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A CONTRACTARIAN PERSPECTIVE ON ANARCHY

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I. TWO-STAGE UTOPIA

I have often described myself as a philosophical anarchist. In my conceptualized ideal society individuals with well defined and mutually respected rights coexist and cooperate as they desire without formal political structure. My practical ideal, however, moves one stage down from this and is based on the presumption that individuals could not attain the behavioral standards required for such an anarchy to function acceptably. In general recognition of this frailty in human nature, persons would agree to enact laws, and to provide means of enforcement, so as to achieve the closest approximation that is possible to the ideally free society. At this second level of norms, therefore, I am a constitutionalist and a contractarian: constitutionalist in the sense of recognizing that the rules of order are, and must be, selected at a different level and via a different process from the decisions made within those rules; contractarian in the sense that conceptual agreement among individuals provides the only benchmark against which to evaluate observed rules and actions taken within those rules.

This avowedly normative construction enables me to imagine the existence of an ideal social order inhabited by real persons, by men and women that I can potentially observe. In moving from stage one, where the persons are themselves imaginary beings, to stage

two, the persons become real, or potentially so, while the rules and institutions of order become imaginary. But I must ask myself why I consider the second stage to be an appropriate subject for analysis and discussion whereas the first stage seems methodologically out of bounds, or at least beyond my interest. Presumably, the distinction here must rest on the notion that the basic structure of order, "the law," is itself chosen, is subject to ultimate human control, and may be changed as a result of deliberative human action. By contrast, the fundamental character traits of human beings either cannot be, or should not be, manipulated deliberately. In other terms, attempts to move toward an idealized first-stage order may require some modification of human character, an objective that seems contrary to the individualistic value judgments that I make quite explicit. On the other hand, attempts to move toward an idealized second-stage ideal require only that institutions be modified, an objective that seems ethically acceptable.

As a preliminary step, I have called for the adoption of a "constitutional attitude," a willingness to accept the necessity of rules and an acknowledgment that choices among rules for living together must be categorically separated from the choices among alternative courses of action permitted under whatever rules may be chosen. But what happens if I should be forced, however reluctantly, to the presumption that individual human beings, as they exist, are not and may not be capable of taking on such requisite constitutional attitudes. In this case, my treatment of an idealized constitutionalist-contractarian social order becomes neither more nor less defensible than the discourse of those who go all the way and treat genuine anarchy as an ideal. Yet, somehow, I feel that my discussion of idealized social order is more legitimate, more productive, and less escapist, than the comparable discussion of the libertarian anarchists, perhaps best exemplified here by Murray Rothbard.[1] I shall return to this proposition below, and I shall attempt an argument in defense.

II. THE LOGIC OF AUTHORITY?

Before doing so, however, I want to examine one possible consequence of abandoning the constitutionalist-contractarian perspective. If we say that persons are simply incapable of adopting the requisite set of constitutionalist attitudes, which is another way of saying that they are incapable of evaluating their own long-term

interests, we are led, almost inexorably, to imposed authority as the only escape from the genuine Hobbesian jungle. Anyone who takes such a position, however, must acknowledge that a "free society," in the meaningful sense of process stability, is not possible. The analysis turns to alternative criteria for authority, both in terms of the basic objectives to be sought and in terms of the efficiency properties of structures designed to accomplish whatever objectives might be chosen. But whose values are to be counted in deriving such criteria? We have, in this setting, already rejected the individualistic base, at least in its universalized sense, from which such criteria might be derived. But if only some persons are to be counted, how do we discriminate? Of necessity, the treatment of the idealized limits to authority must be informed by the explicit or implicit value norms of some subset of the community's membership. In the extreme, the value norms become those of the person who offers the argument and his alone.

Most discussion of social reform proceeds on precisely this fragile philosophical structure, whether or not the participants are aware of it. When an economist proposes that a particular policy measure be taken, for example, that the ICC be abolished, he is arguing that his own authority, backed presumably by some of the technical analysis of his professional discipline which has its own implicit or built-in value norms (in economics, Pareto efficiency), is self-justificatory. But since different persons, and groups, possess different norms, there is no observed consensual basis for discriminating between one authority and another. The linkage between the consent of individuals and the policy outcomes is severed, even at the purely conceptual level and even if attention is shifted back to basic rules of order.

The implication of all this is that the authority which emerges from such a babel of voices, and from the power struggle that these voices inform and motivate, carries with it no legitimacy, even in some putative sense of this term. The authoritarian paradigm for the emergence and support of the state lacks even so much as the utilitarian claims made for the basic Hobbesian contract between the individual and the sovereign, whomever this might be. There can be no moral legitimacy of government in this paradigm, no grounds for obligation to obey law, no reasons for the mutual respect of individuals' boundaries or rights.

If most persons, including most intellectuals-academicians, view

government in this perspective, and more importantly, if those who act on behalf of government view themselves in this manner, both the libertarian anarchist and the constitutional-contractarian exert didactic influence in their attempts to expose the absence of moral underpinnings. But does not such activity, in and of itself, reduce to nihilism under the presupposition that universalized individual values are not acceptable bases for moral authority? If individuals are not capable of acting in their own interest in the formulation of social institutions, both the anarchist and the contractarian may be deemed genuinely subversive in their "as if" modeling of society, in their establishment of normative standards for improvement that are empirically nonsupportable. The activity in question weakens the natural subservience to the existing authority, whomever this might be, and may disrupt social order without offering redeeming elements that might be located in some constructive alternative.

III. INDIVIDUALISTIC NORMS

The libertarian anarchist and the contractarian must ask these questions and somehow answer them to their own satisfaction. I pose these questions here in part for their own intrinsic interest and importance but also in part because they place the libertarian anarchist and the constitutionalist-contractarian squarely on the same side of the central debate in political philosophy, the debate that has gone on for several centuries and which promises to go on for several more. Both the libertarian anarchist and the constitutionalist-contractarian work within the *individualistic* rather than the *nonindividualistic* framework or setting.[2] I use the term "nonindividualistic" rather than "collectivist" explicitly here because I want to include in this category the transcendent or truth-judgment paradigm of politics, a paradigm that may produce either collectivist or noncollectivist outcomes at a practical level.

I want to argue first that it is normatively legitimate to adopt the individualistic model, regardless of empirical presuppositions, and secondly, that within this model broadly defined the constitutionalist-contractarian variant is superior to the libertarian-anarchist variant. It is morally justifiable, and indeed morally necessary, to proceed on the "as if" presumption that individuals, by their membership in the human species, are capable of acting in their

own interest, which they alone can ultimately define. Empirical observation of human error, evaluated *ex post,* can never provide a basis for supplanting this "as if" presumption; for no acceptable alternative exists. If persons are considered to be incapable of defining and furthering their own interests, who is to define such interests and promote them? If God did, in fact, exist as a suprahuman entity, an alternative source of authority might be acknowledged. But failing this, the only conceivable alternative authority must be some selected individual or group of individuals, some man who presumes to be God, or some group that claims godlike qualities. Those who act in such capacities and who make such claims behave immorally in a fundamental sense; they deny the moral autonomy of other members of the species and relegate them to a value status little different from that of animals.

The primary value premise of individualism is the philosophical equality of men, as men, despite all evidence concerning inequalities in particular characteristics or components. In thinking about men, we are morally obligated to proceed as if they are equals, as if no man counts for more than another. Acceptance of these precepts sharply distinguishes the individualist from the nonindividualist. But we must go one step further to inquire as to the implications of these precepts for social order. It is at this point that the libertarian anarchist and the constitutionalist-contractarian part company, but, philosophically, they have come a long way together, a simple statement but one that is worthy of emphasis.

IV. ANARCHY AND CONTRACTUAL ORDER

The issue that divides the anarchist and the contractarian is "conjecturally empirical." It concerns the conceptually observable structure of social order that would emerge if men could, in fact, start from scratch. Would they choose to live in the idealized anarchy, or would they contractually agree to a set of laws, along with enforcement mechanisms, that would constrain individual and group behavior? This question cannot actually be answered empirically because, of course, societies do not start from scratch. They exist in and through history. And those elements of order that may be observed at any point in time may or may not have emerged contractually.

It is at this point that the constitutionalist-contractarian paradigm is most vulnerable to the criticisms of the anarchist. How are we to distinguish between those elements of social order, those laws and institutions which can be "explained" or "interpreted" (and by inference "justified") as having emerged, actually or conceptually, on contractual precepts and those which have been imposed noncontractually (and hence by inference "illegitimately")? If the contractual paradigm is sufficiently flexible to "explain" all observable institutions it remains empty of discriminant content, quite apart from its possible aesthetic appeal.

Careful usage of the model can, however, produce a classification that will differentiate between these two sets of potentially observable institutions. For example, the existence of unrestricted political authority in the hands of a political majority could never be brought within contractarian principles. Persons who could not, at a time of contract, predict their own positions, would never agree to grant unrestricted political authority to any group, whether this be a duly elected majority of a parliament, a judicial elite, or a military despot. Recognition of this simple point is, of course, the source of the necessary tie-in between the contractarian paradigm and constitutionalism.[3] But what are the constitutional limits here? What actions by governments, within broad constitutional authority, may be thrown out on contractarian precepts?

Arbitrary restrictions or prohibitions on voluntary contractual agreements among persons and groups, in the absence of demonstrable spillover effects on third parties, cannot be parts of any plausible "social contract." For example, minimum-wage legislation, most restrictions on entry into professions, occupations, types of investment, or geographical locations could be rejected, as could all discrimination on racial, ethnic, religious, grounds.

This is not to suggest that the appropriate line is easy to draw and that borderline cases requiring judgment are absent. More importantly, however, the classification step alone does not "justify" the institutions that remain in the potentially allowable set. To conclude that an observed institution may have emerged, conceptually, on generalized contractarian grounds, is not at all equivalent to saying that such an institution did, in fact, emerge in this way. Many, and perhaps most, of the governmental regulations and restrictions that we observe and which remain within possible

contractarian limits, may, in fact, represent arbitrary political impositions which could never have reflected generalized agreement.

Consider a single example, that of the imposition of the fifty-five-mile speed limit in 1974. We observe this restriction on personal liberties. Where can we classify this in terms of the contractarian paradigm? Because of the acknowledged interdependencies among individual motorists, in terms of safety as well as fuel usage, it seems clearly possible that general agreement on the imposition of some limits might well have emerged, and fifty-five miles per hour might have been within reasonable boundaries. But whether or not the fifty-five-mile limit, as we observe it, would have, in fact, reflected a widely supported and essentially consensual outcome of some referendum process cannot be determined directly. The observed results could just as well reflect the preferences of members of the governmental bureaucracy who were able to exert sufficient influence on the legislators who took the policy action.

V. CONSTITUTIONAL CONTRACT

If we look too closely at particular policy measures in this way, however, we tend to overlook the necessary differentiation between the constitutional and the postconstitutional stage of political action. Should we think of applying contractarian criteria at the postconstitutional level at all? Or should we confine this procedure to the constitutional level? In reference to the fifty-five-mile limit, so long as the legislature acted within its authorized constitutional powers, which are themselves generally acceptable on contractarian grounds, the observed results in only one instance need not be required to meet conceptual contractarian tests.

At this juncture, the contractarian position again becomes highly vulnerable to the taunts of the libertarian anarchist. If specific political actions cannot be evaluated per se, but must instead be judged only in terms of their adherence to acceptable constitutional process, the basic paradigm seems lacking in teeth. Improperly applied, it may become an apology for almost any conceivable action by legislative majorities or by bureaucrats acting under the authorization of such majorities, and even strict application finds discrimination difficult. This criticism is effective, and the contrast-

ing stance of the uncompromising libertarian anarchist is surely attractive in its superior ability to classify. Since, to the anarchist, all political action is illegitimate, the set of admissible claims begins and remains empty.

The constitutionalist-contractarian can, and must, retreat to the procedural stage of evaluation. If his hypotheses suggest that particular political actions, and especially over a sequence of isolated events, fail to reflect consensus, he must look again at the constitutional authorizations for such actions. Is it contractually legitimate that the Congress and the state legislatures be empowered by the constitution to impose speed limits? What about the activities of the environmental agencies, acting as directed by the Congress? What about the many regulatory agencies? Such questions as these suggest that the constitutionalist-contractarian must devote more time and effort into attempts to derive appropriate constitutional limits, and notably with respect to the powers of political bodies to restrict economic liberties. Furthermore, the many interdependencies among the separate political actions, each of which might be plausibly within political limits, must be evaluated.[4] Admittedly, those of us who share the constitutionalist-contractarian approach have been neglectful here. We have not done our homework well, and the research agenda facing us is large indeed.

Meanwhile, we can, as philosophical fellow travelers, welcome the arguments put forth by the libertarian anarchists in condemning the political suppressions of many individual liberties. We can go part of the way on genuine contractarian principles, and we can leave open many other cases that the anarchists can directly condemn. As I have noted elsewhere,[5] the limited-government ideals of the constitutionalist-contractarian may not excite the minds of modern man, and given the demonstrable overextension of political powers, the no-government ideals propounded by the libertarian anarchists may help to tilt the balance toward the individualistic and away from the nonindividualistic pole.

I have acknowledged above that the anarchist critique of existing political institutions is probably intellectually more satisfying than that which may be advanced by the contractarian. But where the anarchist critique falters, and where the contractarian paradigm is at its strongest, is at the bridge between negative criticism and

constructive proposals for change. To the libertarian anarchist, all political action is unjustified. He cannot, therefore, proceed to advocate a politically orchestrated dismantling of existing structure. He has no test save his own values, and he has no means of introducing these values short of revolution. The contractarian, by contrast, has a continuing test which he applies to observed political structure. Do these basic laws and institutions reflect consensus of the citizenry? If they do not, and if his arguments to this effect are convincing, it becomes conceptually possible to secure agreement on modification. The rules of the game may be modified while the game continues to be played, so long as we all agree on the changes. But why not eliminate the game?

This returns us to the initial distinction made between the ideal society of the philosophical anarchist and that of the contractarian. To eliminate all rules and require that play in the social game take place within self-imposed and self-policed ethical standards places too much faith in human nature. Why do we observe rules in ordinary games, along with referees and umpires? Empirical examination of such voluntary games among persons offers us perhaps the most direct evidence for the central contractarian hypothesis that rules, laws, are generally necessary.

VI. DEFINITION OF INDIVIDUAL RIGHTS

I could end this paper here and remain within the limits of most discussion by economists. Traditionally, economists have been content to treat exchange and contract, in all possible complexities, on the assumption that individual participants are well-defined entities, capable of making choices among alternatives, and in mutual agreement concerning legal titles or rights to things that are subject to exchange. The distribution of basic endowments, human and nonhuman, among persons has been taken as a given for most economic analysis, both positive and normative. The libertarian anarchist has gone further; in order to develop his argument that any and all political structure is illegitimate, he finds it necessary to presume that there are definitive and well-understood "natural boundaries" to individuals' rights. These boundaries on rights are held sacrosanct, subject to no justifiable "crossings" without consent.[6]

The problem of defining individual boundaries, individual rights, or, indeed, defining "individuals" must arise in any discussion of social order that commences with individuals as the basic units. Who is a person? How are rights defined? What is the benchmark or starting point from which voluntary contractual arrangements may be made?

I stated earlier that the primary value premise of individualism is the moral equality of men as men, that no man counts for more than another. This remains, and must remain, the fundamental normative framework even when we recognize inequalities among persons in other respects. The libertarian anarchist accepts this framework, but in a much more restricted application than others who also fall within the individualistic set. The libertarian anarchist applies the moral equality norm in holding that each and every man is *equally* entitled to have the natural boundaries of his rights respected, regardless of the fact that, among persons, these boundaries may vary widely.[7] *If* such natural boundaries exist, the contractarian may also use the individual units defined by such limits as the starting point for the complex contractual arrangements that emerge finally in observed, or conceptually observed, political structures.[8] Within the presupposition that natural boundaries exist, the differences between the constitutionalist-contractarian and the libertarian anarchist reduce to the variant hypotheses concerning the interdependencies among persons, as defined, interdependencies that could be, as noted above, subjected to testing at a conjecturally empirical level.

But do such natural limits or boundaries exist? Once we move beyond the simple rights to persons in the strictly physical sense, what are the distinguishing characteristics of boundary lines? In all cases where separate individual claims may come into conflict, or potential conflict, what is the natural boundary? Robin Hood and Little John meet squarely in the center of the footbridge. Who has the right of first passage? [9]

Robert Nozick makes a bold attempt to answer such questions by referring to the process of acquisition. In his formulation, the legitimacy of the boundary limits among persons depends upon the process through which rights are acquired and not on the absolute or relative size of the bundle that may be in the possession or nominal ownership of a person or group. A person who has acquired

assets by voluntary transfer holds the rights to these assets within admissible natural boundary limits. A person who holds assets that have been acquired, by him or by others in the past, by nonvoluntary methods has little claim to include these assets within the natural limits.

What is the ultimate test for the existence of natural boundaries? This must lie in the observed attitudes of individuals themselves. Do we observe persons to act as if there were natural boundaries on the rights of others, beyond those formally defined in legal restrictions? The evidence is not all on one side. In rejecting the extreme claims of the libertarian anarchists, we should not overlook the important fact that a great deal of social interaction does proceed without formalized rules. For large areas of human intercourse, anarchy prevails and it works. We need no rules for directing pedestrian traffic on busy city sidewalks; no rules for ordinary conversation in groups of up to, say, ten persons; no rules for behavior in elevators.

In the larger context, however, the evidence seems to indicate that persons do not mutually and simultaneously agree on dividing lines among separate rights. There is surely a contractual logic for at least some of the activity of the state in defining and enforcing the limits on the activities of persons. To accept this, however, does not imply that the legally defined rights of individuals, and the distribution of these rights, are arbitrarily determined by the political authorities. If we reject the empirical existence of natural boundaries, however, we return to the initial question. How do we define "individuals" for the purpose of deriving the contractual basis for political authority?

VII. THE HOBBESIAN SETTING

The only alternative seems to be found in the distribution of limits on individuals' spheres of action that would be found in the total absence of formalized rules, that is, in genuine Hobbesian anarchy. In this setting, some "equilibrium," some sustainable distribution of allowable activities would emerge. This distribution would depend on the relative strengths and abilities of persons to acquire and to maintain desirable goods and assets. The "law of the jungle" would be controlling, and no serious effort could be made to attribute moral legitimacy to the relative holdings of persons. But

this construction does have the major advantage of allowing us to define, in a conjecturally positive sense, a starting point, an "original position" from which any contractual process might commence.[10] Individuals need not be "natural equals" in this Hobbesian equilibrium, but they would still find it mutually advantageous to enter into contractual agreements which impose limits on their own activities, which set up ideally neutral governmental units to enforce these limits.

The perspective changes dramatically when this, essentially Hobbesian, vision is substituted for the natural boundaries or Lockean vision, when the existence of natural boundaries to the rights of persons that would be generally agreed upon and respected is denied. In the Nozick variant of the Lockean vision, anarchy, the absence of formalized rules, the absence of law along with means of enforcement, offers a highly attractive prospect. By contrast, in the basic Hobbesian vision, or in any paradigm that is derivative from this, anarchy is not a state to be desired at all. Life for the individual in genuine anarchy is indeed predicted to be "poor, nasty, brutish, and short." The Hobbesian jungle is something to be avoided, and something that rational self-interested persons will seek to avoid through general agreement on law, along with requisite enforcement institutions, even if, in the extreme, the contract may be irreversible and Hobbes's Leviathan may threaten.[11]

VIII. CONCLUSIONS

We have here a paradox of sorts. The libertarian anarchist and the contractarian share the individualistic value premise. In addition, their diagnoses of current social malaise is likely to be similar in condemning overextended governmental authority. Further, the items on both agenda for policy reform may be identical over a rather wide range. In their descriptions of the "good society," however, these two sets of political philosophers are likely to differ widely. The constitutionalist-contractarian, who looks to his stage two set of ideals, and who adopts at least some variant of the Hobbesian assumption about human nature, views anarchy, as an institution, with horror. To remove all laws, all institutions of order, in a world peopled by Hobbesian men would produce chaos. The

contractarian must hold fast to a normative vision that is not nearly so simplistic as that which is possible either for the libertarian anarchist or for the collectivist. The contractarian seeks "ordered anarchy," that is, a situation described as one that offers maximal freedom for individuals within a minimal set of formalized rules and constraints on behavior. He takes from classical economics the important idea that the independent actions of many persons can be spontaneously coordinated through marketlike institutions so as to produce mutually desirable outcomes without detailed and direct interferences of the state. But he insists, with Adam Smith, that this coordination can be effective only if individual actions are limited by laws that cannot themselves spontaneously emerge.

The contractarian position requires sophisticated discrimination between those areas of potential human activity where "law" is required and those areas that had best be left alone. The "efficient" dividing line must be based on empirical reality. Formal law may be severely limited in a society characterized by widespread agreement on the structure of rights and embodying agreed-on ethical standards of mutual respect. The scope for law becomes much more extensive in a society populated by hedonists who neither agree upon reciprocal rights nor upon desired standards of personal conduct. Between the libertarian anarchist, who sees no cause for any laws, and who trusts to individuals' own respect for each others' reciprocal natural boundaries, and the collectivist-socialist, who sees chaos as the result of any human activities that are not politically controlled, the constitutionalist-contractarian necessarily occupies the middle ground. Regardless of his empirical presuppositions, his ideal world falls "between anarchy and Leviathan," both of which are to be avoided.

NOTES

1. Murray Rothbard, *For a New Liberty* (New York: Macmillan, 1973). See also David Friedman, *The Machinery of Freedom* (New York: Harper and Row, 1973). I shall not discuss those putative anarchists who fail to see the internal contradiction between anarchy and socialism. The absurdity of such juxtaposition should be apparent without serious argument.
2. This is recognized by Plattner when he places John Rawls, an avowed contractarian, and Robert Nozick, almost a libertarian-anarchist, in

the same category "on the deepest level." Against both, Plattner advances the transcendentalist view of politics as supraindividualistic. See Marc F. Plattner, "The New Political Theory," *The Public Interest,* 40 (Summer 1975), 119-28, notably p. 127.

3. For an elaboration of the underlying theory, see James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).
4. For a general discussion of this sort of interdependence, see James M. Buchanan and Alberto di Pierro, "Pragmatic Reform and Constitutional Revolution," *Ethics,* 79 (January 1969), 95-104.
5. See my review of David Friedman's book, *The Machinery of Freedom,* in *Journal of Economic Literature,* XII (September 1974), 914-15.
6. One merit of Robert Nozick's analysis is his explicit discussion of the underlying presumptions of the "natural-boundaries" model. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
7. For purposes of discussion here, I am including Robert Nozick as being among the libertarian anarchists. Although he defends the emergence of the minimal protective state from anarchy, and specifically refutes the strict anarchist model in this respect, he does provide the most sophisticated argument for the presumption of inherent natural boundaries on individuals' rights, which is the focus of my attention here. Cf. Robert Nozick, *Anarchy, State, and Utopia,* op. cit.
8. John Locke provides a good example.
9. I use this example in several places to discuss this set of problems in my recent book, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975).
10. In his much-acclaimed book, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), John Rawls attempts to derive principles of justice from conceptual contractual agreement among persons who place themselves in an "original position" behind a "veil of ignorance." Rawls does not, however, fully describe the characteristics of the "original position." I have interpreted this position in essentially Hobbesian terms, with interesting implications. See my "A Hobbesian Interpretation of the Rawlsian Difference Principle," Working Paper CE 75-2-3, Center for Study of Public Choice, Virginia Polytechnic Institute and State University, 1975.
11. The argument of the few preceding paragraphs is developed much more fully in my book, *The Limits of Liberty,* op. cit. Also see *Explorations in the Theory of Anarchy,* edited by Gordon Tullock (Blacksburg: Center for Study of Public Choice, 1972).