, but against all landowners

insofar as their hoarding renders them landless. Therefore, all landowners, irrespective of when they appropriated their land, have a responsibility to compensate the landless commoners in proportion to how much they own.

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I am a recent graduate of Trent University, having earned an undergraduate degree in indigenous studies, international development studies, and philosophy (with an emphasis on applied ethics). My philosophical interests have, not surprisingly, nested at the intersection of development, law, and ethics. I am consistently drawn to the ethics of international intervention and foreign aid; theories of justice and rights across both borders and cultures; issues of intellectual and cultural property; and normative readings of the future of global governance and international relations. In the coming months, I will begin to view these issues from the perspective of a first-year law student.

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*Art thou pale for weariness
Of climbing heaven and gazing on the earth,
Wandering companionless
Among the stars that have a different birth,
And ever changing, like a Joyless eye
That finds no object worth its constancy?*

Percy Bysshe Shelley