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Capitalism and Rights: An Essay toward Fine Tuning the Moral Foundations of the Free Society

Roger Pilon

ABSTRACT. The moral foundations of the free society are not epitomized by democratic decisions about costs and benefits, as Michael Novak recently argued in *The American Vision: An Essay on the Future of Democratic Capitalism*. Nor is equality of opportunity, insured through government measures that prohibit private discrimination, a component of the liberty that characterizes the free society, as Milton and Rose Friedman recently argued in their *Free To Choose*. Rather, it is the theory of rights – which is the theory of private property, broadly understood – that underpins and epitomizes the free society, justifying the capitalist economic order in the process. For that theory describes our basic moral and legal relationships, and shows as well that capitalism, unlike socialism, is a fundamentally moral system.

I. Introduction: The force of moral ideas

While the whole of Western thought can be read as concerned with the moral foundations of the free society, it was not until the seventeenth and eighteenth centuries and the rise of classical liberalism that political and legal institutions mature enough to secure that society in any far reaching form were brought into being. Then it was that church and state and market and state were finally separated – not for the first time, to be sure, and certainly not entirely, but at least in an institutional form that has survived, more or less, to the present. Then it was too that the connection between thought and history was clearly manifest: whether we look to the Glorious Revolution, to the French Revolution, or to our own Revolution in America, we see the same cluster of ideas leading the way – liberty and property, enshrined in a doctrine of natural or moral rights. Far from having evolved in any mechanical or predetermined fashion, then, the institutions of the free society were made to evolve by the press of ideas – and in particular, by the press of moral ideas.[1]

In the intervening years, of course, new ideas have arisen, not least the idea that history is not the outcome of thought but rather the predetermined, if not preordained, product of economic or material forces. This reductionist-mechanical doctrine, set in motion most forcefully by Karl Marx, purports to 'justify' the course of political events simply by 'explaining' them as thus determined; it is a doctrine claiming to be rooted not so much in ethics, then, as in 'value-free' science.[2] While the final evidence on these complex causal matters has yet to come in, if ever it does, it is noteworthy at least that the predictions of this 'science' have in many instances been widely at variance with the historical facts.[3] Moreover, and more importantly, the theory itself is so interlarded with the language and ideas of ethics and its advocates have been so zealous to implement what by their own account should be inevitable as to cast the determinist part of the doctrine in serious doubt. Indeed, a far more plausible explanation for the spread of the marxist political order in our own century – though by no means the only explanation – would point to its *moral* appeal, however deceptive that appeal may be. In the end, that is, and when the use of force is excepted, it seems that it is ideas that move men – cogent ideas and mistaken ideas alike.

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It is unfortunate that this power of ideas, especially moral ideas, to determine events has been so little understood by those who have most profited from the institutions brought into being by the thought of the seventeenth and eighteenth centuries. I refer to the men of affairs, to the countless businessmen and even economists who have been content too often to leave the defense of the free society to others – to 'moralists' or 'humanists', many of whom have been anything but sympathetic to the capitalist order that undergirds that society. And even when they have taken up the task – against the waves of criticism that have marked the social thought of the twentieth century – these businessmen have frequently tried to make their case on economic grounds alone. The free society 'works' better, they have argued; it has provided a higher standard of living for more people than any other system in history. Now I do not doubt the truth of these claims – the evidence is all about us. – and that to many they will be persuasive. But to the moral critic – especially the critic who argues from egalitarianism, from the view, for example, that individuals have *rights* to equal shares of the wealth of the world and hence to the private property that constitutes the capitalist order – these arguments are nothing. In the parlance of moral philosophy, the businessman is resting his case on consequential grounds, and in particular on grounds of utility. He is saying, by implication, that the free society is just because of the consequences it yields: in particular, it provides the greatest good for the greatest number of people. Absent any further arguments, however, he can easily be understood as saying – and indeed he often *does* say – that if the free society did *not* produce these results then it should be abandoned (or if it did not do so in particular cases then in those cases it should be abandoned). Moreover, and more to the point, his argument leaves him open to the more basic charge that his claims, even if true, are irrelevant; they are irrelevant because in his economic calculations individuals get lost – they drop out of the utilitarian picture. And the individual and his rights, after all, are what the free society is all about, as a look at our founding documents, and at the Declaration of Independence in particular, will plainly attest. (For the present let me leave open the crucial question just what it is the individual has rights to in the free society as implied in those documents.)

Clearly, then, in order to defend the free society we have to look to more than economic arguments alone. If critics of that society are resting their case on moral grounds, the defense must likewise spring from morality, a point that only recently has come to be appreciated by the business community. As suggested above, however, and as will become more clear as this essay develops, it is important to get that defense right, to not think, for example, that the moral case is ultimately one of values – or, in the democratic vein, one of 'shared values' – which collapses quite easily into a matter of costs and benefits and hence into a matter of economics. Rather, the critics are right when they place their emphasis upon a very different moral notion, namely, a *right*, for it is our rights that define our moral and legal relationships with each other and with the state: rights and the obligations correlative to them tell us and the state what is prohibited, permitted, or required, and hence what the boundaries of behavior are. Those critics are wrong, however, in thinking that we have the rights they often claim we have, and in denying that we have the rights they often claim we do not have. In sum, the issues, at bottom, are indeed moral, not economic; but by no means does this imply that the critics of capitalism, who have taken up the moral case, have won the day, that they have gotten that case right. On the contrary, they have gotten the moral case very wrong, as we will see below.

What I want to do in this essay, then, is sketch more fully some of the issues I have thus far only touched upon. More specifically, I want to show how rights serve to underpin the free society in general and the capitalist economic order in particular. These are complex and subtle matters, however, a full treatment of which would take us into the deepest reaches of moral and legal theory, and well beyond the scope I am permitted here.[4] Accordingly, I want to try to limit and focus the inquiry, which I

will do by looking at two recent defenses of the free society, each of which makes important contributions, but both of which, I believe, contain fundamental misunderstandings. The first of these is Professor Michael Novak's *The American Vision: An Essay on the Future of Democratic Capitalism*, which was written under a grant from the Exxon Corporation and was published in 1978 by the American Enterprise Institute. In this essay Novak states explicitly and clearly that the case for the free society must be made on moral grounds, but repeatedly he understands this to be a matter not of rights but of costs and democratic decision – which would take us very far indeed from the real foundations of that society. The second defense of the free society I want to look at has just come from Milton and Rose Friedman. I refer to their *Free To Choose: A Personal Statement*, published this year by Harcourt Brace Jovanovich and intended to amplify the television series that is currently running under that title on the Public Broadcasting System. More specifically, it is the Friedmans' discussion in Chapter 5, 'Created Equal', that will concern me here. In this chapter they raise one of the most important questions before the world today, whether equality, the principal concern of socialists, and liberty, the principal concern of classical liberals, are consistent. They go on to distinguish three senses of 'equality' – personal equality, equality of opportunity, and equality of outcome – arguing that only the first two senses are consistent with liberty. I am afraid, however, that they are mistaken here, that the theory of rights that underpins the free society will permit only the first sense of 'equality' – or at best, will permit equality of opportunity only as originally understood – however much we may wish it were otherwise. (Indeed, this part of my discussion is intended to encourage us to focus upon those aspects of the free society that may not be entirely pleasing to us, in order not only to help us to get a better understanding of that society but to enable us to put forth a better defense of it as well – better because more clearly understood.)

As the title suggests, then, this essay will not be the final word on the subject it treats. Space alone prohibits that. Rather, I want to try simply to 'fine tune' some of the work that has gone before. And I will move only 'toward' that task, for there is so much more that needs to be done.

II. The basic moral issue: Costs or rights?

It is a commonplace, at this point in the twentieth century, that we live in a world of specialists. It is not so much that generalists are not still to be found. It is rather that they are seldom heard from – perhaps because seldom turned to. When we seek the counsel of 'authorities' – a habit that comes naturally in an increasingly complex world – we *ipso facto* exclude the generalist. On the other hand, complexity itself encourages the division of labor and hence specialization. Thus are generalists selected against – and found, indeed, to be a diminishing species in the society. (I would like to believe that the philosopher, at least, is the last generalist; but here too – perhaps especially – the narrowing hand of specialization has firmly set in.)

The issues before us, however, are quintessentially those that call for the breadth of the generalist. In fact, it is from considerations such as these that Novak sets out to trace the American vision. He laments, for example, that "we do not actually have a theory that expresses our vision of the good and just society, ... no single book one would willingly place in the hands of a serious inquirer and say: 'Here is our full moral, political, and economic vision'"[5]. Indeed, he notes that it is awkward at least "that we have no overarching vision to express, no electrifying text to send into the worldwide ideological battle in which we are engaged"[6]. And we have no such work, he continues, because of specialization. Our system is trinitarian: "It is, at once, an economic system, a political system, and a cultural system"[7], the whole of which such a text must capture. But our specialists – economists, political theorists, and humanists – too often get only a part of that whole. It is Novak's aim, then, to try to articulate the whole, or at least the essence of the American vision.

To be sure, this is an ambitious undertaking, too ambitious, undoubtedly, for the slim volume he has given us. Nevertheless, Novak has pointed clearly to the problem of emphasis – or misemphasis – to which specialization gives rise. In his own statement of the problem, however, Novak himself appears not to have the emphasis entirely right. He is arguing, it seems, that the economist tends to our economic vision, the political theorist to our political or legal vision, and the humanist to our cultural or moral vision, the last of which especially concerns him. In large measure, of course, Novak has correctly captured our intellectual division of labor. But these separate aspects of our culture are nonetheless intimately connected. In particular, it needs to be said that the *moral* threads itself through *each* of these domains: certainly the costs and benefits that concern the economist are reflections of the values of the participants in economic interactions; and just as clearly the rights and obligations that constitute the political and legal domain are matters of ethics, as are the 'higher values' that are often taken to constitute the larger cultural sphere. While it is important to recognize, however, that each of these aspects of our society – the economic, the political, and the cultural – is intimately connected to the other two and that ethical considerations are rooted in each domain, it is also important to notice that these are quite different ethical considerations, and that not all are on a par with the rest. It is these subtleties that Novak seems not to have appreciated, as we will see shortly.

In tracing out the moral foundations of the free society, then, I will be trying to indicate why it is that the classical theorists of that society tended to emphasize the second of the domains Novak has distinguished – the political and legal. Stated generally for the moment, it is not that this domain was supposed to be separate or apart from ethics or morality, as is often thought today, and as Novak's taxonomy seems to suggest; on the contrary, the political and legal order in the free society was thought precisely to *reflect* the moral order, or at least that part of the moral order that is described by our moral rights and obligations.[8] Those rights and obligations, in turn, by describing our relationships with each other and with the state, were thought to indicate how we might legitimately pursue our various values – our economic values, which constitute the first of Novak's domains, and our 'higher values' as these might be thought to constitute the cultural domain. In particular, the political and legal arrangements reflected by those rights and obligations were seen as characterizing the *institutions* of the free society, as mentioned at the outset of this essay. In an important sense, then, our moral rights and obligations serve as the moral foundation and the institutional framework of the free society.

Let us see then how Novak's discussion fails to capture these important issues. He begins by setting forth, quite nicely, the problem that today confronts the free society – which he designates by the name 'democratic capitalism' in order to capture its tripartite nature. That problem is that democratic capitalism is seen, as against the socialist alternative, as having no moral vision. Most defenses of our system, he points out, "spring from a base too narrow both in the interests to which they appeal and in the intellectual grounds on which they stand"[9]. By stressing the economic aspects of democratic capitalism – that it is efficient, and creates substantial and widespread wealth – these defenses appeal to the selfish in us; and that sentiment, when institutionalized, generates what to many is "a pattern of shocking inequalities"[10]. Despite the manifest ideals of fraternity, cooperation, and generosity in our society, "a suspicion remains that the entire design is vaguely immoral; that it yields too much to human selfishness; that it encourages the worst in the human breast"[11]. And in the post-war era, in which "[t]he field of conflict has moved into the sphere of communications and ideas and symbols"[12], these economic virtues of democratic capitalism may not count for much. In such a world, socialism, which views the human struggle as essentially moral, which purports to be 'progressive', stressing brotherhood over selfish individualism, clearly has the upper hand. For again, it is ideas, and moral ideas in particular, that move men.

Now a reply to these charges might begin by

pointing out that socialism too is rooted in selfish concerns. For the 'duties' of brotherhood have correlative to them 'rights' of recipience, and these rights are nothing but selfish claims to the 'beneficence' of our brothers. Far from being selfish claims to what is *ours*, then, which is the moral foundation of capitalism, these socialist 'rights' are selfish claims to what is *not* ours – hardly, one would think, an appeal to what is *best* in the human breast! Novak, however, does not take up this line of reply. Rather, he develops an argument that is a curious and often confused blend of ad hominem appeals, democratic appeals, and consequentialist considerations that point to costs.[13] Let us look more closely at that reply.

Over the past thirty years, Novak observes, there has emerged in our society a powerful new social class whose main business is not business, the preoccupation of influential classes in times past, but social change and self-aggrandizement. This 'new class', whose power base lies in 'the knowledge industry' and in the state, has become extremely influential due both to its enormous growth and to the emergence of national media of communication perfectly suited to its own needs and purposes.

> [W]hat distinguishes the left wing of the new class is its hidden agenda of self-aggrandizement, its adversarial posture against the central conceptions of our political, economic, and cultural systems, and its attempt to short-circuit the will of the majority.... The new class, so defined, is the carrier of the new politics, the new ideology, and the new morality.[14]

In the realm of ideas and symbols, which is where the ideological battles are now being waged, the older business class has thus far been no match for the new class, Novak concludes, which is challenging not only the achievement of the older class but its very moral standing – its system, its character, and its credibility.

Against this onslaught, Novak argues, the business community must take the offensive: it must engage in open intellectual debate. To begin, it must not allow its critics "to affect a moral, high-minded, and public-spirited posture, while seeming [itself] to be answering their charges in the position of a defendant"[15]. Accordingly, their "moral pretense needs to be punctured"[16]. For "[t]he new adversarial class also has its interests, ambitions, strategies, and tactics"[17]. The various media, for example, are 'lucrative businesses', with "a hidden interest in the struggle between the new adversarial class and the business class"[18]. Indeed, Novak continues, the public is at least as suspicious of the new class as of the old:

> Just below the level of consciousness, waiting to be elicited, is the perception that what is at stake is not the interest of the public but a contest between two powerful elites. Every step forward by the new adversarial class has brought new costs, new taxes, new laws, new rules. The adversarial class is statist. It can easily become – it is already becoming – an oppressive class whose intrusions upon personal liberties chafe and anger, and whose costs to the public are already outrunning its benefits.[19]

In short, the public's attention must be drawn "to the many hidden interests of the new adversarial class in its costly assault upon the majority"[20]. And make no mistake about it: "The issue is how much things cost – in money, in productivity, in jobs, in growth"[21]. Accordingly, "[t]he corporate executive needs to raise the issues of cost, and to appeal to the public to decide"[22]. There are two points to "hammer home": "Business is interested in keeping costs down"; "Public-interest advocates rank in the top 10 percent of the population in income"[23]. Indeed, "[t]o change the structure of the game the corporate executive needs to find the moral weakness of the new class. The weakness is its own affluence"[24].

Now there is no question that Novak has put his finger on some important issues here. This 'new class' does indeed affect a posture of self-righteousness, and its programs are in fact costly in many of the respects to which Novak has pointed. At the same time, this whole line of argument has serious difficulties. To begin, even if affluence were a 'moral weakness' – which a defender of capitalism can hardly argue – these ad hominem appeals to populist prejudices have no place in the debate, even as a matter of strategy (where they could as well be counterproduc-

tive as successful). The arguments of the critics must stand or fall on their merits, not on the basis of who puts them forth. Rather than denigrate its critics, then, bringing them down, in effect, to a mundane consideration of costs, as Novak is urging, the business community might better be advised to rise to their level and beat them at the *moral* game. To do that, however, the businessman would have to understand that game – better, certainly, than Novak, who has come some distance from the moral concerns with which he began. Indeed, when he remarks that "[i]f the game concerns morality, the moralists will win. If the game concerns costs, the businessman will win"[25], he appears to have abandoned morality altogether! Yet he continues to speak of *justifying* "the ideals of democratic capitalism"[26]. All of which raises the question just what Novak believes those ideals to be – and, ultimately, just what those ideals in fact are.

With respect to the first of these questions, there are two points Novak seems to be pressing – costs and majority opinion – neither of which, I submit, will withstand scrutiny, but both of which will help us to see what our ideals in fact are. Consider the following passage:

> Instead of announcing, "We're in the business of protecting the environment, too" the oil companies should be telling the truth: "It costs money to protect the environment. We know how to do that, and we're responsive to the will of the public. How much extra are you willing to pay? We can all have a lower-pollution environment, if we're willing to pay for it. There is only one final judge about whether to pay more for it, and one source of dollars to pay for it – the consumer. The consumer is the one who pays. There is no other source of income. You are the judge"[27].

Or again, on the same subject:

> Without saying so, corporations should shift the grounds of public discussion toward the costs attached to new policies recommended by the new class. "Every time you buy a gallon of gasoline, you are paying *N* cents for pollution-control facilities in our plants"[28].

Now if these are examples of appeals to 'the ideals of democratic capitalism' then perhaps the critics are right after all. What Novak is doing here, clearly, is appealing simply to the pecuniary interests of consumers – which are sentiments, albeit rooted in values, at some remove from what we ordinarily take to be the deeper issues of morality. Still, as such, there is nothing wrong with our pursuing those pecuniary interests; indeed, the observation that men do so has provided the springboard for economics since at least Adam Smith. But Smith and most of the other classical theorists of liberty were careful always to point out that those interests must be pursued *without violating the rights of others.*[29] And that proviso serves to constrain not only the murderer and the mugger but the majority as well. That a policy will reduce costs to the majority, then, is no warrant for imposing it on the minority when doing so would violate the rights of that minority. It is here that we arrive at one of the central tenets of the free society, one of 'the ideals of democratic capitalism', which the Founders – who feared the tyranny of the majority no less than the tyranny of the king – were judicious enough to bequeath to us, whatever we have done with that tenet in the interim. In recognizing those individual rights, then, "judicial activism" may indeed "thwart majority will in the political system"; but *as such* it can hardly be seen, as Novak suggests, as an attack upon "the moral bases of the cultural system"[30] – not so long, that is, as that system is rooted in principles of individual rights, as ours clearly is.

A consideration of costs and majority opinion, then, will hardly bring us to the moral foundations of the free society. Those foundations concern the integrity of the individual, as described by the theory of moral rights. Whether we look to the common law tradition we inherited from England, which was long held to be rooted in principles of reason, or to our own founding documents, which themselves were thought to reflect the natural law and hence the rule of reason,[31] we discover that we have rights, at bottom, to be free in our persons and property: this entails rights to be left alone, or, if not, to be made whole again by those who have interfered with us; rights to do whatever does not

interfere with others; and rights to associate with others for whatever purpose, provided only that those others consent.[32] *These* are the principles that will justify (or disjustify) the various activities of the businessman, not a consideration of mere costs, as determined by some majority vote.[33] For unless his critics can show that his activities violate some right, the businessman has a perfect right to perform those activities.

Now in fairness to Novak, he may have been misled by the kinds of examples he chose to fasten upon. For an appeal to costs and democratic decision is appropriate in at least *some* environmental cases (the whole of which are still a small and in principle a difficult set of cases).[34] But even here Novak's discussion is simply not subtle enough to give guidance to the businessman, for it makes no distinctions between kinds of cases. Consider, for example, the case of auto-emission standards: here we have a paradigmatic public domain example in which those standards are appropriately determined by some public, cost-benefit decision procedure. By no means, however, are all environmental cases of this kind – to be handled as suggested in the first of the two passages cited immediately above. In fact, in the second of those passages we have a case that appears to involve not a pure public domain but the private property rights of particular individuals.[35] Here, again, reducing the cost of gasoline to consumers generally will not justify removing pollution-control facilities on gasoline plants, thereby polluting the adjacent home or property owners; for they have rights against being thus polluted, and the plant owners have obligations not to pollute upon them. (Nevertheless, even in these cases a public line is called for, which will serve to determine in general when a nuisance amounts to a right violation.) In still other cases closely related to these, however, such as the current automobile air-bag controversy, costs and democratic opinion have no place at all. For each of us has a right to live as dangerously or as cautiously as he pleases – provided he doesn't violate the rights of others by doing so – and hence to (not) buy, if he can and is willing to pay for it, or (not) offer for sale whatever he chooses toward that end. The air-bag question is not, that is, a matter for public decision at all.

When we move out into the broad range of cases, however, cases involving the businessman's right to buy and sell, to produce and price as he chooses, to contract as he will, to hire and fire, to relocate his plant, and on and on, including even his right simply to be in business, we are quite out of the domain of legitimate public decision-making. Yet in appealing generally to the democratic device, Novak undermines these rights and indeed the free society itself, as has been recognized since at least Plato and Aristotle. For the businessman is likely always to be in the minority. If the majority, in the name of reducing *its* costs, chooses to limit his freedom – indeed, to put him in its service – what grounds has Novak given him on which to appeal? On the contrary, by giving the majority control over what rightly belongs to the businessman, Novak has permitted the public to *use* the businessman for its purposes; in effect, he has made public what otherwise is private and thus has undermined private property itself, which is nothing less than the material foundation of the free society.[36] For the private domain *just is* the free domain, in which individuals control their own affairs, free from the interference of both their fellow men and of government.[37]

III. Old rights and new

Moral ideas do underpin the free society, then; in particular, the idea that individuals have rights to be free in their persons and property, as outlined briefly above. To be sure, rights *are* selfish claims, claims to what rightly belongs to us. But that hardly makes of them immoral or even amoral claims. On one hand, they are not claims to what is *not* ours, to what belongs to others – as would be entailed by a pure pursuit of pecuniary interests that disregarded the rights of others. On the other hand, rights are claims to be left alone, to not be forced to give to others what is rightly ours (though rights *permit* us to give to others, if that is what we choose).[38] Plainly, it is this second aspect of rights that has come in for so much criticism in the twentieth

century. And yet, as was adumbrated earlier, to argue that there is no right to be left thus alone is tantamount to undermining the first aspect of rights as well and hence to undermining rights altogether. For if we can be forced to give to others what is rightly ours – our property in the narrow sense, or our property in our person or our labor[39] – then to that degree, others may pursue their pecuniary interests quite in disregard of what is ours. Indeed, 'ours', 'theirs', and the whole institution of property – and of our separate, private beings – breaks down.

In this century, of course, this is precisely what has been happening – gradually in the 'free societies', suddenly in the communist countries. And this has happened, frequently, in the name of 'rights' – 'new rights': 'welfare rights', 'social and economic rights', 'socialist rights'[40]. However characterized, these new rights come down to the same thing: they are claims to what does not, in the traditional or ordinary sense, belong to us. To be sure, these claims are never put quite that way; on the contrary, they *too* are couched in the language of property – or better, entitlement – thus paying obeisance, by implication, to the theory by which our traditional rights are justified. We are 'entitled', it is said, to an education, or to a minimum income, or to health care, or indeed, to "periodic holidays with pay"[41]. Never mind that these goods are not 'ours' in any ordinary sense of that idea, much less that they can become ours only by taking from others what is not ours. Caught up in the greed that is socialization, these embarrassments count for little.

Our traditional rights, as just mentioned, are rooted in a theory of entitlement, which is their justificatory foundation – the foundation of capitalism and of the free society generally. That theory, conforming closely to language itself, characterizes the world in terms of holdings, and then explains how those holdings arise or come to be attached to particular persons or institutions, either legitimately or illegitimately.[42] To be legitimately held or owned, a thing must have been acquired without violating the rights of others. Individuals acquire title to their persons and labor, for example, by a certain 'natural necessity', as it were. With the more ordinary kinds of holdings, something might have been taken from the state of nature, in which it was unheld;[43] more likely, it might have been acquired from someone else who held it legitimately, either in exchange for something else or as a gift; or it might have been acquired from someone else or his agent in rectification for some past wrong by that other.[44] Thus, in general, do holdings and rights to the exclusive possession and use of those holdings arise legitimately. Things are held illegitimately when they are taken by force or fraud from those who hold them legitimately – that is, when they are taken without the voluntary consent of those who rightly hold them.[45] When what is ours has been taken without our consent, our basic right to be free in our person and property has been violated.

By contrast, the 'entitlement' of which advocates of the new rights speak has nothing to do with the integrity of individuals or with what individuals have done for themselves or what others have done for or to them. Indeed, these various doings – which are the stuff of ordinary human existence – count for little or nothing in this tale of entitlements. Instead, we are entitled to things, it is said, simply because we *need* or even *want* those things. Never mind the problem of scarcity – that there never are enough things to go around to satisfy all of our needs, much less all of our wants. Never mind too that scarcity means that satisfying one man's needs or wants, if possible, will frustrate the same 'entitlements' of another man, and hence that 'rights' such as these, even with perfectly egalitarian distribution, can never be respected as can our traditional rights. Never mind all the practical and political problems of distribution and endless redistribution, or the disparity between distributors and distributees, or indeed between contributors and contributees. (Socialist justice does not require supply side egalitarianism!) Never mind finally that the gap between 'need' or 'want' and 'is entitled to' is yawning by contrast with the gap between 'freely acquires' and 'is entitled to'[46]. For there are enough people in the world who believe in 'something for nothing' and enough demagogues and despots who

know this and know how to wrap that sentiment in the trappings of 'justice' to have made this new theory of entitlements a powerful force of destruction, destroying not only whole societies but, as Orwell predicted, the very language that enables us to communicate.

But it is not the gullible alone who are misled by the new ethics. None of us, in fact, is immune entirely from the subtle changes in language and thought it gradually brings about (which is why we constantly have to plumb the depths of our ideas, ferreting out anomalies, inconsistencies, and plain untruths). I want now, in fact, to turn to the treatment of 'equality' that has just been put forth by the Friedmans, who can hardly be thought to be in the other camp, but who nonetheless seem to have been misled, as easily they might, by the idea of 'equality of opportunity'. As suggested at the outset, I will argue that this is an issue on which defenders of the free society must simply 'bite the bullet'; for much as we might wish it were otherwise, there is no right to equal opportunity, at least as that 'right' is coming increasingly to be understood. Yet trying to make such a right exist, through positive law, will do substantial damage to our other rights and hence to the free society itself. Let us look more closely, then, at the subtle shifts of which I speak.

As stated earlier, the question that centrally concerns the Friedmans in this part of their book is whether liberty and equality are consistent one with the other, or whether they conflict. Toward answering that question they distinguish three senses of 'equality' – personal equality, equality of opportunity, and equality of outcome – only the last of which, they conclude, is inconsistent with liberty (and hence, they argue, ought not to be pursued through government). When he wrote that "all men are created equal", the Friedmans say, Jefferson did not mean these words to be taken literally; rather, he and the rest of the Founders meant that all men were equal in the sense that all were "endowed by their Creator with certain unalienable rights". Men are thus "equal before God".

> Each person is precious in and of himself. He has unalienable rights, rights that no one else is entitled to invade. He is entitled to serve his own purposes and not to be treated simply as an instrument to promote someone else's purposes. 'Liberty' is part of the definition of equality, not in conflict with it.... Their different values, their different tastes, their different capacities will lead [men] to want to lead very different lives. Personal equality requires respect for their right to do so, not the imposition on them of someone else's values or judgment.[47]

After the Civil War, however, "emphasis shifted, in intellectual discussion and in government and private policy, to a different concept – equality of opportunity"[48]. Here again, literal equality of opportunity – which would have to take into account in particular all the contingencies of birth and fortune – is not what is meant, the Friedmans argue. Rather equality of opportunity means that

> [n]o arbitrary obstacles should prevent people from achieving those positions for which their talents fit them and which their values lead them to seek. Not birth, nationality, color, religion, sex, nor any other irrelevant characteristic should determine the opportunities that are open to a person – only his abilities.
>
> On this interpretation, equality of opportunity simply spells out in more detail the meaning of personal equality, of equality before the law....
>
> Equality of opportunity, like personal equality, is not inconsistent with liberty; on the contrary, it is an essential component of liberty. If some people are denied access to particular positions in life for which they are qualified simply because of their ethnic background, color, or religion, that is an interference with their right to 'Life, Liberty, and the pursuit of Happiness'[49].

In the twentieth century, however, there has arisen "a very different concept of equality"[50], equality of outcome. "Everyone should have the same level of living or of income, should finish the race at the same time"[51]. Once again, the Friedmans continue, 'equal' here is not to be understood literally as 'identical'. Rather, the goal is 'fairness', "a much vaguer notion – indeed, one that it is difficult, if not impossible, to define precisely"[52]. For " 'fairness', like 'needs', is in the eye of the beholder"[53]. Although they never explicate the point clearly,

the Friedmans conclude that "there is a fundamental conflict between the *ideal* of 'fair shares', ...and the *ideal* of personal liberty"[54]. Accordingly, "[g]overnment measures that promote personal equality or equality of opportunity enhance liberty; government measures to achieve 'fair shares' for all reduce liberty"[55].

In claiming that equality of outcome is inconsistent with liberty or with the original sense of equality, the Friedmans are perfectly correct, of course, though one would like to have seen the point more clearly developed. Had they done that, in fact, they might have discovered the difficulties in their argument for equality of opportunity as well. For the ideal of fair shares conflicts with the original ideal of personal equality simply because it conflicts with our equal personal *rights*. If indeed every man "is entitled to serve his own purposes and not to be treated simply as an instrument to promote someone else's purposes"[56], then taking from some in order to give 'fair shares' to others amounts to nothing less than *using* the people from whom the shares are taken: it is to treat them as *instruments* to promote someone *else's* purposes, and hence to violate their rights – in particular, their right to lead their own lives free from the interference of others. But this same argument applies, *mutatis mutandis*, to the argument for equality of opportunity. For the right to be free – that is, the right to be left alone – is the right to use your person and possessions for whatever purposes you choose (to not suffer "the imposition... of someone else's values or judgment"[57]) provided you do not violate the equal rights of others to do the same; thus it is the right to associate or not to associate with others for whatever reasons you choose provided only that those others agree to the terms of association. The starting point, then, is one of *privacy*; we begin with our separate existences, we respect that privacy, and we come together only on terms that are mutually agreeable, whatever our respective reasons for doing so – or indeed, for *not* doing so. Our *reasons* for associating or not associating with someone, that is, are altogether irrelevant to the *rights* in the matter.[58] Putting the point as straightforwardly as possible, if we have a right to not associate *at all*, then we have a right to not associate for any particular *reason*, even if that reason amounts to an 'arbitrary obstacle' to the other person's associating with us. Now whether those obstacles the Friedmans cite are indeed 'arbitrary' is every bit as problematic as the 'fairness' and 'needs' they rightly criticize in the case of equality of outcome.[59] But however 'objective' (or indeed lengthy) we make the list of proscribed reasons for discriminating, and however impossible the issues of proof accordingly become,[60] the objectivity of those criteria is not the point. The point, rather, is much more fundamental. It is the same point the Friedmans correctly cite in the case of personal equality, namely, that individuals cannot be used as instruments to promote the purposes of others. Forcing someone to associate with another – especially when his reasons for not wanting to associate are likely to be far more complex than can be captured in any list of proscribed reasons – is nothing less than using that person to promote the purposes of the other. Far then from 'interfering' with those with whom they refuse to associate, as the Friedmans would have it, those who would thus refuse are *themselves* interfered with when they are nevertheless forced into association, as is required today by an almost endless set of government requirements to that effect.[61] In sum, the Friedmans have assumed there is some right against discrimination, which would amount to a right to associate quite apart from the consent of others (or except when discriminated against for the 'right' reasons), when in fact there is only a right *not* to associate and a right *to* associate *provided* the other associates consent – a consent having nothing to do with the reasons behind it.[62]

Now it is curious that the Friedmans should have gotten this idea wrong, especially since they go on, in their discussion of equality of opportunity, to say that "[e]veryone was to be free to go into any business, follow any occupation, buy any property, *subject only to the agreement of the other parties to the transaction*"[63]. (Emphasis added) Indeed, this *is* the original idea of 'equality of opportunity', which is equivalent, however, to equality before the law – assuming that the law reflects or encodes

the basic theory of rights.[64] For there is nothing in the statement just cited about disagreeing to the transaction (and hence not associating) for the 'wrong' reasons, as is clearly spelled out in the earlier passage.[65] It may be, however, that the Friedmans got this issue wrong because they do not really have a clear conception of the connection between government measures and individual liberty, as captured in their remark, "Government measures that promote personal equality or equality of opportunity enhance liberty; government measures to achieve 'fair shares' for all reduce liberty"[66]. In truth, *all* government measures reduce liberty for some, while enhancing it for others (even if the class of these others is limited, as it sometimes is, to the goverment officials themselves). The criminal law, after all, reduces the liberty of would-be criminals while promoting the liberty of the rest of us, just as measures to achieve 'fair shares' reduce the liberty of those from whom the shares are taken while promoting the liberty of those to whom they are given. (I speak here of 'short-run' liberty, of course.) The basic question, then, is not whether government measures reduce or promote liberty but what *justifies* any proposed measure. A measure that promotes personal equality – or equal rights, as outlined here – is justified because the individuals whose liberty is restricted by such a measure have no right to do what the measure prohibits. Measures aimed at promoting 'equal opportunity' or 'fair shares', however, are not justified because individuals have a perfect right to the liberty these measures restrict. Far from promoting rights, then, such measures would violate rights and hence would be inconsistent with a free society.

In none of this, of course, have I argued that individuals *ought* to discriminate on the bases the Friedmans have listed, that they ought to refuse to associate with others on the basis of such 'arbitrary reasons'; nor do I mean to be understood as having so argued. I have simply tried to show that we have a *right* to thus discriminate, even though it may not be 'good' to do so, and even though we 'ought not' to do so.[67] It is in cases like this, in fact, that we see clearly the difference between rights and values. To paraphrase Patrick Henry, there is all the difference in the world between defending the *right* to speak and defending the speech that flows from the exercise of that right, between defending the *right* to freedom of religion and defending the religious practices permitted by that right. These are points that today are too little understood or appreciated. Indeed, we have come in this century to think that law should promote 'the good' – which of course is never more than someone's or some group's conception of 'the good' – when in fact the original understanding, as set forth by the Founders, was nothing like that at all. Laws and governments were instituted to protect our rights, to provide a minimum but basic framework within which each of us might pursue his *own* conception of the good. Rights leave us free to do that, which means that we are also free to pursue what many, even a majority, might think is not very good at all. This 'abuse' of rights, as it is sometimes characterized, is not to be confused with the *violation* of rights (of others); rather, it is simply the 'bad' that is the other side of the 'good' that comes with respecting rights – and indeed it is the mark of every free society. Only when we appreciate these subtleties, when we understand that legitimate law is not an instrument for imposing our conception of the good on others, will we be able to defend the free society in all of its richness.

IV. Conclusion

In this article, then, I have tried to show that the free, capitalist society, far from being basically immoral, is grounded in fundamental ethical principles, principles of individual moral rights. These rights, in turn, are reflections of our individuality, which is to say our freedom from each other, and are themselves rooted in the material or property foundations of that individual freedom, which are the foundations of the capitalist economic order. Our rights do not describe the whole of ethics. But when reflected in our basic law they do permit and indeed encourage us to come together as free individuals, and to pursue, alone or together, the higher values that have ever been the mark of the free society.

Notes

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[1] See, e.g., Richard M. Weaver, *Ideas Have Consequences* (1948).

[2] See Philip T. Grier, *Marxist Ethical Theory in the Soviet Union* (1978), 38–39.

[3] The most glaring of these predictions perhaps is that the workers in industrialized societies would rise up to take over the means of production.

[4] I have set forth a more complete treatment of these issues elsewhere: see Roger Pilon, *A Theory of Rights: Toward Limited Government*, Ph.D. diss. (University of Chicago, 1979). See also Note 33, *infra*.

[5] Michael Novak, *The American Vision: An Essay on the Future of Democratic Capitalism* 1 (1978).

[6] *Id.*

[7] *Id.*

[8] This in fact was one of the insights of state-of-nature theory, as developed by Hobbes, Locke, and Rousseau, and especially as returned to recently by Robert Nozick in his important *Anarchy, State, and Utopia* (1974). One can set forth the moral order, that is, quite independently of there being any institutions of government to enforce that order; it then becomes the business of government, in classical liberal theory, to encode and enforce that order. The connection between the moral and the political or legal, then, is one of model institutionalized. See also Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law* (1955); Carl L. Becker, *The Declaration of Independence* (1922); Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

[9] Novak, *supra* Note 5, at 7.

[10] *Id.*, at 13.

[11] *Id.*

[12] *Id.*, at 14.

[13] Indeed, he says that we have market liberty "for the sake of the greater good", and that "[t]he reasons for supporting a market system are not absolutist but instrumental". *Id.*, at 25. Does this mean that economic freedom would *not* be justified if it did not serve 'the greater good' (assuming even that we knew how to define that notion)?

[14] *Id.*, at 31.

[15] *Id.*, at 38.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*, at 38–39.

[20] *Id.*, at 39.

[21] *Id.*, at 44.

[22] *Id.*, at 43.

[23] *Id.*, at 44.

[24] *Id.*, at 43.

[25] *Id.*, at 44.

[26] *Id.*, at 53.

[27] *Id.*, at 44.

[28] *Id.*, at 52.

[29] For an excellent history of the decline of this view and the rise of utilitarianism among British political economists see Ellen Paul, *Moral Revolution and Economic Science: The Demise of Laissez-Faire in Nineteenth Century British Political Economy* (1979).

[30] *Id.*, at 45.

[31] See Corwin, *supra* Note 8.

[32] For a fuller explication of these points see Pilon, *supra* Note 4, Ch. 3.

[33] For an application of these principles to a wide range of economic issues generally and corporate issues in particular, see Roger Pilon, 'Corporations and Rights: On Treating Corporate People Justly', *Georgia Law Review* 13 (1979), 1245.

[34] For a more complete discussion of these cases than follows here see Pilon, *supra* Note 33, at 1276–77, 1333–39. See also Richard A. Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints', *The Journal of Legal Studies* 8 (1979), 49.

[35] Compare *Boomer v. Atlantic Cement Co.* 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 312 (1970). See David Kretzmer, 'Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case', *Israel Law Review* 13 (1978), 298.

[36] See, e.g., Richard Pipes, in 'Capitalism, Socialism, and Democracy: A Symposium', *Commentary*, April 1978, at 65–66.

[37] See Isaiah Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (1969).

[38] Indeed, it is too often forgotten that only where rights are respected can genuine virtue arise. Forced 'beneficence' is hardly a virtue.

[39] Thus 'property' should be understood broadly, as did most of the classical theorists. See, e.g., John Locke, *The Second Treatise of Government* §123: 'Lives, Liberties and Estates, which I call by the general Name, Property'.

[40] See Maurice Cranston, 'Human Rights, Real and Supposed', in D. D. Raphael (ed.), *Political Theory and the Rights of Man* (1967), 43–53; Inga Markovits, 'Socialist vs. Bourgeois Rights – An East-West German Comparison', *University of Chicago Law Review* 45 (1978), 612.

[41] This last 'entitlement' is listed in Article 24 of the United Nations Universal Declaration of Human Rights

(1948). No mention is made of just who holds the correlative obligation when the claimant is an employer or is self-employed.

[42] This discussion of justice in holdings stems from Nozick, *supra* Note 8, at 149–174, where it is developed with some subtlety.

[43] For a criticism of Nozick's treatment of original acquisition see Pilon, *supra* Note 33, at 1281–84.

[44] For a detailed development of justice in rectification see the following articles by Richard A. Epstein: 'Pleadings and Presumptions', *University of Chicago Law Review* 40 (1973), 556; 'A Theory of Strict Liability', *The Journal of Legal Studies* 2 (1973), 151; 'Defenses and Subsequent Pleas in a System of Strict Liability', *The Journal of Legal Studies* 3 (1974), 165; 'Intentional Harms', *The Journal of Legal Studies* 4 (1975), 391.

[45] On 'voluntary consent', which is often a sticking point between capitalists and their critics, one of the best discussions still is the *locus classicus* of the issue, in Aristotle, *Nicomachean Ethics*, Bk. III, Ch. 1.

[46] Here enter the critical arguments that show that there are rights at all. See Alan Gewirth, *Reason and Morality* (1978); but see also Pilon, *supra* Note 4, Ch. 3.

[47] Milton and Rose Friedman, *Free to Choose: A Personal Statement* (1980), 129.

[48] *Id.*, at 131.

[49] *Id.*, at 132.

[50] *Id.*, at 134.

[51] *Id.*, at 128.

[52] *Id.*, at 134.

[53] *Id.*, at 135.

[54] *Id.*

[55] *Id.*, at 134–35.

[56] See text accompanying Note 47, *supra.*

[57] See text accompanying Note 47, *supra.*

[58] For a fuller discussion of these issues see Pilon, *supra* Note 33, at 1327–31.

[59] Private employers, for example, can no longer discriminate against the handicapped, which HEW has recently interpreted to include even *unreformed* drug addicts and alcoholics who are "otherwise qualified". See 42 Fed. Reg. 22675–22702 (May 4, 1977); —— C.F.R.——. Consider also the ambivalence we are currently showing about outlawing discrimination on the basis of sexual orientation.

[60] Indeed, it is because it is impossible to prove discrimination straightforwardly – for this involves getting into the mind of the defendant – that we have 'quotas', 'goals', 'guidelines', and so on, all of which shifts the burden of proof to the defendant, doing profound damage to the legal system in the process. It is due to the issues of proof, in fact, that the distinction between anti-discrimination legislation and affirmative-action legislation is ultimately specious, a point that many conservatives have failed to grasp.

[61] I have in mind here in particular the results that have flowed from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

[62] Compare, e.g., *Runyon v. McCrary* 427 U.S. 160 (1976).

[63] Friedmans, *supra* Note 47, at 133.

[64] Through pure positive law, of course, one can 'create' whatever rights one wishes. Thus the importance of there being a clear, consistent, and justified background moral theory.

[65] See the text accompanying Note 49, *supra.*

[66] Friedmans, *supra* Note 47, at 134–35.

[67] I have developed some of these points more fully in Roger Pilon, 'Ordering Rights Consistently: Or What We Do and Do Not Have Rights To', *Georgia Law Review* 13 (1979), 1171, 1193–96. See also H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64 (1955), 175, 186.

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