ROTHBARD GRADUATE SEMINAR

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Natural Law and Positive Law
 Self Defense, Punishment, and Proportionality
 The Theory of Contracts

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MONDAY JULY 29 NATURAL LAW AND POSITIVE LAW (CH. 3, PP. 17-20) LIFEBOAT SITUATIONS (CH. 20, PP. 149-154)

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SUMMARY OF CHAPTER 3: NATURAL LAW AND POSITIVE LAW (PP. 17-20)

- WILL COVER LIFEBOAT SITUATIONS TODAY INSTEAD OF WED.
- OTHER WORKS OF ROTHBARD RELEVANT HERE, ESPECIALLY: LAW, PROPERTY RIGHTS, AND AIR POLLUTION, HTTP://WWW.MISES.ORG/ROTHBARD/LAWPROPERTY.PDF

• MAINSTREAM APPROACH TO NATURAL LAW AND POSITIVE LAW

- LEGAL PHILOSOPHERS IN THE NATURAL LAW TRADITION HAVE ARGUED THAT WHERE POSITIVE LAWS ARE IN CONFLICT WITH NATURAL LAW THEY MAY NOT BE TREATED AS VALID LAW. THEY DO NOT WANT TO "SEPARATE" LAW AND MORALS. SO-CALLED "LEGAL POSITIVISTS" SAY DISTINGUISH THE LAW THAT IS FROM THE LAW THAT OUGHT TO BE.
 - WWW.LAW.USYD.EDU.AU/~LIBRARY/LAWX/MAREX97/JURIS C197.HTM
- O "NATURAL LAW THEORY HOLDS THAT ALONG WITH THE POSITIVE LAW THERE EXIST CERTAIN IDEAL PRINCIPLES OR VALUES TO WHICH THE POSITIVE LAW SHOULD CORRESPOND IF IT IS TO BE REGARDED AS GENUINE LAW. THUS, WHILE POSITIVISM HOLDS THAT TO BE VALID LAW, ALL THAT IS REQUIRED IS THAT IT SHOULD ISSUE FROM A COMPETENT LEGISLATOR [OR COMMON LAW SYSTEM] AFTER FOLLOWING THE PRESCRIBED PROCESS, NATURAL LAW THEORY REQUIRES IN ADDITION THAT SUCH LAW, TO BE VALID, MUST CONFORM TO SOME IDEAL PRINCIPLE (WHICH MAY EMANATE FROM MORALITY, REASON, GOD, OR SOME OTHER SUCH SOURCE)."
 - HTTP://WWW.EBC-INDIA.COM/LAWYER/ARTICLES/496 1.HTM
- O THE FAMOUS HART/FULLER DEBATE FOLLOWED THE ASSERTION BY A GERMAN LEGAL PHILOSOPHER (RADBRUCH) THAT CERTAIN NAZI LAWS HAD BEEN SO MORALLY INIQUITOUS THAT THEY OUGHT NOT TO BE TREATED AS POSITIVE OR VALID LAW.

HTTP://WWW.MISES.ORG/EVENT.ASPX?CONTROL=40&TITLE=ROTHBARD+GRADUATE+SEMINAR

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- EXAMPLE IN THE HART-FULLER DEBATE: THE WIFE OF A GERMAN WHO REPORTED HER HUSBAND TO THE GESTAPO FOR CRITICIZING HITLER'S CONDUCT OF THE WAR. THE HUSBAND WAS TRIED AND SENTENCED TO DEATH, BUT HIS SENTENCE WAS CONVERTED TO SERVICE AS A SOLDIER ON THE RUSSIAN FRONT. THE HUSBAND SURVIVED THE WAR, AND AFTER THE WAR INSTITUTED LEGAL PROCEEDINGS AGAINST HIS WIFE.
- THE WIFE'S DEFENCE WAS THAT HER HUSBAND HAD COMMITTED AN OFFENCE UNDER A NAZI STATUTE OF 1934. POST-WAR GERMANY, HOWEVER, HELD THE WIFE LIABLE.
- WAS THE PREVIOUS POSITIVE LAW PERMITTING HER TO RAT OUT HER HUSBAND A "VALID" LAW? WAS IT A DEFENSE TO A LATER LAWSUIT AGAINST HER?
- O FULLER ARGUED THAT THE CONCEPT OF THE RULE OF LAW IMPLIED CERTAIN FORMAL CRITERIA SUCH AS CERTAINTY AND CONSISTENCY AND WHERE THESE WERE VIOLATED THE RULES WERE NOT VALID LAWS. THEREFORE, THE NAZI REGIME WAS SO "LAWLESS" THAT NOTHING THEREIN COULD QUALIFY AS LAW. THE WIFE THUS HAD NO DEFENSE THAT SHE WAS FOLLOWING "THE LAW" AT THE TIME.
 - FORMAL CRITERIA: FULLER SAYS: NOTHING CAN COUNT AS LAW UNLESS IT IS CAPABLE OF PERFORMING LAW'S ESSENTIAL FUNCTION OF GUIDING BEHAVIOR. AND TO BE CAPABLE OF PERFORMING THIS FUNCTION, A SYSTEM OF RULES MUST SATISFY THE FOLLOWING PRINCIPLES: (P1) THE RULES MUST BE EXPRESSED IN GENERAL TERMS; (P2) THE RULES MUST BE PUBLICLY PROMULGATED; (P3) THE RULES MUST BE PROSPECTIVE IN EFFECT; (P4) THE RULES MUST BE EXPRESSED IN UNDERSTANDABLE TERMS; (P5) THE RULES MUST BE CONSISTENT WITH ONE ANOTHER; (P6) THE RULES MUST NOT REQUIRE CONDUCT BEYOND THE POWERS OF THE AFFECTED PARTIES; (P7) THE RULES MUST NOT BE CHANGED SO FREQUENTLY THAT THE SUBJECT CANNOT RELY ON THEM; AND (P8) THE RULES MUST BE ADMINISTERED IN A MANNER CONSISTENT WITH THEIR WORDING."
 - HTTP://WWW.UTM.EDU/RESEARCH/IEP/N/NATLAW.HTM
- O HART ARGUED THAT THIS NATURAL LAW DEBATE CONFUSED THE ISSUE OF WHAT LAWS OUGHT TO BE WITH WHAT LAWS IN FACT EXIST. HART ARGUED THAT THE DECISION OF THE COURT WAS WRONG, AS THE NAZI LAW OF 1934 WAS A VALID LAW—IT SATISFIED HIS "RULE OF RECOGNITION", E.G. IT HAD BEEN ISSUED BY A GOVERNMENT RECEIVING REGULAR OBEDIENCE FROM THE CITIZENS.
- AS ONE COMMENTATOR HAS POINTED OUT, "THE ANXIETY OF NATURAL LAW THINKERS LIKE FULLER IS THAT UNLESS NAZI LAWS ARE TREATED AS NON-LAWS, THOSE WHO PERPETRATED ATROCITIES UNDER THE NAZI REGIME COULD ESCAPE PUNISHMENT."
- O BUT THIS IS NOT A CONCERN FOR LIBERTARIANS, BECAUSE WE DISTINGUISH BETWEEN NATURAL LAW AND POSITIVE LAW.
 - HART SAID THAT IF WE WANTED TO PUNISH PEOPLE WHO HAD ACTED IN OBEDIENCE TO PREVIOUS POSITIVE LAW, RETROSPECTIVE (RETROACTIVE) LAWS COULD HAVE BEEN FRAMED AFTER THE WWII RETROSPECTIVELY REPEALING NAZI LAWS AND RETROSPECTIVELY DECLARING THE ACTS OF PERPETRATORS OF SUCH ATROCITIES AS CRIMINAL.
 - HTTP://WWW.EBC-INDIA.COM/LAWYER/ARTICLES/496 1.HTM
 - DOES A LIBERTARIAN HAVE A PROBLEM WITH THIS, IN GENERAL?

LIBERTARIAN APPROACH

- MAINSTREAM APPROACH IS CONFUSED. JUST BECAUSE A POSITIVE LAW IS IDENTIFIABLE AS
 LAW, DOES NOT MEAN IT IS LEGITIMATE. "VALID" AND "GENUINE" ARE AMBIGUOUS. IF
 "VALID" MEANS "AN ACTUAL LAW", SATISFYING FORMAL CRITERIA OF WHAT LAW IS, FINE.
- LIBERTARIAN APPROACH: WE **CAN IDENTIFY** POSITIVE LAW, WHETHER IT'S LEGITIMATE OR NOT. JUST BECAUSE IT'S A "VALID" LAW DOES NOT MEAN IT'S ETHICALLY VALID, I.E. LEGITIMATE—I.E., CONSISTENT WITH NATURAL RIGHTS.
 - O SUPREME COURT JUSTICE OLIVER WENDELL HOLMES' "BAD MAN" APPROACH TO POSITIVE LAW: LAWS SHOULD BE WRITTEN AND UNDERSTOOD FROM THE STANDPOINT OF "THE BAD MAN," HE WHO WILL DO THE ABSOLUTE MINIMUM NECESSARY TO AVOID THE SANCTIONS OF HIS NEIGHBORS. "IF YOU WANT TO KNOW THE LAW AND NOTHING ELSE, YOU MUST LOOK AT IT AS A BAD MAN, WHO CARES ONLY OF THE MATERIAL CONSEQUENCES WHICH SUCH KNOWLEDGE ENABLES HIM TO PREDICT".
 - O THIS IS NOT TO SAY THAT GIVEN RULES BACKED BY FORCE, FROM THE STATE, HAVE TO SATISFY CERTAIN CRITERIA TO BE IDENTIFIED AS "LAW"—E.G. BEING PUBLICLY KNOWN, CONSISTENT, ETC.
 - PURPOSE IS ALSO RELEVANT TO UNDERSTANDING WHAT A LAW IS: "[SUPPOSE A] LEGAL RULE FORBIDS YOU TO TAKE A VEHICLE INTO THE PUBLIC PARK. PLAINLY THIS FORBIDS AN AUTOMOBILE, BUT WHAT ABOUT BICYCLES, ROLLER SKATES, TOY AUTOMOBILES? WHAT ABOUT AIRPLANES? ARE THESE, AS WE SAY, TO BE CALLED "VEHICLES" FOR THE PURPOSE OF THE RULE OR NOT?" WHAT ABOUT A HORSE? WHAT ABOUT A CAR OR MOTORCYLE MOUNTED AS A STATUE, IN THE PARK? WE NEED TO LOOK AT THE PURPOSE OF A LAW (ESPECIALLY A STATUTE) IN ORDER TO APPLY IT TO NEW SITUATIONS.
 - H.L.A. HART: "THE PROBLEM OF INTERPRETATION", IN "POSITIVISM AND THE SEPARATION OF LAW AND MORALS", 71 HARV. L. REV. 593, 606-615 (1958).
 - HTTP://WWW.KENTLAW.EDU/CLASSES/RWARNER/JUSTICE/SYLLABUS/HINTERP.HTML
 - O BUT NONE OF THIS MEANS THAT AN UNJUSTIFIED OR IMMORAL LAW IS NOT A POSITIVE (ACTUAL) LAW. AND JUST BECAUSE WE HAVE TO LOOK AT A LAW'S PURPOSE TO UNDERSTAND ITS CONTENT, DOES NOT MEAN THAT IT HAS TO BE A MORAL OR LEGITIMATE PURPOSE TO COUNT AS LAW.
- AS ROTHBARD SAID [AIR POLL, 122]: "MANY WRITERS AND JURISTS HAVE CLAIMED THE LAW IS A VALUE-FREE, "POSITIVE" DISCIPLINE. **OF COURSE IT IS POSSIBLE SIMPLY TO LIST, CLASSIFY AND ANALYZE EXISTING LAW WITHOUT GOING FURTHER INTO SAYING WHAT THE LAW SHOULD OR SHOULD NOT BE.**" THIS IS DISTINGUISHED FROM THE JURIST'S "ESSENTIAL TASK": "SINCE THE LAW IS ULTIMATELY A SET OF NORMATIVE COMMANDS, THE TRUE JURIST OR LEGAL PHILOSOPHER HAS NOT COMPLETED HIS TASK UNTIL HE SETS FORTH WHAT **THE LAW SHOULD BE**, DIFFICULT THOUGH THAT MIGHT BE."

PURPOSE OF NATURAL LAW

- NATURAL LAW: PROVIDES OBJECTIVE NORMS BY WHICH TO COMPARE *POSITIVE LAW* OF THE STATE.
 - O ROTHBARD EMPHASISES REASON VERSUS BOTH CUSTOM AND POSITIVE LAW—OBJECTIVE MORAL PRINCIPLES CAN COME INTO CONFLICT WITH BOTH CUSTOM AND POSITIVE LAW
 - O ROTHBARD WOULD NOT DISAGREE THAT WE CAN IDENTIFY POSITIVE LAW, EVEN IF IT

IS "BAD" LAW.

- WE HAVE TO IDENTIFY IT TO CRITIQUE IT AND TO COMPARE IT TO THE GUIDEPOST OF NATURAL RIGHTS
- EVERYONE WHO CRITICIZES ANY GIVEN POSITIVE LAW OR RECOMMENDS THAT IT "SHOULD" BE CHANGED HAS SOME IMPLICIT NATURAL LAW THEORY.
- MOST PEOPLE WHO DENY NATURAL LAW AND NATURAL RIGHTS ARE SIMPLY INCONSISTENT AND HYPOCRITES.

ARE NATURAL RIGHTS ETHICAL RULES?

- WHAT IS THE ETHICAL STATUS OF NATURAL LAW AND NATURAL RIGHTS? ARE NATURAL RIGHTS ETHICAL RULES?
 - O SEE PREFACE, P. XLVIII: ROTHBARD SAYS HIS BOOK COVERS NOT ETHICS IN GENERAL, BUT ONLY THE SUBSET OF ETHICS DEVOTED TO POLITICAL PHILOSOPHY.
 - O BUT SEE LIFEBOAT SITUATIONS (CH. 20): IN THIS CHAPTER R POINTS OUT THAT "LIFEBOAT SITUATIONS" ARE NOT VALID TESTS OF A THEORY OF R IGHTS OR ANY MORAL THEORY; PROBLEMS A MORAL THEORY IN AN EXTREME SITUATION DON'T INVALIDATE A THEORY DESIGNED TO FRAME AN ETHIC FOR MAN BASE DON HIS NORMAL NATURE, NOT FOR RARE AND ABNORMAL SITUATIONS.
 - Does this make sense? R makes good point that a tough ethical decision (save only 1 of 2 kids) does not invalidate the general ethical principles of saving your kids
 - LIFEBOAT SIT. IS WAR OF ALL AGAINST ALL (150). SINCE POINT OF RIGHTS IS TO AVOID CONFLICT, RIGHTS DO NOT APPLY WHEN CONFLICT IS SIMPLY NOT AVOIDABLE.
 - Plus: Why is this a critique of libertarian ethic—could any other ethic handle it better?
 - JUST AS RIGHTS CAN BE VIOLATED, TRAGEDY IN LIFE CAN HAPPEN
 - O BUT R THEN (152, EXAMPLE OF 2 SHIPWRECKED MEN FIGHTING OVER A PLANK): DISTINGUISHES BETWEEN "THE QUESTION OF THE MORAL COURSE OF ACTION FOR THE PERSON IN SUCH A TRAGIC SITUATION WITH THE TOTALLY SEPARATE QUESTION OF WHETHER OR NOT HIS SEIZING OF LIFEBOAT OR PLANK SPACE BY FORCE CONSTITUTES AN INVASTION OF SOMEONE ELSE'S PROPERTY RIGHTS. FOR WE ARE NOT, IN CONSTRUCING A THEORY OF LIBERTY AND PROPERTY, I.E. A "POLITICAL" ETHIC, CONCERNED WITH ALL PERSONAL MORAL PRINCIPLES. ... WHETHER OR NOT IT IS MORAL ... FOR [LATECOMER TO THE LIFEBOAT] TO FORCE SOMEONE ELASE OUT OF THE LIFEBOAT ... IS NOT OUR CONCERN AND NOT THE PROPER CONCERN OF A THEORY OF POLITICAL ETHICS."
 - O SEEMS THAT R IS SAYING THAT NATURAL RIGHTS DO NOT NECESSARILY TRANSLATE INTO PERSONAL ETHICAL RULES. IT CAN BE "MORAL" TO VIOLATE A RIGHT.
 - O [R, AIR POLL, P. 122]: "IF ETHICS IS A NORMATIVE DISCIPLINE THAT IDENTIFIES AND CLASSIFIES CERTAIN SETS OF ACTIONS AS GOOD OR EVIL, RIGHT OR WRONG, THEN [...] LAW IS A SUBSET OF ETHICS IDENTIFYING CERTAIN ACTIONS AS APPROPRIATE FOR USING VIOLENCE AGAINST THEM. THE LAW SAYS THAT ACTION X SHOULD BE ILLEGAL, AND THEREFORE SHOULD BE COMBATED BY THE VIOLENCE OF THE LAW. THE LAW IS A SET OF "OUGHT" OR NORMATIVE PROPOSITIONS.
 - O SO WHAT DOES IT MEAN THAT POLITICAL PHILOSOPHY IS A "SUBSET" OF ETHICS? THAT "POLITICAL ETHICS" IS A TYPE OF, OR SUBSET OF, ETHICAL INQUIRY IN GENERAL, BUT IT

IS RESTRICTED TO THE QUESTION OF WHAT RIGHTS ARE, I.E. WHEN THE USE OF DEFENSIVE OR RETALIATORY FORCE (E.G., TO PUNISH AN ACTOR) IS LEGITIMATE OR JUSTIFIED.

- I.E., AN INFRINGEMENT OF RIGHTS MAY BE MORAL, BUT IT IS STILL AN INVASION OF RIGHTS AND SUBJECT TO PUNISHMENT. (SEE QUOTE OF PROF. MORRIS, IN NOTE 6, P. 153)
- IS THERE ANY RELATIONSHIP BETWEEN NATURAL RIGHTS AND MORAL/ETHICAL RULES? CAN WE AT LEAST SAY AN ACTION IN VIOLATION OF A RIGHT IS PRESUMPTIVELY IMMORAL?
 - O DO RIGHTS GUIDE CONDUCT IN GENERAL? OR ONLY FORCE-WIELDING CONDUCT DIRECTED AGAINST AN ALLEGED WRONGDOER?
 - SEEMS THAT RIGHTS GUIDE THE FORCE-WIELDING CONDUCT AND RELATED RULES, I.E. WHEN IT IS LEGITIMATE TO USE FORCE
 - RIGHTS ALSO GUIDE THE CONDUCT OF THOSE WHO **DESIRE** TO RESPECT OTHERS' RIGHTS, I.E. TO **ACT LEGITIMATELY OR JUSTIFIABLY**
 - O RELATION BETWEEN POSITIVE LAW AND NATURAL LAW.
 - IF THERE IS NO NECESSARY MORAL OBLIGATION TO FOLLOW RULES OF NATURAL LAW (IT'S NOT A SUBSET OF ETHICS!), THEN ISN'T THE CLAIM THAT ONE HAS A MORAL OBLIGATION TO OBEY POSITIVE LAW (WHATEVER IT IS) EVEN MORE DUBIOUS?

HOW TO DERIVE NATURAL RIGHTS? META STUFF

- How to derive natural rights?
 - O BY ANALYZING NATURE OF MAN.
 - O SEE HOPPE-INTRO, PP. XXXIV-XXXV; AND PP. 32-33: ROTHBARD SHOWS SELF-OWNERSHIP AND ORIGINAL APPROPRIATION TO BE THE PRAXEOLOGICAL PRECONDITION OF ARGUMENTATION, AND HIS RECOGNITION THAT WHATEVER MUST BE PRESUPPOSED AS VALID IN ORDER TO MAKE ARGUMENTATION POSSIBLE IN THE FIRST PLACE, CAN'T BE DISPUTED W/O CONTRADICTION.
 - R: 32-33: SAYS A PROPOSITION IS AN AXIOM (RANDIAN LINGO FOR SYNTHETIC APRIORI TRUTH) IF SOMEONE NECESSARILY USES OR PRESUPPOSES ITS TRUTH IN THE VERY COURSE OF DENYING OR REFUTING IT.
 - AND, ANYONE PARTICIPATING IN A DISCUSSION, INCLUDING ONE ABOUT VALUE
 [E.G., ETHICS, RIGHT AND WRONG, PROPERTY RIGHTS, PUNISHMENT, ETC.] IS, BY
 VIRTUE OF PARTICIPATING, ALIVE AND AFFIRMING LIFE—THIS ESTABLISHES AS
 AN AXIOM, THE VALUE OF PRESERVATION AND FURTHERANCE OF ONE'S LIFE.
 - TO PRESERVE AND FURTHER LIFE, REQUIRES NATURAL RIGHTS IN ACCORDANCE WITH MAN'S NATURE... THIS IS HOW ROTHBARD SHOWS THAT "NATURAL LAW" AND "NATURAL RIGHTS" ARE JUSTIFIED STANDARDS FOR CRITIQUING POSITIVE LAW.
 - HOPPE COMBINED THIS "UNFORTUNATELY BRIEF BY CENTRALLY IMPORTANT PASSAGE" WITH SIMILAR REASONING BY HIS MENTOR HABERMAS, AND APEL (KANTIAN ARGUMENTATION ETHICS THEORISTS) TO EXTENT THE ROTHBARDIAN INSIGHT FURTHER, IN HIS LIBERTARIAN ARGUMENTATION ETHICS
 - [WHICH ROTHBARD HEARTILY ENDORSED BY THE WAY, IN LIBERTY 1988 SYMPOSIUM, BUT NO TIME TO GO INTO THIS NOW]

- BARNETT'S DISTINCTION: BACKGROUND RIGHTS AND LEGAL PRECEPTS
 - DARNETT: PRINCIPLES SUCH AS PRIVATE PROPERTY, FIRST POSSESSION, AND FREEDOM OF CONTRACT ARE VERY ABSTRACT. THESE ABSTRACT BACKGROUND RIGHTS CANNOT SERVE TO GUIDE CONDUCT EXCEPT IN RELATIVELY RARE SITUATIONS. SO A LEGAL SYSTEM MUST DEVELOP A BODY OF CONCRETE LEGAL RULES ("LEGAL PRECEPTS"), BASED ON OR AT LEAST COMPATIBLE WITH THE ABSTRACT BACKGROUND RIGHTS.
 - THE LEGAL PRECEPTS, ALONG WITH ABSTRACT LEGAL RIGHTS, CAN SERVE AS GUIDES TO ACTION.
 - SO "NATURAL RIGHTS" = BACKGROUND RIGHTS PLUS ASSOCIATED LEGAL PRECEPTS
 - ACTUALLY EXISTING OR ENFORCED RIGHTS, "LEGAL RIGHTS" (POSITIVE LAW)
 SHOULD CONFORM TO BACKGROUND RIGHTS AND ASSOCIATED LEGAL PRECEPTS.
 - How are **BACKGROUND RIGHTS** DERIVED? How are concrete legal precepts developed?
 - ROTHBARD WOULD SAY THAT LIBERTARIANS CAN DERIVE AT LEAST BACKGROUND RIGHTS BY NATURAL LAW-TYPE REASONING
 - PRACTICAL LEGAL RULES MUST BE CONCRETE IN THE SENSE THAT THE RULES MUST TAKE INTO ACCOUNT THE ENTIRE RELEVANT FACTUAL CONTEXT. HOWEVER, SINCE THERE ARE AN INFINITE NUMBER OF FACTUAL SITUATIONS THAT COULD EXIST IN INTERACTIONS BETWEEN INDIVIDUALS, A PROCESS WHICH FOCUSES ON ACTUAL CASES OR CONTROVERSIES IS LIKELY TO PRODUCE THE MOST "INTERESTING" OR USEFUL RULES.
 - This is analogous to Mises's method selecting certain empirical assumptions (e.g., assuming there is money instead of barter) to develop "**interesting**" laws based on the fundamental axioms of praxeology, rather than irrelevant or uninteresting (though not invalid) laws. Mises, The Ultimate Foundation of Economic Science, p. 41; idem, Epistemological Problems of Economics, pp. 14-16, 30-31, 87-88; idem, Human Action, ch. II, sec. 10, pp. 65-66.
 - A DECENTRALIZED LEGAL SYSTEM SUCH AS THE ENGLISH COMMON LAW (OR THE EARLY ROMAN LAW, THE LAW MERCHANT, AND EVEN MODERN ARBITRAL SYSTEMS)—ESPECIALLY ONE IN WHICH JUDGES OR ARBITRATORS ATTEMPT TO APPLY FUNDAMENTAL NOTIONS OF JUSTICE TO CONCRETE SITUATIONS—IT IS REASONABLE TO EXPECT A BODY OF CONCRETE LEGAL CONCEPTS AND PRECEPTS TO DEVELOP, WHICH ARE MORE OR LESS COMPATIBLE WITH FUNDAMENTAL NOTIONS OF JUSTICE.
 - BARNETT PROVOCATIVELY ARGUES THAT THE "LEGAL RIGHTS" (POSITIVE LAW)
 GENERATED BY A COMMON LAW PROCESS MAY EVEN BE ENTITLED TO
 PRESUMPTIVE LEGITIMACY.
 - IS THIS CORRECT?
 - AS R POINTS OUT, NATURAL RIGHTS CAN CONFLICT WITH BOTH POSITIVE LAW AND CUSTOMARY LAW (COMMON LAW CAN BE CONSIDERED TO BE BOTH).
 - IS THERE ANY NATURAL LIMIT TO OUR ABILITY TO DEDUCE, BY

- REASON, BACKGROUND RIGHTS AS WELL AS A SET OF COMPATIBLE, AND MORE CONCRETE, LEGAL PRECEPTS?
- OTHER QUESTIONS: EXACTLY HOW LIBERTARIAN ARE THE ABSTRACT RIGHTS AND LEGAL PRECEPTS THAT HAVE BEEN FOLLOWED THROUGHOUT THE AGES BY JUDGES AND JURISTS OF THE COMMON LAW, ROMAN LAW, AND LAW MERCHANT? JUST HOW STRONG IS BARNETT'S PRESUMPTION OF LEGITIMACY WHICH IS TO BE ACCORDED TO THESE EXTANT BODIES OF LAW? WHICH CONCEPTS OF THE COMMON LAW ARE ILLIBERAL ENOUGH, WHEN COMPARED TO LIBERTARIAN, ABSTRACT BACKGROUND RIGHTS, TO OVERCOME THE PRESUMPTION OF LEGITIMACY? HOW DID THE COMMON LAW HAPPEN TO EMPLOY MORE OR LESS CORRECT ABSTRACT PRINCIPLES OF JUSTICE EVEN BEFORE MODERN LIBERTARIAN THEORY? ARE THESE PRINCIPLES INTUITIVE? WAS IT LUCK? NATURAL SELECTION?

META THEORY

- Preliminary points: rights are normative; prescriptive.
 - O AT THE LEAST, HAVING A RIGHT IMPLIES THE VICTIM IS *JUSTIFIED* IN USING FORCE TO DEFEND OR RETALIATE AGAINST AN INFRINGEMENT OF HIS RIGHTS.
 - O AT THE MOST, THEY IMPLY THAT THE INFRINGER SHOULD NOT INFRINGE
 - O BUT RIGHTS CAN BE VIOLATED. THEY ARE UNLIKE DESCRIPTIVE FACTS, E.G. CAUSAL LAWS SUCH AS GRAVITY, WHICH CANNOT BE VIOLATED.
- WHAT IS THE NATURE AND FUNCTION OF RIGHTS? *HOW* ARE THEY DEDUCED, DEVELOPED, JUSTIFIED, IN GENERAL?
 - O CONSIDER CASE OF PROPERTY RIGHTS, AS AN ANALOGY. IF THERE WERE SUPERABUNDANCE AND LITERALLY NO SCARCITY AT ALL, IF YOUR TAKING MY BANANA DID NOT DEPRIVE ME OF IT, THERE WOULD BE NO POSSIBILITY OF CONFLICT, AND THUS NO NEED FOR PROPERTY RIGHTS. PROPERTY RIGHTS ALLOCATE SPECIFIC OWNERS TO SPECIFIC SCARCE RESOURCES, AND ESTABLISH PUBLICLY-VISIBLE BORDERS SO THAT CONFLICTS **CAN** BE AVOIDED.
 - O SOMEONE MIGHT IGNORE THE BORDER. THEY MIGHT NOT CARE ABOUT RESPECTING OTHERS RIGHTS, OR AVOIDING CONFLICT. BUT THAT DOES NOT PROVE THAT THE PROPERTY RIGHT DID NOT EXIST.
 - O IF A MURDERS B, IT DOES NOT PROVE B DIDN'T HAVE A RIGHT TO LIFE. IT JUST SHOWS RIGHTS CAN BE INFRINGED.
 - O IN ANY SOCIETY THERE ARE A NUMBER OF "CIVILIZED" MEN AND A NUMBER OF OUTLAWS. THE OUTLAWS ARE LIKE ANIMALS: THEY DON'T CARE ABOUT JUSTIFYING THEIR ACTIONS. THEY DO WHAT THEY CAN GET AWAY WITH. BUT THE EXISTENCE OF OUTLAWS IS IRRELEVANT TO THE EXISTENCE OF RIGHTS—RIGHTS ARE PRESCRIPTIVE, AND CAN BE VIOLATED.
 - THE "CIVILIZED" ARE THOSE AMONG US WHO SEEK TO JUSTIFY THEIR ACTIONS, IN PARTICULAR USES OF FORCE AGAINST OTHERS.
 - HUMANS INTERACT WITH MATERIAL STUFF IN REALITY, INCLUDING OTHER PEOPLE. WE
 EMPLOY VARIOUS SCARCE RESOURCES TO ACHIEVE OUR GOALS. JUST AS I MAY DESIRE
 TO APPROPRIATE AND USE A SCARCE RESOURCE, ON OCCASION I MAY DESIRE TO "USE"
 THE BODY OF ANOTHER HUMAN:
 - TO EAT IT, TO HAVE SEX WITH IT, TO ENSLAVE IT, TO KILL IT.
 - I MAY WANT TO HIT YOU TO STOP YOU FROM TAKING MY COW, OR TO PUNISH

YOU FOR INSULTING ME.

- UNLIKE OUTLAWS AND ANIMALS, SOME HUMANS—THE "CIVILIZED"—FEEL "UNEASY"
 ABOUT INFLICTING FORCE ON OTHERS. THEY SEEK JUSTIFICATION FOR THEIR ACTIONS
 TO QUELL THIS UNEASINESS.
 - JUST AS MISESIAN ECONOMIC MAN ACTS TO REDUCE FELT UNEASINESS, SO ETHICAL MAN SEARCHES FOR JUSTIFICATION FOR DESIRED OR PROPOSED USES OF FORCE TO REDUCE THE NATURAL UNEASINESS WE HAVE WHEN STRUGGLING WITH OTHERS.
- THUS, MAN'S ESSENTIAL NATURE, INSOFAR AS POLITICAL PHILOSOPHY GOES, IS: THAT
 OF AN ACTING BEING SEEKING TO AVOID CONFLICT AND SEEKING JUSTIFICATION FOR
 FORCE-FUL ACTIONS AGAINST OTHERS
- JUSTIFICATION, THEN, IS THAT REASON OR FACT THAT **SATISFIES** THE MOST SCRUPULOUS AND CIVILIZED AMONG US WHO ARE *SEEKING* JUSTIFICATION.
- FOR LIBERTARIANS, FOR A VARIETY OF REASONS (COMMON SENSE, INTUITIVE, RATIONALIST-DEDUCTIVE, EMPIRICAL, EVEN UTILITARIAN), WE ARE SATISFIED THAT FORCE AGAINST OTHERS IS JUSTIFIED WHEN THE OTHERS HAVE THEMSELVES USED FORCE. THERE IS A NATURAL SYMMETRY HERE THAT WILL SATISFY THOSE SEEKING JUSTIFICATION.
 - O BUT WHEN OTHERS HAVE NOT USED FORCE—E.G., THEY HAVE ONLY INSULTED YOU OR ARE UNDERCUTTING YOUR PRICES OR WORSHIPPING A DIFFERENT GOD—THE UNEASINESS, FOR LIBERTARIANS, IS NOT OVERCOME.
 - THIS HAS IMPLICATIONS FOR TOPICS LIKE INCITEMENT AND COLLECTIVE RESPONSIBILITY (DISCUSSED **TUESDAY** DURING **PUNISHMENT** TOPIC).
 - MAINSTREAM PEOPLE ARE THOSE WHO HAVE A LOWER THRESHOLD FOR SATISFYING
 THEIR NORMAL, CIVILIZED UNEASINESS WITH FORCE. THEY ARE WILLING TO
 THEMSELVES ACCEPT JUSTIFICATIONS FOR FORCE USED AGAINST PEACEFUL PEOPLE.
 - SUCH JUSTIFICATIONS ARE NECESSARILY INCONSISTENT AND WILL NOT BE ACCEPTED BY CIVILIZED PEOPLE SINCERELY AND EARNESTLY SEEKING JUSTIFICATION FOR FORCE.
 - IT IS INCONSISTENT FOR ALL THE **SUBSTANTIVE** REASONS LIBERTARIANS HAVE GIVEN IN SUPPORT OF THEIR PHILOSOPHY.
 - I AM NOT HERE JUSTIFYING LIBERTARIANISM, BUT POINTING OUT THE FRAMEWORK WHERE JUSTIFICATION HAPPENS, AND SHOWING HOW IT PLAYS OUT FOR LIBERTARIANS. BUT REALIZING THE NATURE OF JUSTIFICATION HELPS TO CLARIFY WHY THE LIBERTARIAN ARGUMENT IS CORRECT. IT IS THE ONLY CONSISTENT JUSTIFICATION, THE ONLY CONSISTENT AND HONEST RATIONALE FOR JUSTIFYING THE USE OF FORCE.
 - THEY ARE THUS **IN-BETWEEN** CIVILIZED PEOPLE AND CRIMINAL-OUTLAW TYPES AN ANIMALS, BUT BY AND LARGE, CLOSER TO CIVILIZED; THIS IS WHY CIVILIZATION PROSPERS DESPITE IMPERFECT ADHERENCE TO STANDARDS OF CIVILIZED CONDUCT.

SURPLUS:

ECONOMICS IS A WERTFREI SCIENCE CONCERNED WITH THE LOGIC OF ACTION--HUMAN ACTION; ITS SUBJECT IS THOSE THAT ACT. ETHICS IS CONCERNED WITH WHAT MAY BE CALLED ETHICAL ACTORS; ITS

SUBJECT IS THOSE WHO SEEK JUSTIFICATIONS FOR THEIR ACTIONS. AND MORE SPECIFICALLY, THE SUBJECT OF ETHICS IS THOSE WHO SEEK JUSTIFICATIONS FOR INTERPERSONAL ACTIONS, ESPECIALLY THOSE ACTIONS HAVING TO DO WITH FORCE--IN PARTICULAR, ACTIONS THAT HAVE TO DO WITH BORDER CROSSINGS OF BODIES OR OTHER SCARCE RESOURCES WHICH ARE SUBJECT TO DISPUTE BY TWO OR MORE ACTORS.

ECONOMIC EXPLORES IMPLICATIONS OF THE FACT THAT ACTORS ACT. ETHICS EXPLORES IMPLICATIONS OF THE FACT THAT SOME ACTORS SEEK JUSTIFICATIONS FOR THEIR ACTIONS. MORE PARTICULARLY, ETHICS INQUIRES INTO THE NATURE OF THESE JUSTIFICATIONS AND ELABORATES ON WHAT TYPES OF ARGUMENTS AND FACTS SUFFICE TO JUSTIFY VARIOUS TYPES OF ACTIONS, FOR VARIOUS TYPES OF JUSTIFICATION-SEEKERS. POLITICAL ETHICS INQUIRES INTO THE NATURE OF JUSTIFICATIONS THAT ARE SOUGHT BY, AND THAT SATISFY, JUSTIFICATION-SEEKING INDIVIDUALS--JUSTIFICATIONS FOR BORDER-CROSSING TYPE ACTIONS, THOSE INVOLVING FORCE AIMED AT THE BODY OR PUTATIVE PROPERTY OF OTHERS.

ACTION IMPLIES UNEASINESS WITH CURRENT CONDITIONS, AND A DESIRE TO MAKE A CHANGE. THUS THE ACTOR EMPLOYS SCARCE MEANS, IN ACCORDANCE WITH KNOWLEDGE OR JUDGMENTS ABOUT CAUSAL LAWS (THUS PRESUMING CAUSALITY), IN AN ATTEMPT TO BRING ABOUT A DIFFERENT STATE OF AFFAIRS THAT THE ACTOR JUDGES EX POST TO BE SUPERIOR, TO AT LEAST SOMEWHAT ALLEVIATE/ADDRESS THE FELT UNEASINESS.

ETHICAL ARGUMENTATION OCCURS ONLY AMONGST THOSE SEEKING JUSTIFICATIONS FOR ACTIONS THAT CROSS THE BORDERS OF OTHERS' BODIES OR PUTATIVE PROPERTY. JUST AS ACTION OCCURS ONLY IF AND BECAUSE INDIVIDUALS ARE UNEASY WITH THE STATUS QUO, SO JUSTIFICATION IS SOUGHT WHEN ACTORS ARE UNEASY OR RELUCTANT TO ENGAGE IN CERTAIN OTHERWISE-DESIRED ACTIONS.

THUS, ETHICAL ARGUMENTATION IS ARGUMENTATION BETWEEN ACTORS SEEKING JUSTIFICATION FOR ACTION EMPLOYING FORCE. THESE PARTICIPANTS IN DISCOURSE ARE NECESSARILY THOSE WHO ARE ALREADY UNEASY WITH THE USE OF FORCE AND SEEK A JUSTIFICATION TO OVERCOME THIS UNEASINESS. THEREFORE, WHATEVER TYPES OF REASONS THAT SATISFY THE JUSTIFICATION-SEEKING PERSON WILL BE THOSE THAT CORRESPOND TO WHATEVER RIGHTS WE MAY BE SAID TO HAVE

TUESDAY JULY 30 SELF DEFENSE, PUNISHMENT, AND PROPORTIONALITY (CHS. 12-13, PP. 77-96)

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SUMMARY OF CHAPTERS 12-13: SELF DEFENSE, PUNISHMENT, AND PROPORTIONALITY

• OTHER WORKS OF ROTHBARD RELEVANT HERE, ESPECIALLY: LAW, PROPERTY RIGHTS, AND AIR POLLUTION, HTTP://WWW.MISES.ORG/ROTHBARD/LAWPROPERTY.PDF

SELF-DEFENSE OF PROPERTY

- IF YOU HAVE A RIGHT TO PROPERTY, AND A RIGHT AGAINST OTHERS FORCIBLY INVADING IT, OWNER MUST HAVE A RIGHT TO USE FORCE IN DEFENSE OF IT. OTHERWISE DO NOT HAVE FULL OWNERSHIP OF IT.
 - WHY? BECAUSE IF YOU MAY NOT USE FORCE IN DEFENSE, THEN ANY AGGRESSOR HAS
 AT LEAST AS GOOD TITLE TO IT, IN FACT MORE IF HE FORGETS ABOUT PROHIBITIONS
 AND USES FORCE.
 - O IF YOU MAY NOT DEFEND AGAINST INVASION, THE "RIGHT" GIVES YOU NO MORE LEGITIMATE CONTROL OVER THE GOOD THAN ANYONE ELSE, AND SOMEONE STRONGER HAS MORE RIGHTS THAN YOU DO.
 - O IT COLLAPSES RIGHT INTO MIGHT, BY IN EFFECT CONDONING ANY CURRENT POSSESSION OF PROPERTY, NO MATTER HOW IT WAS OBTAINED.
 - O BUT THE ESSENCE OF LIBERTARIANISM IS THE IDEA THAT THE ORIGIN OF PROPERTY RIGHTS MATTERS, AND IN PARTICULAR THAT *FIRST POSSESSION* (ORIGINAL APPROPRIATION) IS WHAT MATTERS.

• COROLLARIES TO AGGRESSION

- O ROTHBARD SAYS THAT INVASION INCLUDES TWO "COROLLARIES" TO ACTUAL PHYSICAL AGGRESSION:
 - *Intimidation, or a direct threat* of physical violence; and
 - **FRAUD**, WHICH INVOLVES THE APPROPRIATION OF SOMEONE ELSE'S PROPERTY WITHOUT HIS CONSENT, AND IS THEREFORE "IMPLICIT THEFT".

• THREAT.

- WHY DOES R JUST ASSUME THAT "THREAT" IS A TYPE OF AGGRESSION?
- HE SAYS IT CAN BE USED TO "OBTAIN OBEDIENCE TO COMMANDS" (78), AND THUS "IS EQUIVALENT TO THE INVASION ITSELF.
 - BUT INVASION DOES NOT OBTAIN OBEDIENCE TO COMMANDS; IT OVERRIDES THE WILL OF THE OWNER.
 - AND OTHER THINGS CAN "OBTAIN OBEDIENCE TO COMMANDS"—OFFERS OF MONEY, PERSUASION, BLACKMAIL—WHICH ARE NOT THEREBY "EQUIVALENT TO INVASION".
- O HE SAYS THREAT HAS TO BE CLEAR AND IMMEDIATE AND OVERT. (78; AIR POLL 131) WHY? BECAUSE BURDEN OF PROOF THAT AGGRESSION HAS "REALLY BEGUN" SHOULD BE ON THE PERSON WHO EMPLOYS (DEFENSIVE) VIOLENCE. (78)
- IN MY VIEW, A THREAT CAN BE VIEWED AS A SPECIES OF THE CRIME OF ASSAULT.
 ASSAULT IS DEFINED AS PUTTING SOMEONE IN FEAR OF RECEIVING A BATTERY (PHYSICAL BEATING).

- A THREAT SHOULD COUNT AS A TYPE OF ASSAULT BECAUSE THE THREATENER DELIBERATLY PUTS THE VICTIM IN FEAR OF RECEIVING A **BATTERY**, AND ALSO DELIBERATELY INCREASES THE LIKELIHOOD OF PHYSICAL HARM BEFALLING THE VICTIM.
 - R TALKS OF PENALTIES FOR AGGRESSION BEING ENHANCED BECAUSE THE AGGRESSOR PUT THE VICTIM "INTO A STATE OF FEAR AND UNCERTAINTY". (89)
- ASSAULT MAY BE PUNISHED BECAUSE THIS IS THE ONLY WAY THE VICTIM CAN RECIPROCATE AND PUT THE AGGRESSOR-THREATENER IN A LIKE STATE OF FEAR.
- ANOTHER POINT: THE NOTION OF THE RIGHT TO SELF-DEFENSE IMPLIES THE RIGHT TO DEFEND AGAINST IMMINENT THREATS, AND THUS IMPLIES THAT THREATS ARE SPECIES OF AGGRESSION.
 - WHY? BECAUSE ONE WAY TO DEFEND AGAINST AGGRESSION IS TO STOP IT JUST BEFORE IT HAPPENS. JUST AS ONE CAN USE FORCE *AFTER* A CRIME TO PUNISH THE AGGRESSOR (WHERE SELF-DEFENSE FAILS), ONE CAN USE SELF-DEFENSIVE FORCE *BEFORE* THE CRIME, TO PREVENT IT. THE POINT OF SELF-DEFENSE IS TO STOP AGGRESSION AND TO DEFEND ONE'S CONTROL OF ONE'S PROPERTY. THE EARLIER IT CAN BE DONE THE BETTER.
 - SUPPOSE SOMEONE AIMS A GUN AT YOU AND GIVES AN OBJECTIVE INDICATION HE IS ABOUT TO SHOOT YOU. NOTHING IN LIBERTARIANISM REQUIRES THE VICTIM TO WAIT UNTIL THE BULLET HITS HIM TO START DO DEFEND. (SEE AIR POLL 132)

• STALKING, PREVENTATIVE FORCE, EXTENDED SELF-DEFENSE, ETC.

- O ROTHBARD'S "OVERT ACT" REQUIREMENT WOULD SEEM TO PRECLUDE PUNISHMENT OF STALKERS OR THOSE WHO THREATEN AT A DISTANCE OR SUBTLY.
- I THINK IT CAN BE STRETCHED FURTHER, ESPECIALLY IF YOU THINK OF IT AS AN ACTION THAT INTENTIONALLY PLACES ANOTHER IN APPREHENSION/FEAR OF RECEIVING A PHYSICAL BATTERY.
 - FOR EXAMPLE, STALKING CAN BE SUBTLE, BUT IT IS A CLEAR FORM OF PLACING PEOPLE IN FEAR OF RECEIVING A BATTERY.
 - THINK OF A HUSBAND ON TRIAL FOR PLUGGING SOME GUY WHO KEPT FOLLOWING HIS WIFE AROUND, SUBTLY THREATENING HE WAS GOING TO RAPE OR KILL HER WHEN HE GOT READY TO. THE WIFE IS A NERVOUS WRECK. THE COPS CAN'T DO ANYTHING. THE HUSBAND, NOT WANTING TO WAIT UNTIL HIS WIFE IS KILLED, FOLLOWS THE STALKER AND KILLS HIM.
 - WOULD YOU ACQUIT IF YOU WERE ON THE JURY? WOULD YOU THINK THE HUSBAND'S USE OF FORCE WAS JUSTIFIED?
 - WHY MUST WE FIND AN "OVERT ACT"? WHY SEARCH FOR LOOPHOLES FOR DANGEROUS, REPREHENSIBLE CONDUCT?
 - I WOULD (ASSUMING RIGHT FACTS)
- O BARNETT ARGUES THAT THE PRINCIPLE OF "EXTENDED SELF-DEFENSE" JUSTIFIES IMPRISONING (SOMETIMES FOR LIFE) THOSE WHO HAVE MADE A SUFFICIENTLY UNAMBIGUOUS *COMMUNICATION OF A THREAT* TO ANOTHER.
- O BECAUSE OF THE POSSIBILITY OF ENFORCEMENT ABUSE AND RULE OF LAW CONSIDERATIONS, HOWEVER, BARNETT WOULD LIMIT THIS REMEDY TO THOSE PERSONS

- WHO HAVE COMMUNICATED A THREAT TO OTHERS BY THEIR PAST CRIMINAL BEHAVIOR (I.E., THOSE WHO HAVE BEEN CONVICTED, PERHAPS MULTIPLE TIMES, OF A CRIME), AND ONLY IF THE PREVIOUS CRIMES WERE PROVED BEYOND A REASONABLE DOUBT.
- THIS LIMITATION ON THE PRINCIPLE OF EXTENDED SELF-DEFENSE SEEMS TO ME TO BE UNDULY RESTRICTIVE, HOWEVER. I SEE NO REASON TO ALLOW EXTENDED SELF-DEFENSE ONLY WHERE THE AGGRESSOR HAS PREVIOUSLY BEEN CONVICTED OF A CRIME. EVEN THE FIRST CRIME IS A CRIME. IT SHOULD BE CASE-BY-CASE.

• FRAUD.

- FRAUD, WHICH INVOLVES THE APPROPRIATION OF SOMEONE ELSE'S PROPERTY WITHOUT HIS CONSENT, AND IS THEREFORE "IMPLICIT THEFT".
- FRAUD AS IMPLICIT THEFT, STEMS FROM RIGHT OF CONTRACT—WHICH STEMS FROM RIGHT TO OWN PROPERTY. (MORE ON WED.)
- IF ONE OWNS PROPERTY ONE CAN CONSENT TO HOW IT IS USED OR TO ALIENATION/TRANSFER OF ITS TITLE. BUT CONDITIONS CAN BE PLACED ON THIS USE OR TITLE TRANSFER.
- FOR EXAMPLE (78), SMITH WILL PAY \$1000 FOR JONES'S CAR. SMITH TAKES CAR BUT REFUSES TO PAY THE \$1000 TO JONES. SMITH HAS "IN EFFECT" STOLEN "THE \$1000".
 - YES. IT IS "THE \$1000" THAT IS STOLEN, **NOT THE CAR**. (RELEVANT LATER FOR DEBTOR'S PRISON ETC.)
 - WHY? BECAUSE SMITH ALREADY TRANSFERRED TITLE TO \$1000, CONDITIONED UPON RECEIPT OF TITLE TO THE CAR. ONCE THE CAR WENT TO SMITH, TITLE TO THE \$1000 AUTOMATICALLY TRANSFERRED TO JONES IN "PAYMENT". AT THAT POINT, SMITH IS NOW IN POSSESSION OF \$1000 OF JONES' MONEY, AND REFUSAL TO TURN IT OVER IS "THEFT" BECAUSE IT IS ASSERTING DOMINION AND CONTROL OVER JONES'S PROPERTY, WTIHOUT JONES'S CONSENT.
 - <u>[ALTERNATIVELY</u>, WE CAN ALSO ASSUME THAT JONES'S TRANSFER OF THE TITLE TO THE CAR TO SMITH WAS ALSO CONDITIONAL ON SMITH NOT PULLING A FAST ONE. THEREFORE, UPON SMITH'S FRAUDULENT ACTS, THE TITLE TO THE CAR SWITCHES BACK TO JONES AND SMITH HAS TO RETURN IT TO ITS OWNER. DEPENDS ON HOW CONTRACT IS INTERPRETED.]
- CONTRACTS: ONLY THOSE THAT INVOLVE *IMPLICIT THEFT* ARE ENFORCEABLE.
 - OTHERWISE, IT'S A MERE PROMISE. A PROMISE DOES NOT VIOLATE RIGHTS.
 - R SAYS THAT **DEBT CONTRACTS** ARE ENFORCEABLE, NOT BECAUSE THE **CREDITOR'S PROPERTY** IS STOLEN—IF THE **DEBT IS NOT PAID**.
 - FOR EXAMPLE, BROWN LENDS GREEN \$1000 NOW, IN RETURN FOR \$1100 NEXT YEAR. IF GREEN FAILS TO PAY, GREEN HAS "STOLEN" \$1100 OF SMITH'S PROPERTY.
 - **PROBLEM**. YES, IF GREEN HAS THE \$1100, HE HAS TO REPAY IT. IT IS SMITH'S PROPERTY HE IS IN POSSESSION OF. BUT WHAT IF GREEN CANNOT REPAY, I.E. IS PENNILESS? R STILL CALLS IT THEFT. BUT HOW CAN GREEN STEAL SOMETHING THAT DOES NOT EXIST?
 - Unlike the Car-purchase scenario, (1) the \$1000 is not given conditionally, because otherwise Green could not use the loaned money; and (2) the \$1100 "in exchange" is a *future* sum,

AND THUS ITS EXISTENCE IS UNCERTAIN. IF THE TIME ARRIVES AND IT **DOES** EXIST, THEN TITLE TO IT DOES TRANSFER. IF IT DOES NOT EXIST, **THERE IS NO THEFT**. THERE IS NOTHING TO STEAL.

PROPORTIONAL PUNISHMENT

- THE VICTIM IS ENTITLED TO PUNISH THE AGGRESSOR "TO THE EXTENT" OF THE AGGRESSION HE HAS COMMITTED.
- HE CAN PUNISH "UP TO" THIS AMOUNT. (89)
 - O BUT HE DOES NOT HAVE TO. HE CAN *FORGIVE*. OR HE CAN LET THE AGGRESSOR *BUY HIS WAY* OUT OF PUNISHMENT.
 - O BENEFIT OF BUYING WAY OUT OF PUNISHMENT (89):
 - PUNISHMENT (OR A THEORY OF PUNISHMENT) MAY BE UTILIZED TO REACH A MORE OBJECTIVE DETERMINATION OF THE PROPER AMOUNT OF RESTITUTION, BECAUSE A SERIOUS AGGRESSION LEADS TO THE RIGHT TO INFLICT MORE SEVERE PUNISHMENT ON THE AGGRESSOR, WHICH WOULD THUS TEND TO BE TRADED FOR A HIGHER AVERAGE AMOUNT OF RANSOM OR RESTITUTION THAN FOR COMPARATIVELY MINOR CRIMES.
 - ESPECIALLY OFFENDED VICTIMS WILL TEND TO BARGAIN FOR A HIGHER RANSOM, THUS TAKING SUBJECTIVE DAMAGE INTO ACCOUNT
 - RICHER AGGRESSORS WILL TEND TO BE WILLING TO PAY MORE RANSOM TO AVOID THE PUNISHMENT THE VICTIM HAS A RIGHT TO INFLICT, THEREBY SOLVING THE SO-CALLED "MILLIONAIRE" PROBLEM FACED UNDER A PURE RESTITUTION SYSTEM (WHERE A RICH MAN MAY COMMIT CRIMES WITH IMPUNITY, SINCE HE CAN SIMPLY PAY EASILY-AFFORDABLE RESTITUTION AFTER COMMITTING THE CRIME).
 - EVEN IF PUNISHMENT IS BANNED (*DE FACTO* OR *DE JURE*) AND IS NOT AN **ACTUAL OPTION**—BECAUSE OF THE POSSIBILITY OF MISTAKENLY PUNISHING INNOCENTS, SAY—AN AWARD OF RESTITUTION CAN BE *BASED* ON THE MODEL OF PUNISHMENT.
 - A JURY COULD BE INSTRUCTED TO AWARD THE VICTIM AN AMOUNT OF MONEY IT BELIEVES HE *COULD* BARGAIN FOR, GIVEN ALL THE CIRCUMSTANCES, *IF* HE COULD THREATEN TO PROPORTIONATELY PUNISH THE AGGRESSOR. THIS CAN LEAD TO MORE JUST AND OBJECTIVE RESTITUTION AWARDS THAN WOULD RESULT IF THE JURY IS SIMPLY TOLD TO AWARD THE AMOUNT OF DAMAGES IT "FEELS" IS "FAIR".
- EXCEPTION: CAN USE DEADLY FORCE, EVEN FOR MINOR CRIMES, WHILE CRIME IS IN COMMISSION. THIS IS DIFFERENCE BETWEEN SELF-DEFENCE AND AFTER-THE-FACT RESTITUTION [AIR POLL 135]
- QUERY: WHY EXACTLY CAN YOU "FORGIVE" SOMEONE? SUPPOSE YOU WANT TO TORTURE THE AGGRESSOR. YOU DO IT BY MAKING HIM THINK YOU FORGIVE HIM, THEN YOU CHANGE YOUR MIND A MONTH LATER. THAT MIGHT BE DELICIOUS. IT THE AGGRESSOR FORFEITS HIS RIGHTS SO THAT YOU CAN JAIL OR PUNISH OR KILL HIM, HOW DOES IT VIOLATE HIS RIGHTS IF YOU FORGIVE HIM AND THEN TAKE IT BACK?
- **QUERY: CAPITAL PUNISHMENT:** R SAYS WE CAN ONLY EXECUTE SOMEONE FOR COMMITTING THE CRIME OF MURDER.
 - O WHY? ISN'T THIS TOO MECHANICAL?

- YES, THERE MUST BE PROPORTIONALITY, IN THE ROUGH SENSE. THE WORSE THE CRIME, THE WORSE THE PUNISHMENT. YET EVEN R RECOGNIZES A "TWO TEETH FOR A TOOTH" RULE. (88N6)
- O IF WE EXECUTE A MURDERER, WHAT CAN WE DO WORSE TO A SERIAL MURDERER? MAYBE NO MORE. SO WHAT? WE DON'T HAVE TO "LEAVE ROOM"—THIS IS A PRUDENTIAL REQUIREMENT ONLY. CONSIDER THE KIDNAPPER OF A LITTLE GIRL WHO IS ATTEMPTING TO RAPE AND KILL HER. WE CATCH HIM JUST BEFORE HE KILLS HER. WE CAN PROVE WHAT HIS PLANS WERE. WHY NOT EXECUTE HIM?
- O GENERAL BOUNDS OF PROPORTIONALITY ARE SATISFIED WHEN THE CONSEQUENCES AND POTENTIAL CONSEQUENCES TO THE VICTIM THAT ARE CAUSED BY THE AGGRESSION ARE TAKEN INTO ACCOUNT. THUS, SOME CRIMES MAY BE PUNISHED CAPITALLY IF THEIR CONSEQUENCES ARE SERIOUS ENOUGH, FOR EXAMPLE STEALING A MAN'S HORSE WHEN HIS SURVIVAL DEPENDS ON IT, AS WAS DONE IN THE FRONTIER WEST FOR THE SAME REASON.
 - ONE CASE REPORTED AN EXCHANGE MANY YEARS AGO BETWEEN THE CHIEF JUSTICE OF TEXAS AND AN ILLINOIS LAWYER VISITING THAT STATE. "WHY IS IT," THE VISITING LAWYER ASKED, "THAT YOU ROUTINELY HANG HORSE THIEVES IN TEXAS BUT OFTENTIMES LET MURDERERS GO FREE?" "BECAUSE," REPLIED THE CHIEF JUSTICE, "THERE NEVER WAS A HORSE THAT NEEDED STEALING!" PEOPLE V. SKILES, 115 ILL.APP.3D 816, 827, 450 N.E.2D 1212, 1220 (1983).

MURDER VICTIM'S HEIRS

- WHAT IF A VICTIM'S HEIRS ARE "LESS THAN DILIGENT" IN PURSUING THE MURDERER, OR INCLINDED TO FORGIVE OR LET THEM BUY THEIR WAY OUT.
 - \circ R. Says the victim can simply state in the will what kind of punishment they want. P. 86.
 - O YES, BUT MAY BE NO WILL, OR MAY NOT COVER EVERYTHING.
 - O SUPPOSE A PACIFIST PARENT OR WIFE, WANTS TO FORGIVE THE MURDERER OF THE CHILD/HUSBAND. BUT THE VICTIM BELIEVED IN RESTITUTION. IN THAT CASE WE CAN PRESUME THE VICTIM WOULD HAVE CONDITIONED THE INHERITANCE OF THE RIGHT TO DEAL WITH THE AGGRESSOR, ON CERTAIN CONDITIONS; AND THAT THEY WOULD REMOVE THIS FROM THE PACIFIST HEIRS. MAYBE SOME JUSTICE-AGENCY CAN "HOMESTEAD" THE NOW-ABANDONED "RIGHT-TO-PUNISH".

INCITEMENT, FREE SPEECH, CAUSATION, ETC.

- ROTHBARD SAYS (81) THAT INCITING OTHERS TO RIOT IS NOT A CRIME. THE REASON IS THAT EVERY MAN HAS FREE WILL, SO THE INCITER DOES NOT "DETERMINE" OR "MAKE" THE MOB COMMIT THE CRIMES.
 - O WORDS AND OPINIONS ARE NOT PHYSICAL INVASIONS.
- YET R IMPLIES THAT A HEAD OF A CRIMINAL GANG IS GUILTY (81). IF HE IS "INVOLVED IN A PLAN OR CONSPIRACY WITH OTHERS TO COMMIT VARIOUS CRIMES," AND "TOLD THE OTHERS" TO PROCEED.
 - O DOES R SAY THAT A MAFIA BOSS OR PRESIDENT, "ORDERING" UNDERLINGS TO COMMIT CRIMES, IS GUILTY TOO?
 - O NOT SURE. (WHAT DOES WALTER SAY?)
 - O ALSO, SEE NOTE 4, P. 80: R SAYS THAT "ON THE MAXIMALIST VIEW, [] SOCIALISTS, INTERVENTIONISTS, AND UTILITARIANS WOULD, **BY VIRTUE OF THEIR VIEWS**, BE LIABLE

TO EXECUTION". THE MAXIMALIST POSITION IS SIMPLY THAT ANY CRIME AT ALL PUTS YOU OUTSIDE THE LAW, THERE IS NO PROPORTIONALITY REQUIREMENT AND THUS THE AGGRESSOR CAN BE PUNISHED EVEN BY DEATH, EVEN FOR A MINOR CRIME.

- NOW ROTHBARD REJECTS THE MAXIMALIST VIEW, BECAUSE HE FAVORS PROPORTIONALITY IN PUNISHMENT.
- HOWEVER, THIS DOES INDICATE HE VIEWS "SOCIALISTS" AND "INTERVENTIONISTS" *TO BE AGGRESSORS*, BY <u>VIRTUE OF THEIR VIEWS</u> (ALBEIT, PRESUMABLY NOT DESERVING OF THE DEATH PENALTY).
- DOES THIS NOT IMPLY INDIRECT ACTIONS THAT TEND TO CAUSE RIGHTS TO BE VIOLATED, CAN BE "CAUSES" OF AGGRESSION? THEREFORE, A LOOSER STANDARD WOLD APPLY FOR INCITEMENT, MAFIA/GOVERNMENT BOSSES ORDERING UNDERLINGS TO COMMIT CRIMES, ETC.
- MY VIEW: WE CAN HAVE COLLECTIVE CRIMES, LIKE BANK ROBBERIES, WHERE EACH ACTOR IS LIABLE FOR ALL OF THE DAMAGE. THE GETAWAY CAR DRIVER IS AS LIABLE AS HIS GUN-WIELDING PARTNERS IN THE BANK.
 - R AGREES WITH THIS: SEE AIR POLL P. 164: "IN THE ASE OF TRULY JOINT TORTS, IT [] MAKES SENSE TO HAVE EACH OF THE JOINT AGGRESSORS EQUALL LIABLE FOR THE ENTIRE AMOUNT OF THE DAMAGES. IF IT WERE OTHERWISE, EACH CRIMINAL COULD DILUTE HIS OWN LIABILTY IN ADVANCE BY SIMPLY ADDING MORE CRIMINALS TO THEIR JOINT ENTERPRISE." SO PEOPLE CAN ACT "IN CONCERT" AND IT DOES NOT GET THEM OFF THE HOOK.
 - BUT IF CRIMINAL CONSPIRACIES CAN EXIST, WHY CAN'T THEY BE **TEMPORAL CONSPIRACIES**? WHY DOES AN INTERVENING FREE WILL REMOVE RESPONSIBILITY FROM SOMEONE EARLIER IN THE CHAIN? AFTER ALL, FELLOW BANK ROBBERS ALL HAVE FREE WILL.
 - I THINK BLOCK'S RESPONSE IS: THE GENERAL/MAFIA BOSS ARE LIABLE FOR THEIR UNDERLINGS' ACTIONS ONLY IF (1) THERE IS A CONTRACT; OR (2) THE BOSS IS (AT LEAST IMPLICITLY) COERCING THE UNDERLING. BLOCK ALSO BELIEVES THAT THERE IS ALWAYS AN IMPLICIT THREAT IN SUCH ORGANIZATIONS, LIKE MAFIA OR GOVERNMENT.
 - PROBLEMS WITH BOTH. (1) CONTRACTS ARE ONLY TRANSFERS OF TITLE TO PROPERTY. IF A MAFIA BOSS IS NOT LIABLE FOR SIMPLY PERSUADING OR SUGGESTING TO HIS UNDERLING/ASSASSIN THAT HE KILL SOMEONE, WHY DOES THIS CHANGE JUST BECAUSE THE BOSS PAYS MONEY TO THE UNDERLING/ASSASSIN?
 - (2) EVEN IF THERE IS COERCION, IT DOES NOT, UNDER TODAY'S LAW, AND SHOULD NOT, UNDER LIBERTARIAN LAW, RELIEVE THE UNDERLING FROM RESPONSIBILITY. YOU MAY NOT MURDER SOMEONE EVEN IF YOU ARE COERCED INTO DOING SO. THEREFORE, WHETHER THE BOSS COERCES THE UNDERLING, OR NOT, THE UNDERLING STILL HAS A FREE WILL AND HE IS **NOT** DETERMINED TO COMMIT THE CRIME. ACCORDINGLY, THESE CASES SHOULD BE TREATED SIMILARLY.
 - FURTHER, THERE IS NOT ALWAYS COERCION/THREAT.
 - O **QUERY**: BLOCK SAYS A GROUP LIKE THE POST OFFICE, SAY, WITH NO THREATS: WHAT IF THE BOSS "ORDERS" HIS UNDERLING TO KILL SOMEONE. IS THE BOSS LIABLE?
 - \circ **Query**: What if a wife hires an assassin to kill her husband. She does not "threaten" him. Is she not

LIABLE? IF SHE IS, IS IT ONLY BECAUSE SHE PAYS HIM MONEY? WHAT IF SHE SLEEPS WITH HIM INSTEAD? OR FLIRTS WITH HER NUTTY NEIGHBOR AND THEREBY PERSUADES HIM? WHAT DOES IT MATTER IF SHE PAYS MONEY? AUSTRIANS KNOW VALUE IS SUBJECTIVE ANYWAY, SO WHY THE FIXATION ON MONEY AS SOME "SPECIAL" INDUCEMENT TO DO SOMETHING?

- IF YOU RELY ON (1) OR (2) (BLOCK DOES, I AM NOT SURE ABOUT ROTHBARD; WE SUPPOSE SO HERE), THEN THERE IS NO BASIS TO SAY THAT THE MAFIA BOSS IS LIABLE. SOLUTION IS *CAUSATION*.
- *CAUSATION*. MAFIA BOSS, AND PRESIDENT ORDERING MILITARY STRIKES, ARE RESPONSIBLE. THE REASON IS SIMPLY *THE ELEMENT OF CAUSATION*.
 - R. SAYS "THE QEUSTION IS *CAUSATION*: WHO INITIATED THE TORT OR CRIME?" [AIR POLL 132]
 - O CONSIDER: PLACING BOMB UNDER A CAR. SHOOTING SOMEONE. PUTTING POISON IN A DRINK. WHY IS THE ACTOR HERE CONSIDERED AN AGGRESSOR? BECAUSE HIS ACTIONS CAUSED THE INVASION OF THE VICTIM'S PROPERTY OR BODILY BORDERS.
 - Cause is implicit in all statements about aggression—A "hit" B; etc.
 - O THE CAUSE CAN STRETCH OVER TIME; BOMB UNDER CAR EXAMPLE.
 - O THE CAUSE CAN INVOLVE OTHER ACTORS, E.G. IN A CRIMINAL CONSPIRACY, OR WHEN SOMEONE USES AN INNOCENT DUPE.
 - JUST BECAUSE INDIVIDUALS HAVE FREE WILL DOES NOT MEAN THEY CANNOT SERVE AS MEANS TO THE ENDS OF OTHER ACTORS.
 - BECAUSE OF A HIERARCHICAL STRUCTURE OF AUTHORITY (E.G. A GOVERNMENT, A COMPANY, A CRIMINAL GANG), THE NATURE OF THE ORGANIZATION MEANS THAT AUTHORITIES CAN ACHIEVE ENDS BY GIVING ORDERS TO SUBORDINATES. IT IS NOT NECESSARILY BECAUSE THERE IS ANY AGREEMENT OR CONTRACT, OR EVEN ANY IMPLICIT COERCION.
 - IF THE PRESIDENT ORDERS CANADA NUKED, THE PILOTS CAN RESIGN. SOME OF THEM WILL EVENTUALLY COMPLY. THE PRESIDENT IS GUILTY.
 - WE HAVE TO REALIZE THAT THERE IS NO RIGHT TO FREE SPEECH IN GENERAL.
 - WE SAY SPEECH IS NOT RIGHTS-VIOLATIVE BECAUSE THIS IS NORMALLY THE CASE. INSULTS FOR EXAMPLE OR CRITICISM DOES NOT VIOLATE ANY RIGHTS.
 [AIR POLL. 129]
 - But in some cases of course speech can be a cause of aggression.
 - President ordering a pilot to drop a bomb.
 - FIRING SQUAD CAPTAIN: SAYING "READY, AIM, FIRE!"
 - SOCIALISTS AGITATING FOR INTERVENTION (SEE N.4, P. 80)
 - VOTERS VOTING FOR SOCIALISTS.
 - INCITING A CROWD TO A RIOT? I'D SAY IT DEPENDS ON THE SITUATION. SUPPOSE YOU HATE YOUR WIFE AND WOULD LOVE TO KILL HER FOR HER MONEY, BUT YOU ARE AFRAID. ONE NIGHT YOU ARE OUT WITH HER IN ASPEN AND SHE HAS HER FUR COAT ON. YOU STUMBLE ACROSS A MILITANT ANIMAL RIGHTS RALLY, AND YOU CAN SEE HOSTILITY BREWING. YOU SEE YOUR CHANCE; AND YOU STOKE A CROWD, ON THE EDGE, ON, IN HOPES THAT THEY KILL YOUR WIFE. IF

THEY DO, HAVEN'T YOU (1) TAKEN AN ACTION, (2) WITH THE INTENT AND DESIGN TO RESULT IN YOUR WIFE'S MURDER, AND (3) IT HAPPENED? WHY IS THIS NOT MURDER?

- YES, PUNISH THE RIOTERS. HANG THEM ALONG WITH THE HUSBAND.
- **QUERY:** WHAT ABOUT A WITNESS LYING ON THE STAND, GETTING AN INNOCENT PERSON CONVICTED AND PUNISHED, MAYBE EXECUTED?

EVIDENCE/TRIALS

- BURDEN IS ON THOSE ACCUSING SOMEONE OF BEING AN AGGRESSOR. (82-83; AIR POLL 137-)
- EXCEPTIONS: COERCIVE METHODS CAN BE USED *PROVIDED* SUSPECT TURNS OUT TO BE GUILTY. OTHERWISE POLICE ARE CRIMINAL.
 - HOWEVER, IF YOU BEAT AND TORTURE A SUSPECT AND HE CONFESSES, THIS IS SIMPLY NOT PROBATIVE, IT IS NOT EVIDENCE.
 - OTOH, IF HE SAYS "THE MURDER WEAPON IS BURIED OVER THERE" AND THAT TURNS OUT TO BE TRUE, NO PROBLEM USING THIS EVIDENCE.
 - EXCLUSIONARY RULE SHOULD BE ABOLISHED. NOT REQUIRED BY LIBERTARIAN LAW.
 - CAN ELABORATE IF NEC. LEGAL STUF ETC.
- BRILLIANT, COMPRESSED DISCUSSION IN AIR POLL P. 138-: WHAT IS STANDARD OF PROOF?
 "PREPONDERANCE OF EVIDENCE"?—"MORE LIKELY THAN NOT". 51% LIKELY. R SAYS NO.
 SCARCELY BETTER THAN RANDOM CHANCE—LIKE FLIPPING A COIN—AS JUSTIFICATION FOR COURT'S USING FORCE AGAINST THE DEFENDANT.
 - SO NEED STRONGER STANDARD: THEREFORE CUSTOMARY "BEYOND A REASONABLE DOUBT" STANDARD IS BEST. IF THERE IS REASONABLE DOUBT, HAVE NOT JUSTIFIED USING FORCE.

ANARCHO-CAPITALISM AND PDA'S

- MANY ADVOCATES OF ANARCHO-CAPITALISM SEEM TO FEEL THAT AN AGGRESSOR CAN BE
 PUNISHED BY A DEFENSE AGENCY ONLY IF THE AGGRESSOR SOMEHOW PREVIOUSLY CONSENTED
 TO THE JURISDICTION OF THE AGENCY (IF HE DID NOT CONSENT, THE ONLY PERMISSIBLE
 REMEDY IS PRESUMABLY OSTRACISM).
 - HOWEVER, AS RANDY BARNETT POINTS OUT, IF AN INDIVIDUAL REFUSES TO CONTRACT WITH ANY LEGAL SYSTEM, FORCE CAN STILL BE USED AGAINST HIM IF HE HARMS OTHERS.
 - THIS IS BECAUSE THE JUSTICE OF USING FORCE AGAINST SUCH A PERSON IS BASED ON
 THE FACT THAT HE OR SHE VIOLATED THE RIGHTS OF THE VICTIM, <u>NOT</u> THAT HE OR
 SHE CONSENTED TO THE JURISDICTION OF A COURT.
 - JUST AS A VICTIM CAN USE SELF-DEFENSE AGAINST AN AGGRESSOR DURING THE ACT OF
 AGGRESSION, EVEN IF THERE IS NO PREVIOUS AGREEMENT BETWEEN THE TWO, SO A
 VICTIM OR HIS AGENT IS ENTITLED TO PUNISH AN AGGRESSOR AFTER THE FACT,
 REGARDLESS OF WHETHER HE IS A CUSTOMER OF ANY PDA.

RESTITUTION V. RETRIBUTION

- ALTHOUGH A VICTIM HAS A RIGHT TO RETRIBUTION, RESTITUTION WOULD PROBABLY TEND TO THE PREDOMINANT MODE OF JUSTICE IN AN ANARCHO-CAPITALIST SOCIETY (87) FOR A VARIETY OF REASONS.
 - O RESTITUTION MIGHT BE A BETTER CRIME DETERRENT;

- O IT IS EASIER AND LESS COSTLY TO UNDO A MISTAKEN CONVICTION IF THERE HAS BEEN NO PUNISHMENT BUT ONLY RESTITUTION
- O THE STANDARD OF PROOF (AS ARGUED BY BARNETT) MIGHT BE HIGHER IF A VICTIM SEEKS TO PUNISH A PURPORTED AGGRESSOR RATHER THAN MERELY OBTAIN RESTITUTION. THUS RESTITUTION MIGHT BE LESS COSTLY THAN RETRIBUTION.
- NEVERTHELESS, ACKNOWLEDGING (AND JUSTIFYING) THE THEORETICAL LEGITIMACY OF PUNISHMENT CAN BE USEFUL.

WEDNESDAY JULY 31 THE THEORY OF CONTRACTS (CH. 19, PP. 133-148)

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- LIFEBOAT SITUATIONS (CH. 20, PP. 149-154): COVERED ON MONDAY.
- DRAWS ON WILLIAMSON EVERS' 1977 JLS ARTICLE "TOWARD A REFORMATION OF A LAW OF CONTRACTS."

PROPERTY TITLE V. PROMISE

- MOST PEOPLE THINK OF CONTRACTS AS ENFORCEABLE OR "BINDING" PROMISES.
 - EXPECTATIONS THEORY
 - MERE PROMISE IS NOT ENFORCEABLE. AT MOST IS A MORAL OBLIGATION.
- TITLE-TRANSFER THEORY OF CONTRACTS: CONTRACT IS **SIMPLY EXCHANGE OF TITLE TO ALIENABLE PROPERTY**.
- RIGHT OF CONTRACT IS DERIVABLE FROM RIGHT OF PRIVATE PROPERTY.
 - O IF YOU OWN PROPERTY YOU CAN USE IT, ABUSE IT, OR SELL IT (TRANSFER ITS TITLE) TO ANOTHER.

REHASH FROM TUES:

- CONTRACTS: ONLY THOSE THAT INVOLVE *IMPLICIT THEFT* ARE ENFORCEABLE. THAT IS, ONLY IF *FAILURE TO ABIDE* BY THE CONTRACT *IMPLIES THE THEFT OF PROPERTY FROM THE OTHER PARTY*. (133)
 - O OTHERWISE, IT'S A MERE PROMISE. A PROMISE DOES NOT VIOLATE RIGHTS.
 - O R SAYS THAT **DEBT CONTRACTS** ARE ENFORCEABLE, NOT BECAUSE THE **CREDITOR'S PROPERTY** IS STOLEN—IF THE DEBT IS NOT PAID.
 - For example, Brown lends Green \$1000 now, in return for \$1100 next year. If Green fails to pay, Green has "stolen" \$1100 of Smith's property.
 - O PROBLEM. YES, IF GREEN HAS THE \$1100, HE HAS TO REPAY IT. IT IS SMITH'S PROPERTY HE IS IN POSSESSION OF. BUT WHAT IF GREEN CANNOT REPAY, I.E. IS PENNILESS? R STILL CALLS IT THEFT. SO DOES EVERS (1977, P.11 N.5): "ONCE THE MONEY FALLS DUE, THE DEBTOR WHO DOES NOT PAY UP IS DEFRAUDING THE CREDITOR AND IS UNJUSTLY DETAINING HIS PROPERTY . . . EVEN IF THE DEBTOR DOES NOT HAVE THE FUNDS ON HAND TO PAY THE CREDITOR"
 - BUT HOW CAN GREEN STEAL SOMETHING THAT DOES NOT EXIST?
 - Unlike the Car-purchase scenario, (1) the \$1000 is not given conditionally, because otherwise Green could not use the loaned money; and (2) the \$1100 "in exchange" is a *future* sum, and thus its existence is uncertain. If the time arrives and it **DOES** exist, then title to it does transfer. If it does not exist, *there is no theft*. There is nothing to steal.
 - ROTHBARD FORMULATES IS CORRECTLY WHEN HE SAYS, OF A DEBT CONTRACT WHERE SMITH GIVES \$1000 TO JONES NOW IN EXCHANGE FOR AN IOU FROM JONES AGREEING TO PAY SMITH \$1100 IN ONE YEAR: "WHAT HAS HAPPENED IS THAT SMITH HAS TRANSFERRED HIS TITLE TO OWNESHIP OF \$1000 AT PRESENT IN EXCHANGE FOR JONES AGREEING NOW TO TRANSFER TITLE TO SMITH OF \$1100-ONE-YEAR-FROM-NOW."
 - NOTE: THE TRANSFER OF TITLE TO THE LOANED FUNDS (\$1000-NOW) IS

- NOT conditional on the \$1100-in-one-year existing. It cannot be conditioned on any future event, because title to the loaned funds either transfers now, or it does not. Instead it is conditioned on Jones agreement now, to transfer title later, to \$1100-in-the-future-IF-IT-EXISTS.
- "JONES MUST PAY SMITH \$1100 BECAUSE HE HAD ALREADY AGREED TO TRANSFER TITLE, AND [] NONPAYMENT MEANS THAT JONES IS A THIEF, THAT HE HAS STOLEN THE PROPERTY OF SMITH." (134)
 - O YES—IF JONES *REFUSES* TO PAY \$1100 TO SMITH, HE IS STEALING SMITH'S \$1100 (SMITH NOW OWNS IT, BECAUSE TITLE TO IT HAD ALREADY BEEN TRANSFERRED).
 - O BUT, IF JONES IS PENNILESS, *THERE IS NO \$1100 TO STEAL*.
- SO THE REST OF THE QUOTE DOES NOT FOLLOW: "IN SHORT, SMITH'S
 ORIGINAL TRANSFER OF THE \$1000 WAS NOT ABSOLUTE, BUT
 CONDITIONAL, CONDITIONAL ON JONES PAYING THE \$1100 IN A YEAR,
 AND THAT, THEREFORE, THE FAILURE TO PAY IS AN IMPLICIT THEFT OF
 SMITH'S RIGHTFUL PROPERTY."
 - The original transfer is absolute. What theft is R talking about: theft of the original \$1000, or of the non-existent \$1100?
 - O IF THERE IS "RETROACTIVE THEFT," IT MEANS THE MONEY HAD AN INDETERMINATE OWNERSHIP STATE FOR A LONG TIME. OR, IT MEANS THAT INITIALLY THE TITLE DID TRANSFER, BUT LATER ON SOMETHING HAPPENED TO RETROACTIVELY, SO TO SPEAK, MAKE THE ORIGINAL TRANSFER NULL AND VOID. DOES THAT MAKE THE PARTY WHO JONES SPENT THE MONEY ON A RECEIVER OF STOLEN GOODS? HOW CAN ACTIONS IN THE PRESENT CHANGE CHANGE PAST EVENT?
- CONSIDER THIS EXAMPLE. JONES NEEDS CAPITAL TO START HIS
 BUSINESS MAKING TRAVEL LUGGAGE. SMITH HAS AN ANTIQUE
 GRANDFATHER CLOCK WORTH \$1000. HE AGREES TO GIVE THE CLOCK
 TO JONES SO JONES CAN SELL IT FOR \$1000 AND USE THE MONEY AS
 CAPITAL; IN EXCHANGE FOR JONES AGREEING TO PAY \$1100 OF JONES'
 PROFIT IN ONE YEAR.
 - In one year, if Jones has profit, the title to \$1100 of it transfers to Smith automatically. Jones is now in possession of \$1100 of Smith's money. If he refuses to turn it over, he is a thief.
 - O IF JONES'S BUSINESS IS KAPUT, AND HE HAS NO MONEY, WHAT HAS HE STOLEN FROM SMITH? THE CLOCK? THE MONEY? THE MONEY DOES NOT EXIST. THE CLOCK WAS SOLD TO A PAWN SHOP, WITH SMITH'S PERMISSION. HOW CAN THAT BE "RETROACTIVE" THEFT? IT WAS NOT THEFT. THEFT IS USE OF ANOTHER'S PROPERTY WITHOUT THEIR CONSENT. JONES HAD SMITH'S CONSENT TO SELL THE CLOCK TO A THIRD PARTY, AND TO USE THE \$1000-MONEY-PROCEEDS TO FUND HIS BUSINESS.
- CLEARER EXAMPLE: SMITH AGREES TO GIVE THE CLOCK (VALUED AT \$1000) TO JONES IN EXCHANGE FOR JONES'S AGREEMENT TO GIVE

SMITH A SET OF LUGGAGE IN A YEAR (WORTH \$1100).

- O IN ONE YEAR, IF JONES'S BUSINESS IS RUNNING AND HE HAS PRODUCED LUGGAGE, THE TITLE TO A SET OF LUGGAGE TRANSFERS TO SMITH AUTOMATICALLY. JONES IS NOW IN POSSESSION OF SMITH'S PROPERTY. IF HE REFUSES TO TURN IT OVER, HE IS A THIEF.
- O IF JONES'S BUSINESS HAS PRODUCED NO LUGGAGE, WHAT HAS HE STOLEN FROM SMITH? THE CLOCK? THE LUGGAGE? THE LUGGAGE DOES NOT EXIST. THE CLOCK WAS SOLD TO A PAWN SHOP, WITH SMITH'S PERMISSION. HOW CAN THAT BE "RETROACTIVE" THEFT. IT WAS NOT THEFT.
- ANOTHER EXAMPLE: SMITH AGREES TO WORK FOR JONES CORP FOR LIFE. NOT ENFORCEABLE FOR INALIENABILITY REASONS. BUT SUPOSE HE RECEIVES \$1,000,000 "IN EXCHANGE" FOR THESE "EXPECTED FUTURE SERVICES." (137) R SAYS JONES CORP TRANSFERRED TITLE TO THE \$1,000,000 CONDITIONED ON PERFORMANCE OF LIFELONG SERVICE. IF SMITH CHANGES HIS MIND, HE CAN'T KEEP THE \$1,000,000, AND IS A THIEF IF HE DOES.
 - THIS IS TRUE ONLY IF HE STILL HAS THE MONEY. THE TITLE TRANSFER TO THE MONEY WAS *NOT* CONDITIONED. RATHER, SMITH RECEIVED FULL, UNCONDITIONAL TITLE TO THE PROPERTY (THAT'S WHY HE'S ENTITLED TO SPEND IT—HE'S THE OWNER OF IT). JONES CORP RECEIVED, IN EXCHANGE, A TRANSFER OF SMITH'S-FUTURE-PROPERTY (NAMELY, \$1,000,000 PLUS INTEREST) CONDITIONED ON THE EVENT OF SMITH QUITTING. BUT THIS FUTURE-PROPERTY MIGHT NOT EXIST. NON-EXISTING PROPERTY CANNOT BE STOLEN.
- FRAUD EXAMPLE: A SELLS TO B A PACKAGE SUPPOSED TO HAVE A RADIO. IF HAS ONLY SCRAP METAL, A HAS STOLEN B'S PROPERTY (B'S MONEY). YES. WHY? BECAUSE B TRANSFERRED TITLE TO THE MONEY TO A CONDITIONED ON GETTING THE RADIO AND NOT BEING DEFRAUDED. A KNOWINGLY OBTAINED B'S MONEY KNOWING THE CONSENT WAS NOT REALLY THERE. (143)
 - THIS IS DIFFERENT FROM THE FUTURE-DEBT CASE. THE CONSENT IS CONDITIONED ON TRANSFER NOW, OF A FUTURE THING. THAT IS FULFILLED, SO THERE IS CONSENT. IN FRAUD, THERE IS ALWAYS FRAUD AT THE TIME OF TRANSFER, OR NOT; THIS IS THE DIFFERENCE.
- O **Debtor's Prison**. Although imprisonment for failure to pay a debt is excessive punishment, technically failure to pay debt is aggression and thus can be punished. R tries to escape the harsh consequences by saying it's excessive. It would be better to distinguish actual theft (refusal to turn over another's property) from inability to pay because of nonexistence of the sum due (not theft). (144)
- "PROMISES". ROTHBARD INSISTS THAT PROMISES ARE NEVER BINDING, THAT THERE IS A SHARP DISTINCTION BETWEEN TITLE TRANSFERS AND PROMISES (141). HE DISTINGUISHES BETWEEN "I PROMISE TO GIVE YOU \$10,000 in a year" and "I hereby agree to transfer \$10,000 to you in one year's time."
 - AS R NOTES, THE QUESTION IS: HAS TITLE TO ALIENABLE PROPERTY BEEN GRANTED, OR HAS A MERE PROMISE BEEN GRANTED? THE FORMER IS ENFORCEABLE, THE LATTER NOT.

- CONCEPTUALLY, YES, ONE CAN DISTINGUISH BETWEEN THESE CASES. BUT, A
 TRANSFER OF TITLE IS A CONSENSUAL ACT. CONSENT CAN BE MANIFESTED IN
 MANY WAYS.
- E.G. BY CONTEXT. WORDS CAN ACCOMPANY—WRITTEN OR ORAL—BUT NEED NOT. I GRAB A USA TODAY OFF THE RACK IN A STORE AND HAND THE CLERK A DOLLAR. HE GLANCES AT ME, ASSESSES THE SITUATION, TAKES THE DOLLAR, AND GIVES ME MY CHANGE. I WALK OUT WITH THE PAPER. NEVER A WORD SPOKEN.
 - LA. CIVIL CODE: ART. 1936. REASONABLENESS OF MANNER AND MEDIUM OF ACCEPTANCE. A MEDIUM OR A MANNER OF ACCEPTANCE IS REASONABLE IF IT IS THE ONE USED IN MAKING THE OFFER OR ONE CUSTOMARY IN SIMILAR TRANSACTIONS AT THE TIME AND PLACE THE OFFER IS RECEIVED, UNLESS CIRCUMSTANCES KNOWN TO THE OFFEREE INDICATE OTHERWISE.
 - ART. 1939. ACCEPTANCE BY PERFORMANCE. WHEN AN OFFEROR INVITES AN OFFEREE TO ACCEPT BY PERFORMANCE AND, ACCORDING TO USAGE OR THE NATURE OR THE TERMS OF THE CONTRACT, IT IS CONTEMPLATED THAT THE PERFORMANCE WILL BE COMPLETED IF COMMENCED, A CONTRACT IS FORMED WHEN THE OFFEREE BEGINS THE REQUESTED PERFORMANCE.
 - ART. 1942. ACCEPTANCE BY SILENCE. WHEN, BECAUSE OF SPECIAL CIRCUMSTANCES, THE OFFERE'S SILENCE LEADS THE OFFEROR REASONABLY TO BELIEVE THAT A CONTRACT HAS BEEN FORMED, THE OFFER IS DEEMED ACCEPTED.
- TOO MECHANICAL TO SAY THE USE OF THE WORDS "I PROMISE" CAN NEVER FORM A CONTRACT. I PROMISE TO PAY YOU \$1000 MIGHT BE MEANT AND UNDERSTOOD BY THE PARTIES TO MEAN \$1000 IS TRANSFERRED. A PROMISE TO DO SOMETHING IS NOT ENFORCEABLE, BUT IT MIGHT IMPLY AGREEMENT TO TRANSFER TITLE TO MONEY AS DAMAGES UPON FAILURE TO PERFORM. ETC.

INALIENABILITY

- R SAYS THAT MERE PROMISES OR EXPECTATIONS ARE NOT ENFORCEABLE. ONLY CONTRACTS THE BREACH OF WHICH AMOUNTS TO *THEFT* OF ANOTHER'S PROPERTY, ARE ENFORCEABLE—BECAUSE PROPERTY RIGHTS ARE ENFORCEABLE.
- BUT, ONLY ALIENABLE THINGS CAN BE SOLD, OR SUBJECT TO A CONTRACT. YOU CAN GIVE OR TRANSFER OWNERSHIP AND CONTROL OF A PIECE OF PHYSICAL PROPERTY YOU CURRENTLY OWN AND CONTROL. (134)
 - O BUT ONE'S WILL IS NOT ALIENABLE; EACH MAN HAS CONTROL OVER HIS BODY AND WILL. IT IS "INALIENABLE"
 - O VOLUNTARY SLAVERY CONTRACTS ARE THEREFORE UNENFORCEABLE.
 - O **PROBLEM:** WE CAN JAIL OR PUNISH AN AGGRESSOR EVEN THOUGH HE STILL HAS A WILL. WE CAN OWN ANIMALS THAT DO NOT OBEY US SOMETIMES. A CRIMINAL IS IN A SENSE "ENSLAVED". EVIDENTLY THE FACT THAT ONE HAS A BODY UNDER THE CONTROL OF ONE'S FREE WILL DOES NOT MAKE ENSLAVEMENT "IMPOSSIBLE" OR UNJUSTIFIED. SO IF SLAVERY-FOR-COMMITTING-AGGRESSION IS JUSTIFIED, WHY NOT VOLUNTARY SLAVERY?
 - ME: THE PROBLEM IS R SAYS WE ARE "SELF-OWNERS". THIS MAKES IT SOUND LIKE OUR

RIGHTS RE OUR OWN BODY ARE SIMILAR TO THOSE FOR OTHER THINGS WE OWN. JUST AS WE CAN OWN A HOMESTEADED THING, AND "THUS" CAN SELL IT, WE CAN ALSO SELL OUR BODIES BECAUSE WE ARE "SELF-OWNERS". BUT R SEES INTUITIVELY THERE ARE PROBLEMS WITH THE LATTER RESULT, SO HE COMES UP WITH THIS "PERSON CAN'T ALIENATE HIS WILL" LIMITATION OF SELF-OWNERSHIP RIGHTS.

- WOULD BE BETTER TO BACK UP AND UNDERSTAND WHY AND HOW THERE IS A RIGHT TO TRANSFER TITLE TO PROPERTY.
- O *OWNERSHIP MEANS THE RIGHT TO CONTROL A SCARCE RESOURCE*. THIS DOES NOT NECESSARILY IMPLY THE RIGHT TO "SELL" OR TRANSFER TITLE. IT MEANS THAT IF THERE IS A POTENTIAL CONFLICT—IF TWO OR MORE PEOPLE DESIRE TO CONTROL OR USE THE SCARCE RESOURCE—THE OWNER IS THE ONE WHO GETS TO DECIDE.
 - **BODIES:** IF AN AGGRESSOR ATTEMPTS TO USE THE VICTIM'S BODY, THE VICTIM CAN OBJECT ON THE GROUNDS HE HAS A **NATURAL CONNECTION** TO HIS OWN BODY AND THUS "BETTER TITLE" TO IT. IF THE AGGRESSOR DENIES THIS, HE HAS NO GROUNDS TO OBJECT TO THE VICTIM DEFENDING HIMSELF, WHICH IS EXACTLY WHAT THE VICTIM WOULD HAVE A RIGHT TO DO IF HE HAD A SUPERIOR RIGHT TO HIS BODY.
 - Thus, if someone commits an act of aggression, force can be used against them. For example to punish them or enslave them.
 - HOWEVER, IF SOMEONE HAS NOT INVADED ANOTHER'S PROPERTY BORDERS, THEIR ACTION IS PEACEFUL AND DOES NOT JUSTIFY FORCE AGAINST THEM.
 - **THEREFORE**, ENSLAVEMENT CONTRACTS HAVE NO EFFECT—BECAUSE SAYING "I PROMISE TO BE YOUR SLAVE" **IS NOT AGGRESSION**.
 - PERSON; HIS USE EXCLUDES THAT OF OTHERS. IF A PERSON IS IN POSSESSION OF PROPERTY THAT HE HAS HOMESTEADED (APPROPRIATED) BY FIRST POSSESSION, THEN IF A TRESPASSER TRIES TO USE IT, THE FIRST POSSESSOR HAS BETTER TITLE TO THE PROPERTY BECAUSE OF HIS STATUS AS ITS FIRST POSSESSOR. IF THE LATECOMER DOES NOT RECOGNIZE THIS DISTINCTION, HE DOES NOT RECOGNIZE OWNERSHIP AT ALL, BECAUSE IF LATECOMERS CAN TAKE PROPERTY, SOMEONE COULD TAKE IT FROM HIM, AND SO ON. IF HE DOES NOT RECOGNIZE OWNERSHIP, HE HAS NO GROUNDS FOR CLAIMING HE IS ENTITLED TO IT, NOR TO OBJECTING TO THE FIRST POSSESSOR'S USE OF FORCE TO DEFEND IT.
 - FOR BODY-RIGHTS, ONE HAS **BETTER TITLE** THAN OTHERS BECAUSE OF THE NATURAL CONNECTION TO ONE'S OWN BODY. NOT EXACTLY "FIRST POSSESSION."
 - FOR HOMESTEADED PROPERTY, THERE IS **BETTER TITLE** BECAUSE ONE APPROPRIATED THE PROPERTY. THIS IS A DISTINCTION. PEOPLE WITH BODIES HAVE A NATURAL CONNECTION TO THEIR BODY; PEOPLE-WITH-BODIES **ACQUIRE** PREVIOUSLY **UNOWNED** SCARCE RESOURCES, BY **FIRST POSSESSION**. THIS IS THE DISTINCTION.
 - HAVING BETTER TITLE TO ONE'S BODY, AND PREVIOUSLY-UNOWNED, NOW-APROPRIATED SCARCE RESORUCES, MEANS ONE IS THE OWNER, AND HAS THE SOLE SAY OVER HOW THESE THINGS ARE USED. BUT

HAVING RIGHT TO CONTROL DOES NOT NECESSARILY MEAN ONE CAN SELL.

- ACQUIRED THINGS ARE ACQUIRED. FIRST POSSESSION IS A PURPOSIVE
 ACTION BY WHICH AN ACTOR PUTS A THING TO USE FOR A GIVEN
 PURPOSE, AND INTENTIONALLY ASSERTS HIS DOMINION AND CONTROL
 OVER IT. JUST AS ONE CAN ACQUIRE A THING, ONE CAN ABANDON A
 THING. AFTER IT IS ABANDONED IT BECOMES UNOWNED PROPERTY
 AGAIN.
- HOWEVER, A TRANSFER OF TITLE (SALE) CAN BE ACCOMPLISHED BY SIMPLY ABANDONING THE THING "IN FAVOR" OF A DESIGNATED TRANSFEREE.
 - OWNERSHIP AND POSSESSION ARE SEPARATE
 - ONE CAN LOAN THINGS TO OTHERS: THAT IS ONE CAN HAVE POSSESSION BUT NOT OWNERSHIP, AND VICE-VERSA.
 - SUPPOSE ONE LOANS PROPERTY TO ANOTHER, SO THAT THEY HAVE POSSESSION, AND YOU HAVE OWNERSHIP.
 THEN YOU "ABANDON" THE PROPERTY. WHAT HAPPENS? THEY RE-HOMESTEAD IT.
 - O CONCEPT OF "QUITCLAIM".
 - O THEN, THIS TRANSFEREE HAS "BETTER TITLE" THAN ANYONE ELSE IN THE WORLD, JUST AS YOU DID, BEFORE. VIS-À-VIS YOU, HE HAS BETTER TITLE, BECAUSE AS FAR AS HE IS CONCERNED, YOU "ABANDONED" IT. VIS-À-VIS THE REST OF THE WORLD, HE HAS BETTER TITLE BECAUSE YOU ABANDONED IT IN FAVOR OF HIM, I.E. HE IMMEDIATELY RE-ACQUIRED IT AS SOON AS YOU RELINQUISHED OWNERSHIP, BECAUSE HE WAS IN POSSESSION OF IT AND THUS BECAME ITS NEW "FIRST POSSESSOR".
- I.E., IN THE CASE OF APPROPRIATED SCARCE RESOURCES, ONE HAS THE RIGHT TO CONTROL (OWNERSHIP), BUT ALSO THE RIGHT TO ABANDON— "IN FAVOR OF" ANOTHER. THEREFORE, OWNERSHIP OF ACQUIRED RESOURCES ALSO INCLUDES THE RIGHT TO ALIENATE TITLE.
- BUT THIS REASONING DOES NOT APPLY TO OUR BODIES.
- THIS IS WHY SLAVERY CONTRACTS ARE UNENFORCEABLE; IT SIMPLY MAKES NO SENSE TO SPEAK OF ABANDONING ONE'S BODY, SINCE WE DO NOT "ACQUIRE TITLE" TO OUR BODIES BY FINDING SOME UNOWNED SCARCE RESOURCE AND THEN APPROPRIATING IT FROM THE STATE OF NATURE. ENFORCING A SLAVERY CONTRACT IS SIMPLY AGGRESSION, BECAUSE IT IS USING FORCE AGAINST A NON-AGGRESSOR (SIGNING A PIECE OF PAPER IS NOT AGGRESSION).
- {?? USE BABY O/S EXAMPLE TO SHOW FLAW IN THINKING BODIES ARE PROPERTY IN EXACT SAME MANNER AS HOMESTEADED PROPERTY. WHAT IF INTERNET WAKES UP???}

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