

Jeremy Shearmur

FROM DIALOGUE RIGHTS TO
PROPERTY RIGHTS:
FOUNDATIONS FOR HAYEK'S LEGAL
THEORY

Hayek's philosophy of law has Kantian features, but he offers indirect utilitarian arguments for them. Hayek's arguments might be strengthened by considering that the utilitarian has an interest in issues of truth and falsity and thus in the individual as the bearer of critical judgments. Individuals might thus be accorded "dialogue rights" upon a (Popperian) epistemological basis, an idea which is further strengthened by the consideration that dialogue may be extended to the appraisal of the validity of utilitarianism. Moreover, such dialogue rights should be interpreted in large part as property rights.

Hayek as a young man was a socialist. He wished to reconstruct a social world which gave rise to misery and to profound dissatisfaction. He was led, through his encounter with Ludwig von Mises, to espouse a form of classical liberalism. This, he argued, would provide a better path than would socialism to the realization of his ideals.

Now, one important theme in Hayek's liberalism, as he subsequently was to develop it, is the ideal of equality before the law—that, in constitutional terms, individuals should be accorded equal rights. Hayek further favors the ideal of the minimization of coercion of individuals, as part and

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parcel of which government also is to respect individuals' rights. All this, however, is argued for upon a basis that is broadly utilitarian in its character. Such ideas make their appearance in Hayek's *Freedom and the Economic System* and in *The Road to Serfdom*. But it is in Hayek's *Constitution of Liberty* where they appear in a full-fledged form. Indeed, John Gray, when discussing Hayek's work, while he noted the "fundamental utilitarian commitment in [Hayek's] theory of morality," also wrote that "Hayek has always been an ethical Kantian"¹ and that

What is distinctive in Hayek's Kantian ethics is his insight that the demands of justice need not be competitive with the claims of general welfare: rather, a framework of justice is an indispensable condition of the successful achievement of general welfare.²

While I would have reservations about Gray's "always"—at least if it is intended as a statement about Hayek's published work—his description does seem to me to fit Hayek's *Constitution of Liberty*. However, it describes a claim rather than an "insight." And what—one might wonder—would someone make of this claim who accepted Hayek's arguments for liberalism up to this point on broadly utilitarian grounds, but who did not feel any particular sympathy for the idea that individuals should be accorded equal rights? They might well wonder: has Hayek actually provided an argument as to why individuals should be treated in this way?

It would seem as if, by the time he wrote *The Constitution of Liberty*, Hayek did not wish to disagree with those who believed in "the value of liberty as an indisputable ethical presupposition."³ But he was well aware that "to convince those who do not already share our moral suppositions, we must not simply take them for granted." He goes on to say that "we must show that liberty is not merely one particular value but that it is the source and condition of most moral values," and, further, that "We can therefore not fully appreciate the value of freedom until we know how a society of free men as a whole differs from one in which unfreedom prevails."⁴ But this—while indicating that he will be concerned with consequentialist arguments—perhaps begs our question, by the reference to "as a whole."

Indeed, when Hayek later refers to the issue of the universality and equality of rights in *Law, Legislation and Liberty*, he refers simply to his wish "to continue on the path which since the ancient Stoics and Christianity has been characteristic of Western civilization." But this would not cut much ice with our utilitarian—who is neither a Christian, nor a Stoic. What would Hayek have to do to show our utilitarian that he should be a

liberal in Hayek's sense? Is it really the case that broadly utilitarian concerns lead to liberalism, at all?

On the face of it, Hayek would have to show that circumstances can be expected to arise within a liberal social order which would be favored by the utilitarian, and that alternative forms of social order would be likely to have defects such as to make them less attractive.

But over and above this, he would face another problem close to that which, on some interpretations, also faced J. S. Mill.⁶ For Hayek would seem to have to argue a case for taking each individual as something close to an end in himself, and for respecting the contents of his choices, from broadly utilitarian premises. (Or, at the very least, he must argue that there is no conflict between all this and utilitarianism.) In addition, as Raymond Plant has argued, there is a constraint over Hayek in his responses to such problems. For he must provide responses that lead to individuals' being accorded rights of the sort that he favors (i.e., rights appropriate to classical liberalism, a *Rechtsstaat*, and a non-market welfare safety-net). But the basis on which he argues for these rights must — presumably — not also support according to individuals positive rights of a stronger kind, incompatible with his liberalism.

Let us briefly consider, then, some of the problems that confront Hayek as a liberal who wishes to argue his case in utilitarian terms. (Our discussion may also contain something of interest for those who wish to argue to liberal conclusions not in utilitarian but in Hobbesian terms, as precisely the same problem about all individuals getting the same rights occurs there, too, and the same or closely similar problems must be overcome.)

Equality before the Law

First, consider the idea that the law should apply equally to all citizens.

Hayek can of course point to the advantages to all citizens from membership of a large society in which there is practiced the social division of labor; where individuals, under the rule of law, are free to choose their own occupations and act on the basis of their own knowledge, and where their activities are coordinated through market mechanisms. Suppose (for the sake of argument) that Hayek is correct that such a society with a welfare safety net will, all things considered, do better in terms of the well-being of its citizens than a centrally planned society or a society in which social justice is pursued politically. This would not,

however, in itself explain why the laws of Hayek's favored society should give equal rights to all citizens.

Clearly, there are utilitarian arguments for this, related to the kind of social order that Hayek is envisaging. In such forms of social organization, citizens are typically dealing (in economic transactions regulated by the legal system) with individuals with whom they do not have face-to-face relationships. There is thus a clear advantage to them if they can deal with such people as legal agents in as abstract and general a form as possible. And so, *ceteris paribus*, they will not want to face the high information costs that variability in the law with respect to different individuals may bring with it.

There may also be some (although smaller) costs that follow from the problem of identifying individuals who have different rights even in situations where we are in face-to-face contact with them. More importantly, in face-to-face situations most of us⁷ would, I guess, feel that all kinds of human and cultural disadvantages result if people have radically different rights, as opposed to all relationships being with citizens who share a basic legal equality. (I.e., I guess that most of us would, with Rousseau, aesthetically prefer life in a society without dependence, although we would wish to extend it further than he did — i.e. beyond *met*!)

However, it is by no means clear that the quantitative gains that one might make from engaging in interactions with other individuals as formal equals, together with qualitative gains of the kind indicated above, will constitute sufficient utilitarian grounds for the law being genuinely universal in its character (and thus for every individual's having the same formal rights).

Identification and informational problems may be susceptible to various forms of technical solution. It is striking that the credit card, with machine readable information, already provides ways in which discrimination may easily be made between individuals of different status.⁸ Human beings have (unhappily) also shown themselves all too adept at the construction and successful living out (by all parties) of cultures in which there is not formal equality (think only of the history of the relationships between men and women).

It is also by no means clear that the results of a utilitarian comparison of exploitation and of freedom will go Hayek's way. There may be huge gains to the exploiters if a minority is exploited — say, most radically, by their being "farmed" as an organ bank for transplant operations for the majority. In this grim situation, their use for transplants apart, the minority may engage in the ordinary transactions of a liberal society with their exploiters. It might also be the case that the exploited minority are not all

that unhappy. If someone is so used, their heirs may be given a sum of money. If the risk of their being "used" in this way is low, they may not be able to feel any more about it (until it occurs) than we do about, say, the risk of being struck by lightning. They might be chosen by lot. And it is also quite possible that—as a rationalization of such a relationship—they might come to accept some belief, custom or ideology that enables them to feel good about being exploited.

Now, it is by no means clear that, on utilitarian grounds, all this would be outweighed by: (i) the gain in well-being on the part of the minority if they were no longer exploited; together with (ii) such gains as there might be to the majority from the fact that they would now only interact with citizens with *one* status before the law.¹⁰

The liberal utilitarian—the person who wants to extract the doctrine of equality before the law from a doctrine of utility—would thus seem not to be in a strong position. But what of Hayek's argument—which appears both in *The Road to Serfdom* and in *The Constitution of Liberty*—that "liberty is not merely one particular value but . . . it is the source and condition of most moral values"?¹¹

If this is meant as an argument to the effect that well-being is promoted by liberty, then it will be open to criticism on the grounds indicated above (i.e., that it would look as if there are cases in which general well-being is promoted by some individuals *not* being accorded full rights). Yet if it is to be taken as an argument that the good—say, virtue—is only the good if it is chosen freely, it will have little appeal to those who favor a consequentialist ethic such as utilitarianism.

Even those who agree that it is something like virtue that is all-important (taking "virtue" as a shorthand for those elements of the good the moral character of which depends upon their being freely chosen), the case for liberty is not sewn up. For someone could well argue for paternalistic restrictions on liberty (say, against drug taking) in order to maximize, in the long run, the occurrence of virtuous acts; or argue that paternalistically imposed education is needed in order to supply to individuals what will form the content of a morality of virtue; or that for individuals to be able to practice moral values requires that material prerequisites (such as food) be satisfied, the provision of which requires restrictions on the liberty of others that are not compatible with liberalism.¹²

If the virtue argument is widened to include an appeal to some idea of the individual creating himself—to his being something like a work of art—this, also, will prove far from conclusive. For such a view is vulnerable to what might be called the Pygmalion objection: that someone else

might be able to make a much better job of ourselves as a work of art than we can, on our own. And even if these arguments could be met, there would *still* be the problem of why *everyone* should be accorded such concern—rather than, say, some people sacrificed to the greater virtue of others.

Respect for the Preferences of Each Individual

Let us look at these issues in more detail. First, Hayek believes that we should respect the preferences and choices of each individual. Why should we do this? Presumably, because they are thought to provide the best path to knowledge of what will satisfy and what will dissatisfy that individual (to say nothing of their relevance to higher-flown ideas about individuality). A case *can* be made here for paternalism. But it is one to which it is not too difficult for Hayek to reply, if he makes use of arguments about the availability of knowledge along the lines of Mill's *On Liberty*, and if he demands that we take a *realistic* as opposed to an "enlightened despot" view of the likely performance of those manning the political institutions that are allocated a paternalistic role. I will thus assume that Hayek could make out a reasonable case for confining paternalism to children and to governmental measures of a sort that do not call into question his ideas about the legitimate sphere of governmental action.

More serious, perhaps, are problems about the manipulation of individuals' tastes: of whether individuals' preferences are a good guide to their well-being, given the influences to which these preferences may be subject in a market-based society. These influences might be argued to fall within a continuum, ranging from brainwashing, through socialization, to the influence of advertising in a pluralistic setting.

At first sight, it might be thought that Hayek has a strong case, just because he would seem to have something pertinent to say about either end of the spectrum. Brainwashing would seem to be ruled out, for Hayek, by the fact that it would involve coercion; while on advertising Hayek has written briefly, but spiritedly—for example, in his response to Galbraith.¹⁴ Here he argued that the influence exerted by advertising poses no serious problem provided that the power to influence people is not in the hands of just one person or organization.

Hayek himself was clearly concerned only with matter-of-fact issues that Galbraith had highlighted, rather than with the deeper problem of the multiplication of needs in commercial society, as discussed, variously, by Mandeville, Rousseau, Smith, Hegel and Marx. However, there is

more depth than one might suspect to Hayek's response. For he also raised an important problem for those—like Galbraith—who complained about the manipulation of preferences. Hayek pointed out that tastes such as those for opera are clearly not natural to us, but that they are something that Galbraith would presumably not wish to condemn. He might have added that such tastes may well have to be acquired *initially* through processes involving cultural snobbery, the wish to impress, etc. (That is, if there is a threshold that has to be crossed before people begin to enjoy the things in question, and if one does not wish to coerce people into such tastes.) All this would seem to make it incumbent upon Galbraith—or some “deeper” critic of liberalism on such grounds—to offer a *theory* relating the desirable conditions for the formation of preferences to considerations of individual well-being. If my argument here is correct, the critic of liberalism would seem to be faced by a massive problem which he would need to solve prior to his being able to make his criticism.

However, this weapon may prove double-edged, in that if the *problems* that I will discuss below concerning the authenticity of preferences amount to anything, some such theory might also seem to be needed by the liberal.

I would indeed admit that cases may exist of inauthentic preference or of false consciousness, which are generated and sustained by forms of social interaction which do not involve coercion. This may happen in interpersonal relationships. (See, for a possible case—which, while initiated in a way that involved coercion, seems to have been later sustained without it—Linda Lovelace's account of her relationship with Chuck Traynor, as recounted in her book *Ordeal*.)¹⁵ Similarly, it seems plausible that some patterns of group interaction (such as those found in certain religious sects) may sustain beliefs in such a way that they may deserve to be called ideologies, and, in consequence, that they may generate preferences which can be described as inauthentic. Those who participate in such social relationships may be insulated from anything that can call their beliefs into question. Such groups may thus practice forms of behavior that—perhaps unintentionally—render their beliefs “immune” to criticism. And they may not be aware of the fact that this is taking place.¹⁶ What is more, such cases of individuals and groups highlight—in an extreme form—things that occur more widely in the day-to-day lives of us all.

If we consider social factors as affecting the way in which beliefs are maintained,¹⁷ it is not difficult to see the beliefs of many people in many kinds of situation as less than authentic, and their preferences as therefore not necessarily constituting a reliable indication of their interests. To the

extent to which this is the case, it is not clear why those preferences demand the respect that is accorded to them by liberals. Clearly, should we argue thus, we would then stand in need of a theory to assist us in discriminating between what is, or is not, an authentic preference, or, more accurately, what are and are not conditions under which people's views are not open to criticism. However, as is the case with more ordinary arguments concerning paternalism, it may be that while we can recognize a problem about preferences as they currently stand, the likely consequences of any alternative set of institutional arrangements might seem worse.

A further problem concerning the respecting of individuals' preferences is raised in a paper by Martin Hollis which argues (with reference to *Brave New World*) that, from a utilitarian perspective, the simplest way of getting people to be satisfied would presumably be to change their physiology, such that they would then be more easily satisfied in existing or even more modest circumstances.¹⁸ To take some substance (which, I would suggest, might be called “Stoite”) which would change people's physiology such that they would be rendered deliciously happy by the most modest of circumstances, is something that any utilitarian might find difficult to resist, for him- or herself, or on behalf of others.

The most obvious response to such problems would be to have recourse to Mill's arguments for the higher pleasures. Mill's argument—as reconstructed, for example, by John Gray¹⁹—was essentially that the Socratic pleasures of a life involving risk and responsibility outweigh the piggish pleasures of a lower-grade existence. But this reply is here of no avail. For the kind of satisfaction accorded by Stoite might be so engineered as to easily outweigh the pleasures of a life of autonomy and responsibility—to which, if the argument is to stay utilitarian in character, appeal must be made.

The more usual liberal arguments for liberty as an engine for the production of utility would also seem to be trumped. As the taking of Stoite promises optimal satisfactions, research on alternative ways of achieving satisfaction becomes pointless. And Hollis's own way out of his problem—a normative theory of human nature—seems to me to be of no use either, unless it is explained how this is other than an arbitrary stipulation.

The Epistemological Twist

I would like here to explore one way in which these arguments might be met. One of our concerns, above, was to see if something akin to a Kantian

ethic of respect for persons could be generated from a consequentialist position which, at its toughest, was a form of utilitarianism. This has customarily been done by adding to utilitarianism some ideal or moral element, whether directly, or through an analysis of the supposed properties of moral language.²¹

Let us eschew anything of this sort as question-begging, and (initially) restrict our argument to the confines of a hard-nosed utilitarianism. Is there anything that, from such a perspective, might assist us? I believe that there is. For if we are utilitarians, we are concerned with the relief of suffering, and with the promotion of happiness. And these depend on matters of fact. As a result, *qua* utilitarians, we have an interest in pertinent matters of fact, and thus — I suggest — in other people through the contribution they can make to the discovery of the truth or falsity of claims about such matters of fact.

If one feeds into the argument at this point some not implausible ideas from epistemology — in the sense of a theory of the growth of knowledge (say, of a kind roughly like that of Popper or of Peirce), which I have argued elsewhere is an approach which makes good sense of much else that is to be found in Hayek's work²¹ — one has an argument for treating people as ends in themselves generated *within* utilitarianism. For, to put this "epistemological twist" at its most stark, while the utilitarian might be able to outweigh respect for the preferences of one individual by those of others, things are very different when one is concerned with the individual as a source of cognitive judgments. For here, one single counter-example — one single judgment — is enough to show that some statement is false. And there is a *prima facie* argument for treating individuals as ends in themselves *qua* sources of such judgments. The contribution — or indeed the possible contribution — of each individual becomes something of interest in itself and, as a consequence, so does the individual who is its bearer. Individuals, that is to say, should be accorded what might be called "dialogue rights" by the utilitarian.

To be sure, particular judgments made by individuals may in some sense be overruled (e.g., if others cannot find the effects which they claim to exist). But this overruling is not merely done as a matter of head-counting.²² And one striking feature of the fallibilism of Popper or of Peirce is that it indicates that we may always have something to learn, even about those things which seem most clear-cut; and even from — as Popper points out, citing Burke²³ — those people who, on the face of it, might seem to have the least to offer.²⁴

My suggestion is thus that via our "epistemological twist" we can on utilitarian grounds accord "rights" to individuals who can — or might be

able to — make contributions, however humble, in their role as bearers of cognitive judgments.²⁵ Furthermore, the character of these rights is given to us by epistemology, in the sense of a theory of the growth of knowledge. (There is here, clearly, a parallel with Jürgen Habermas's theory of communicative competence.)²⁶ Popper's ideas about "conventionalist stratagems" may also serve as the basis of a theory which can explain which kinds of social formation illegitimately protect people's views from openness to criticism.

The theory of knowledge also furnishes us with an argument as to why individuals should be accorded autonomy, in the sense that their judgments should not be dominated by those of other people. For their judgments are supposed to provide independent tests of claims made by other people.²⁷ Individuals should thus be accorded a measure of respect as if they were ends in themselves, at least in this area of their activities.

However, our approach also suggests that these rights might be subject to certain qualifications. The rationale for according individuals rights, and the character of those rights, are derived from considerations in the theory of knowledge. It is on the basis of epistemological considerations that individuals are to be accorded freedom from involuntary domination. But what of domination that does not involve coercion — and the right that individuals may claim to join, voluntarily, a religious sect, or a monastery, membership of which may have the unintended consequence of cutting the individual off from participating in the wider learning process?

It would, indeed, seem to me that *prima facie* they would not have such a right.²⁸ However, on practical grounds one might argue that there is less of a risk — to the growth of knowledge — from giving people such rights than from setting up some social institution with the power to pass judgment as to what institutions an individual is — or is not — to be allowed to join.

Four Objections to Dialogue Rights

It may be useful here to respond to four possible objections to these ideas.

(1) The introduction of "Stoite" (see above) might seem to pose an insuperable difficulty: why should individuals be accorded "dialogue rights" on utilitarian grounds, given that Stoite acts as ace of trumps when we are playing the game of utilitarianism? It might be thought that the obvious response from my position would be: don't take Stoite, as you (and others) need your wits about you to think how you might best be

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satisfied, to solve problems, and, generally, to engage in dialogue about issues relating to utility, etc. But against this, it can be argued that if people take Stoic, such activity is not needed, as everyone will be fully satisfied anyway.

The objection is, I think, valid if the argument is put in such a form. However, all that needs to be done is to raise the epistemological argument to a higher level. For rather than debating about happiness, we can debate about Stoic itself. All kinds of claims have been made about Stoic and its properties. But are these claims true? These, like any other such claims, stand in need of scrutiny and thus of scrutinizers — and thus of individuals with dialogue rights of the sort that we have described. (What is more, they also should not be taking Stoic while engaged in such activities if it affects their judgment!)

(2) This naturally leads on to the next issue: haven't we simply created a paradise for abstemious intellectuals, in which all resources would have to be diverted from enjoyment into investigation — which is an odd view for a utilitarian to take?

It seems to me that an answer of sorts can be given from within our "cognitive" perspective. For in order to evaluate certain claims we will have to be concerned not just with abstract argument, but also with trying out various ideas in a practical way. Such appraisal will require command over resources, the development and use of practical skills, and even experiments in living.²⁹

(3) A critic might also object that all that we have given rights to is a person's intellectual capacities; and, pointing to the fact that in the classical world intellectuals were sometimes slaves, he might ask whether the "dialogue rights" we have developed so far might not be more restrictive in their scope than they may have seemed. *Could not intellectual emancipation be quite compatible with social domination?* An answer to this is, I think, provided by the ideas suggested in the previous paragraph. For if we are also concerned with experiments in living and tacit knowledge, rather than just with abstract theoretical knowledge, it would seem that we would have the basis for an argument for rights that go beyond the merely intellectual, to encompass fuller social liberties of the sort needed for experiments in living.

(4) It might further be argued that I have been engaged in some sleight of hand. For I started with the problem of respect of the preferences of individuals; but I have discussed only their judgments.

It does seem to me that a cognitive approach can — and should — be taken to much of what is often treated as mere preferences; but I cannot

discuss this issue here.³⁰ What I can say, in mitigation of the line that I have taken, is that it is certainly possible for us to take many of our preferences as having a cognitive element — i.e., as involving a judgment that some object has the property of, for example, giving us pleasure of a particular sort. Now, the cognitive aspects of these preferences will be accorded weight and protection by virtue of our epistemological twist. But the non-cognitive aspects of our preferences, and non-cognitive uses of rights which people are accorded for cognitive purposes, may also receive protection — as a side-effect. That they receive such protection is a contingent claim, and it rests on the hypothesis that there is no practical means of protecting one without the other which will not, in its turn, generate other, more undesirable, unintended consequences.

This claim may itself prove incorrect. It is also possible that, even if this claim is correct, it may be felt that there is something wrong with our argument: is it acceptable that important steps in our argument have such a contingent character? To this, the appropriate response is that Hayek's own argument depends entirely on such contingencies. For, clearly, an omniscient God could be a central planner; and many of Hayek's own arguments depend on (presumably contingent) facts about the ways in which human beings are limited in their knowledge.

Plant's Challenge

It might be argued, however, that insofar as any of the above is successful, it walks into the trap set for the market-liberal by Raymond Plant.³¹ For if people are to be accorded rights of the kind favored by (classical) liberalism, because of the epistemological role that they might play, *should they not also be accorded "welfare rights" too?* For could these not also be presented as having an "epistemological" rationale: if a citizen is to be able to contribute, he or she would seem to need such resources as would enable him to play a full role as an active civic participant.

It seems to me that, as Hayek's argument — and our argument here — is at bottom utilitarian, the issue of whether such rights are admitted, and to what extent, must be empirical in character. I cannot address the substance of this issue here, for reasons of space, other than to indicate that I think that much the same arguments as Hayek is able to use against the desirability of high levels of welfare provision for reasons of human well-being should apply here, too.

Aside from the existence and quantity of such entitlements, should they be called "rights"? Nothing much depends on words — and I would have

no objection, if we can agree that they should exist, that they be called rights, provided we remember that such "rights," like all others within this approach, are derivative in their character from utilitarian considerations. Hayek does espouse the idea of a welfare safety net. And if that is desirable on utilitarian grounds³² there would seem to me no reason why an individual's entitlement to its protection should not be called a right—although it would, in some ways, be rather different in character from other rights.

The Rights of the Talking Chicken

There is, however, one major difficulty with the approach that we have taken so far. It is that the point of valuing the individual's cognitive contribution is through the contribution that this can make to the goal of utility. As such, it competes with other contributions that that individual might make—for example, as an object to be consumed by others.

Now I suggested above that from a utilitarian perspective, it might be possible to sanction gruesome arrangements in which, say, a minority were treated as something like living organ banks for the majority. In such a situation, does our "epistemological twist" cut any ice?

It may not, in that the cognitive contribution which the people in question might reasonably be expected to make might well be outweighed by the contribution that they could make as objects to be consumed. The situation is not unlike that, say, of a talking chicken who tries to preserve his life through pointing out the cognitive contributions that he might have to offer. But his interlocutors might be hungry, and getting hungrier. And they might *correctly* judge that the chicken could contribute more to utility if he is eaten than through his contributions to our factual knowledge. Even when their interest is concentrated exclusively on eating chicken, he might stall them by engaging them in discussions about chicken recipes. But not only would this seem demeaning (and thus far from the kind of rights in which the liberal is interested), but, as they got hungrier and hungrier, there would come a point at which what was to be gained from one recipe rather than another was simply of no further interest to them. The end—utility—in terms of the achievement of which rights were being accorded would, in such a case, itself serve to trump those rights.

Is this the end of the road—not just for the chicken, but also for our line of argument? If so, while it has got us some way, it has fallen short of what a liberal might hope to achieve.

The Cognitivist Twist

There is, I think, a further move that might be made here. For all of the above—including our discussion leading to the sad fate of the chicken—was conducted within utilitarianism: a substantive ethical theory, the correctness of which was taken for granted. (Or, more precisely, our concern was to see if rights of a character familiar from classical liberalism could be generated from within utilitarianism.) This, in itself, would indicate that there is a further move that the chicken might make: he might engage with his would-be butcher not over the utility of killing him as opposed to listening to what he might have to say, but over the correctness of utilitarianism!

At this new level of argument, a further case can be made out for rights for the sake of individuals' cognitive contributions. The situation here is somewhat more complicated, given the fact that there are clearly disanalogies, in terms of both goals and the methods appropriate for their achievement, between ethics and empirical knowledge. But it seems to me that there are sufficient similarities for an argument like that in the previous sections to go through.³³

I elsewhere have set out such a theory of ethical argument, by way of an adaptation of Karl Popper's ideas on epistemology and ethics.³⁴ It amounts to the replacement of the utilitarianism in terms of which we have been arguing so far by what is, in effect, a fallibilistic ethical intuitionism at the level of particular judgments, where individuals' judgments are subject to control by intersubjective consensus, in close parallel to Popper's ideas about the "empirical basis" of science. Against such an "empirical basis" of ethics, ethical principles may be tested as to their validity. It would seem to me likely that the procedures of such a theory might well generate, at the level of substantive ethical judgment, a consensus that suffering is bad and, other things being equal, that it is good that people should be able to satisfy their desires. This would thus simulate at least some aspects of utilitarianism.

That consensus would itself generate the problem with which we have been concerned so far: what are the appropriate institutional arrangements for the promotion of utility; and what are the merits of classical liberalism on this basis? However, our cognitivist twist would strengthen the argument, developed within our utilitarian setting, for according "dialogue rights" to the individual. For it would allow the individual to call into question utilitarian values if they should prove a threat to his own existence. For he and other citizens are now accorded dialogue rights of

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existence of viruses.

an enhanced character: ones that cannot automatically be trumped by utilitarian appreciations of themselves as objects to be "consumed."

But what of the acceptability of these ideas concerning dialogue about ethical issues? If we are faced with people who are cognitivists and fallibilists in ethics, and are willing to accept that the patterns of argument in ethics are close to those in matters of fact, then our argument goes through very simply. But such strong assumptions are probably not needed. For many non-cognitivists accept the legitimacy of just such argumentation concerning the formal character of ethical discourse; and they accept, further, that such discourse may have consequences for matters of substance in the field of ethics (they might thus be called meta-ethical cognitivists).³⁵

The biggest problem would seem to be with the ethical nihilist. If he (can be engaged in argument, then there is a toehold for the establishment of "dialogue rights" of the sort with which we have been concerned. But why should such a person be interested in talking? As Nozick justly said, his response to Socrates should not be to argue with him, but to hit him over the head.³⁶

The liberal who is after "dialogue rights" even here seems to have an advantage, in that, as a matter of empirical fact, people seem to be moralizing creatures who typically wish not just to do things, but to feel that they are right in doing them. Into such feelings our dialogue apparatus—and hence something that will serve as the basis for according dialogue rights to others—might be plugged.

However, even if it were empirically the case that everyone possessed such a disposition to moralize, this would not necessarily secure what the liberal requires. For we might well become convinced that this disposition should not be accepted in the way in which it presents itself to us. For instance, it seems quite possible that sociobiologists might be able to convince us that we are, here, simply the victims of drives which we possess because we are the instruments through which genes reproduce themselves. And if this were the case, we could, surely, decide to disregard such promptings to morality. For why—we might reflect—should we (who clearly have a choice in how we behave) consent to being used as instruments by genes for which we may not care a fig? Other human beings, as our dispositions to morality cause them to be presented to us, may seem objects worthy of consideration. But if we discover that the way in which we appreciate them is the result of something like a biological plot by means of which a virus-like object manages to reproduce itself, we may, quite rationally, accord such "moral promptings" no moral weight at all.³⁷

I am not arguing that such a sociobiological theory is true; merely that, if it were true, we could well come to view the promptings of our conscience and the wish to be ethically justified as something that should not be given the kind of weight that seems merited by the way in which it presents itself phenomenologically. This does not mean that such impulses should necessarily be disregarded; but it is not clear why they should be attended to when they are in conflict with our own self-interest.

However, it could be argued that the biological knowledge on the basis of which such a judgment is made must itself be validated via an interpersonal process in which others must be accorded rights for the sake of their possible cognitive contribution—just as in our earlier discussion of *Stoic*. Our appreciation of the fallibility of all human knowledge may also make us slow to disregard our ethical impulses, just because of the risk that the sociobiological theories that led us to do so may not be correct.

But what if people do not have moralizing dispositions, or if they become convinced, say through empirical argument in the field of biology, that the promptings of such dispositions are not to be taken at face value? What, in such cases, have we achieved? Our cognitivist twist would, indeed, have been blocked. And utilitarianism as a substantive ethical theory (constructed upon our moralizing dispositions) would also go under—and with it the epistemologically based arguments for rights, as presented so far in this paper.

Could anything be saved? Dialogue rights would, I suggest, still be warranted to a limited extent, in the sense that insofar as such people will want cooperation from others both socially and in their cognitive capacities, it will be in their interest to extend some such rights to them. But these rights would be subject to even more severe limitations than would the rights of our talking chicken, in that these dialogue rights could be trumped simply by the self-interest of one's interlocutor.

In such circumstances, all is not completely lost for the liberal. For such a situation adds something to the starting-point for contractarian arguments like those of Buchanan and of Gauthier, from which—they would have us believe—liberalism of a sort can be extracted. However it isn't clear to me how, in the face of coalitions of the strong, Buchanan and Gauthier are able to generate a theory of equality before the law, and thus make the world safe for chickens. And being myself a chicken rather than a butcher by temperament, and certainly sympathetic to their plight, I am inclined to explore further what might be done with epistemologically based arguments, rather than to join in the currently more fashionable exploration of forms of pure contractarianism.³⁸

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this mean?

Provisional Conclusions in Favor of Dialogue Rights

I have, by developing the link between Hayek's thought and the critical rationalism of Karl Popper—a link which may also be made on independent grounds, as I have argued elsewhere—been able to add some arguments to Hayek's. These, at the very least, do something to bolster the underpinnings of his Kantian-like ideas about the rule of law. These ideas about the rule of law play an important role in Hayek's thought. But they hardly follow from his utilitarianism as he presents it, and are not obviously even compatible with it. What is more, while the line which we have taken is perhaps a strange one, and may run into difficulties, it is not as obviously question-begging as would be a straight appeal to substantive but highly contestable moral ideas, or to equally contestable theories about individual rights.³⁹

The essential point here—as Hayek himself recognizes in a passage quoted at the start of this paper—is that whatever one may oneself feel about the correctness of some ideal such as individual freedom, the only arguments for it that carry any weight are those that appeal to ideas that are not themselves contested by one's interlocutors.⁴⁰ It is for this reason that I have couched my argument in terms of a moderate utilitarianism and an epistemological fallibilism. For these are ideas which are likely to prove uncontroversial to people of good will. At the same time, it should not prove too difficult to call into question—or at least to deny to be intellectually compelling—any more substantive theories to which other people may be devoted, which may be at odds with these ideas.

From Dialogue Rights to Property Rights

In the previous sections, I discussed the problem, arising in Hayek's work, of generating respect for each individual as an end in himself from more or less utilitarian premises. I suggested that this might be solved through first an epistemological and then a cognitivist twist. I generated the rights which I was seeking as "dialogue rights" accorded to individuals *qua* participants in factual and, finally, normative dialogue.

Suppose that my argument above was in order. A problem might be raised concerning the pertinence of the conclusions to which I was led. For it might seem as if my approach depended, crucially, on actual, face-to-face dialogue. It might then be suggested that, in political terms, such an argument must generate a variant of the *polis*-sized democratic ideal that has so bedevilled modern political thought. It would, indeed,

be ironic if such a view were to be the conclusion of an argument developed in the spirit of Adam Smith and of Hayek. For it was Smith who argued—in contrast to the views of Rousseau and the civic humanists of his day—that the good society was a big society. And Hayek has described the kind of society that he favors as the "Great Society."

Perhaps a way out of the narrow confines of the *polis* is offered in Popper's account of the principles that should underlie a large-scale democratic society. This society is, explicitly, not of a face-to-face character. And it is implicitly arrived at by Popper's generalizing his view of an idealized community of scientists in dialogue.

Unfortunately, Popper's view of scientists as engaged in such dialogue is itself perhaps a little misleading. For even on Popper's own account, scientists will be working within specific, and competing, metaphysical research programs. Between these, dialogue is possible, fruitful, and extremely important. But for such dialogue to take place is by no means a simple matter or a matter of routine, and it is often inconclusive in its character.⁴¹

Moreover, scientists are able to engage in dialogue to good effect even when they are not in face-to-face contact (e.g. through letters or journals). But they can do this just because the scope of the issues that they are discussing is restricted. There are also widely accepted conventions about how such dialogue should proceed.

However, in politics, an inconclusive dialogue is not enough when collective decisions are being taken. For without consensus these decisions will override the very dialogue rights for which we have argued—unless there is explicit agreement to act on, say, a majoritarian basis, on pragmatic grounds. In addition, political issues are multi-dimensional in character (Hayek, in his arguments against central planning, put some emphasis on the fact that we seem faced with different, and apparently irreconcilable, ideas about the good life). But it is difficult to have a fruitful dialogue between more than about four people, unless its scope is severely limited (as anyone with experience in taking group tutorials in a British university would surely testify).

What all this implies, I would suggest, is that actual dialogue has its limitations as a model for politics. I do not wish to claim that it is useless. It will have a role at the level of most general principles, and thus in the legitimation of the entire system, and possibly in the determining of the level at which a welfare safety-net should operate.⁴² It may also have its uses as a forum in which people may be called to give an account of what they are doing, and to respond to criticism. But here we would not expect that consensus will result, and no collective action will follow.

Does this bring us to the limits of the relevance of the "dialogue rights" which we spent so much time developing in the previous sections?

My answer is: no. For while dialogue itself does have such limitations, the gains which we there made may be preserved in another form. For dialogue may be simulated, by means of an "invisible hand" mechanism.⁴³ And individuals may be accorded rights, on epistemological grounds, in order to participate in such a mechanism.

What this is leading up to—as the reader may have guessed—is an argument from epistemology to an attenuated version of Hayekian liberalism. For if individuals are accorded property rights; if they and their property are protected by a "nightwatchman state"; and if they are free to engage in experiments in living and to move between such experiments, all this can serve as a surrogate for that more general dialogue which is not directly attainable.

The character of such property rights, the kind of protection that they are accorded, and what sorts of activity are so protected are themselves determined by considerations from both epistemology and social theory. Social theory comes in because we are here concerned with those arrangements which will best allow us to learn, in conditions of scarcity and of uncertainty. And it is in the face of these conditions that Hayek's arguments, together with Buchanan's contention that we should not treat the state as a benevolent despot, seem to me to tell in favor of a basically liberal model, with a welfare safety net, rather than a model that would grant individuals more extensive welfare rights for the sake of their contributions to such a surrogate dialogue. In a similar way, we can argue against diverting resources to any considerable extent to bring someone who is very severely handicapped into participation in our dialogue—just because of the high opportunity cost of so doing.

However, it is clear that there may be disagreement about such issues. As a result, we may have to agree to differ. Those citizens who believe that the level of support that should be accorded to the severely disadvantaged in order that they can play a participatory role in our surrogate dialogue greater than is allowed for by the consensual judgment of other citizens should be free to use their own resources for this purpose.

Many difficult problems—but, I think, interesting ones—arise if this proposal is explored in some detail: too many, indeed, for me to elaborate here.

However, in broad terms, this approach allows us to combine our epistemologically derived ideas about dialogue rights as developed above, with Hayek's ideas about a market order as a forum within which learning can take place. This means that we can part company with the less

rationalistic aspects of Hayek's work, and argue for the bare bones of classical liberalism by means of an appeal to the theory of knowledge and themes from Hayek's social theory.

This approach provides a rationale for the protection of individual judgments—and, in consequence, of individuals themselves—along the lines set out above. To this, it adds an argument for the protection of property and of experiments in living as these would be a way in which judgments are externalized (there is a certain parallel here with Hegel's view of property). The nightwatchman state must itself be neutral between substantive ideas that are being tried out. But it would maintain rules of the game so as to prevent coercion or the entrapment of individuals within experimental communities, and to deal with overspill effects or externalities. There is, however, a difference from Hegel, and with views that see pluralism as an end in itself, since here the prime rationale for such arrangements is not the expression of values, but their objectification in order that we can learn about them.

A model for such ideas is, in fact, to hand in the (unduly neglected) "utopia" section of Nozick's *Anarchy, State and Utopia*. Nozick noted a discontinuity between this section of his book and its earlier parts, in that the former did not depend upon his earlier assumptions about rights. In addition, in note 7 to chapter 10, Nozick pointed out that there were parallels between the ideas of that section and Popper's philosophy of science. He later noted a parallel between the utopia section of his first book and the pluralistic (yet truth-directed) approach of the introduction to his *Philosophical Explanations*. Thus, the link between the epistemologically grounded ideas of our previous sections, and this suggestion for their social instantiation, is not without its precursors.

Two points, however, should be made explicitly, because of my reference here to Nozick.

The first is that, by contrast with the earlier parts of *Anarchy, State and Utopia*, rights—as in Hayek's work—are in the utopia section accorded as a means to an end: the pursuit of the good (as in our dialogue about ethics), utility (where there is consensus about this), and truth. This, however, means that while judgments, individuals as the source of them, and property as instantiations of them are accorded protection, the basis on which this is done is instrumental, and arrangements here will be shaped by argument as to what represents the best use of our resources. Thus, as noted above, we are not committed to saying that resources must be used, come what may, to give someone a voice in our dialogue if the opportunity cost of so doing would be high.

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Secondly, because of the epistemological basis of our argument, the character of property rights may not prove quite the same as is familiar from classical liberalism. For, while substantive judgments will as far as possible be protected (so that there will be a presumption of freedom of contract between adults), property rights may be limited, as a consequence of Popper's epistemological ban on "conventionalist strategies." That is to say, there may be epistemologically generated restrictions on the right to use property for the construction of certain kinds of social formation which protect people's judgments from critical scrutiny. But this is a somewhat complex issue, which I cannot discuss here.

In our liberal meta-utopia, experimentation and learning take place via the activities of individuals. Individuals back their own judgment with their own resources in the membership of some society, organization, club, or, more radically, experimental community. Learning takes place when those individuals decide they made a mistake and pull out; or when they stay and make whatever changes are allowed for by the particular constitution of the small-scale organization which they have joined; or when they are joined by, or imitated by, others.

For all this to take place, it is necessary that there be a state—or some other institution which plays a similar role—which preserves individuals (and voluntary communities and associations) from aggression and over-spill effects, and which also prevents individuals from being held prisoner by some community or association that they have joined. Such an authority must clearly be neutral between the substantive enterprises and beliefs of specific organizations or communities, but must take particular care that children—second-generation members—have the opportunity to exercise choice between alternatives. Communities themselves may be as "open" or as "closed" as their members wish. Communities may exemplify different particular claims to knowledge—say, as to the character of the good life; or different constitutional theories about how social organizations should change with circumstances. In their internal organization they may be, variously, democratic, authoritarian, traditionalistic, or socialist; and among them would presumably figure, as a large-scale social experiment, Hayek's own specific ideas for the constitutional organization of a good society. Within communities, roles and property may be distributed on whatever basis their constitutions or rules state.

Individuals, as mentioned above, would be free to leave one community, and to join or set up another—though, clearly, some community may impose conditions on new members, or conditions upon those who may wish to leave it, subject, obviously, to the broader requirements laid down by the framework authority.

The details of all this, as may be imagined, are complicated, and would make a long paper more so. I would, however, like to mention explicitly the fact that, in this approach, not all dialogue is privatized in the form of property and experiments in living. Some dialogue of a more ordinary sort is needed in order for the underlying principles of the system to be legitimated. And I believe that one would need also to require those engaged in experiments in living to be mutually accountable in such a forum, as to the character of the experiments in which they are engaged, if this system is, indeed, to operate as a learning mechanism. In all of this, there is, thus, the ghost of civic humanist ideas, come back to haunt the classical liberal. However, participation is limited to the merely intellectual; the only political actions that are taken by the minimal state are ones that have an epistemological as opposed to a substantive political or moral rationale.

All this generates many problems: indeed, many current issues in political philosophy, from communitarian criticisms of liberalism to issues about foundationalism and politics, recur in the context of this approach. But this, and its utopian character, should also not conceal the fact that, insofar as there is anything in such ideas, I would also break a lance for them as a practical theory of the proper limits of the political. And this, I need hardly spell out, would throw doubts even upon Adam Smith as someone who was too willing to use the power of the state to coerce other rational agents into compliance with his own particular judgments.


NOTES

1. John Gray, *Hayek on Liberty* (New York: Basil Blackwell, 1984), 59-60.
2. *Ibid.*, 60.
3. F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 6.
4. *Ibid.*
5. F. A. Hayek, *Law, Legislation and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 27.
6. See, notably, John Gray's *Mill on Liberty: A Defence* (New York: Routledge & Kegan Paul, 1983).
7. Compare ch. 1 of my *The Political Thought of F. A. von Hayek*, University of London Ph.D. diss., 1987.
8. I.e., those who are likely to read the present essay, given our current values, etc.

9. As Peter Danielsen, who in discussion brought up this example, pointed out, in California everyone has a right to obtain a credit card. What they do not have a right to is a more than trivial credit rating.
10. Economic historians have, I understand, suggested that Adam Smith and other classical economists were wrong in arguing that slavery was an efficient institution—for slaves could be driven, i.e., work could be extracted from them of a kind that would not be supplied by free laborers.
11. See Hayek, *The Constitution of Liberty*, 6.
12. The proponent of virtue may, of course, try to reject such maximizing or aggregative arguments. But, clearly, that such aggregation is impermissible cannot just be assumed in the present context. For the point of appealing to virtue here was as the basis of an argument for liberty—for each individual's being taken as an end in himself. But this seems to me just what one is assuming if one gives preference to preserving an individual's freedom rather than interfering with it in order to maximize virtue, or if one insists on the freedom of one individual to pursue his or her own ends when interference would enable many other individuals better to pursue theirs.
13. In the sense of having been subject to manipulation, where this may legitimately include not only the results of purposive activity directed at this goal, but the effects of "the products of human action but not of human design."
14. See Hayek's "The Non Sequitur of the Dependence Effect," in his *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967).
15. See Linda Lovelace, *Ordeal* (London: W. H. Allen, 1981), and also Gloria Steinem's discussion of the case of Linda Lovelace in her *Outrageous Acts and Everyday Rebellions* (London: Cape, 1984).
16. I have discussed the issues involved here in some detail in two papers delivered to the Alexander Society at the University of Manchester: "The Sociological A Priori" and "Hayek, Linda Lovelace and the Moonies." See also my "The Religious Sect as a Cognitive System," *Annual Review of the Social Sciences of Religion* 4:149-63; and my "Epistemology Socialized?" *Et Cetera, Winter 1985*: 272-82; but see also Eileen Barker's important *The Making of a Moonie* (Oxford: Basil Blackwell, 1984) as a corrective to the view that the Unification Church is an empirical example of a group the membership of which has such effects.
17. The emphasis here on "maintenance" as opposed to causation, and on the openness or otherwise of beliefs to criticism suggests an approach to the sociology of knowledge which is not subject to the more usual objections to such theories. Cf. my "Epistemology Socialized?" for some further suggestions on this topic.
18. Martin Hollis, "J. S. Mill's Political Philosophy of Mind," *Philosophy* 44, no. 182 (October 1972): 334-47. I would like to thank Karl Popper for drawing my attention to the importance of this article.
19. In Gray's *Mill on Liberty*.

20. It might be wondered whether a strictly Kantian perspective would help. For if we are going to act morally, we need to be able to identify those who should be the objects of moral consideration. This identification presumably has to take place in the phenomenal world. But there, we seem to have no way in which we can identify what is, and what is not, deserving of treatment as an end in itself. For everything that occurs is perceived by us as occurring as a result of causal processes. So how can we identify moral agents who deserve such treatment as opposed to non-moral non-agents, who do not?
This problem is, at one level, solved by the ideas to be developed in the text, in that (as Bruce Ackermann has suggested in his *Social Justice in the Liberal State* [New Haven: Yale University Press, 1986]), we can see if any candidate can engage with us in dialogue. However, the problem here is that we may not have been listening in the right way for its reply, or it might be severely handicapped. The Kantian problem recurs as the problem of how we can identify potential partners in a dialogue. But this problem, in its turn, is much easier to solve than is Kant's problem, as it is a problem that is posed about—and can be answered in respect of—a world that is open to our inspection, and where we can develop theories about, say, the degree of internal organization needed in order to sustain the possibility of participation in a dialogue. This may make the issue of who is in principle a candidate for dialogue rights a matter that is open to rational assessment.
21. See, on this, my *Political Thought of F. A. Hayek*.
22. As Larry Briskman has suggested to me in a discussion of this material, the failure of others to find the effects in question can be interpreted as the attempt by others to test the original claim that was being made. But this is to recognize, implicitly, that such a claim has been made, and thus to recognize the person who made it. To say that a particular statement can be overruled or outweighed is not to say that its status as a claim, as opposed to its validity, is thus eliminated. (However, if someone's judgment is particularly bad, or becomes badly disturbed, they may come to lose their dialogue rights.)
23. "In my course I have known and, according to my measure, have co-operated with great men; I have never yet seen any plan which has not been mended by the observations of those who were much inferior in understanding to the person who took the lead in the business." Quoted from Burke (without an indication of the source) in Karl R. Popper, *The Open Society and Its Enemies*, vol. 1, (Princeton: Princeton University Press, 1966), vi.
24. It will be an empirical matter who is to count as a "person"—for personhood is simply a consequence of the empirical fact of having the capacity to contribute to dialogue (compare n20 above). Thus, if the claims that have been made for them should prove correct (cf. Eugene Linden's *Apes, Men and Language* [New York: E. P. Dutton, 1975]), Washoe and other chimpanzees might be entitled to such rights as a consequence of their linguistic capacities. But the senile and the fetus may not, as they, clearly, may not possess such capacities. However, this does not necessarily mean that they have no rights

- capacities. However, this does not necessarily mean that they have no rights at all; for as we shall see—when our argument is extended from factual to ethical subject-matter below—those who do not have rights as the subjects of dialogue on ethical matters may be accorded rights as its *object*, i.e., from the dialogue that takes place among those who do have such rights.
25. See, for a first stab at this argument, my "Abstract Institutions in an Open Society," in Wittgenstein, *The Vienna Circle and Critical Rationalism* (Vienna: HPT, 1979). This may be seen as a development of Hayek's idea that property rights should be reshaped with an eye to the contribution that they can make to utility.
 26. Cf. Thomas McCarthy's introduction to Habermas's *Legitimation Crisis* (London: Heinemann Educational, 1976), McCarthy's own *The Critical Theory of Jürgen Habermas*, (Cambridge, Mass.: MIT Press, 1978) and my "Habermas: A Critical Approach," *Critical Review* 2, no. 1 (Winter 1988): 39-50.
 27. I would like to thank Larry Briskman for urging that this point should be made explicit.
 28. I.e., they would not have the right to join social institutions which, in their intended or unintended consequences, acted to insulate them from criticism—where these would be the social equivalents of Popper's "Conventionalist Stratagems." Cf. his *Logic of Scientific Discovery* (London: Hutchinson, 1959), sec. 20. Compare with this the misgivings that Hayek expresses about the consequences for people's attitudes from their participation in large-scale social formations which insulate them from the market. See *The Constitution of Liberty*, ch. 8.
 29. Our argument, as presented here, would seem vulnerable to a related objection: that it would seem to be conducted as if all people were male, single and in the prime of their lives. However, there seems to me to be no reason why our epistemologically based approach may not be developed further, and involve itself with the most effective use of the knowledge and judgment of all citizens. In this connection, there would seem to be a considerable degree of common cause with many of the concerns—if not the suggested solutions to them—of contemporary feminists.
 30. Not only is there a strong cognitive element in many matters of aesthetics and taste (including the appreciation of various traditions of food and drink), but we can, by methodological decision, choose to hold many of our preferences in a form that makes them open to inter-subjective appraisal.
 31. Platz advanced this argument in the course of a paper on Hayek delivered to the Carl Menger Society in London in 1984. I do not know if this paper—or his argument—has yet appeared in print.
 32. There is possibly room for doubt about this, in view of Hayek's suggestion (*Law, Legislation and Liberty*, vol. 2, 144-5) that "It [became] part of the ethos of the Open Society that it was better to invest one's fortune in instruments making it possible to produce more at smaller costs than to distribute it among the poor. . . ." For this may mean that Hayek's admitting of a

- safety-net is a concession to our inability to bite the bullet of what a really systematic utilitarianism would involve.
33. I have explored this further in a paper, "Popper and Liberalism," given at the First Annual Conference on the Philosophy of Karl Popper in Manchester in 1984; a brief article based on one section of that talk has since been published as "Epistemological Limits of the State: Reflections on Popper's Open Society," *Political Studies* 38 (1990): 116-25.
 34. For an interesting exploration of parallels between epistemological and ethical argument, see David McNaughton, *Moral Vision* (Oxford: Basil Blackwell, 1987).
 35. Compare, say, the way in which emotivists such as Ayer and Stevenson strive to show that their theories still allow for ethics to have many of the features that one might have associated with a cognitivist understanding of ethics.
 36. See Robert Nozick, *Philosophical Explanations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1981), 434: "When in the *Republic* Thrasymachus says that justice is the interests of the stronger, and Socrates starts to question him about this, Thrasymachus should hit Socrates over the head. He concedes too much when he enters an activity, discussion, that assumes that there is some mark of correctness and rightness other than (and superior to) strength." 
 37. Compare, on this, Richard Dawkins, *The Selfish Gene* (London: Paladin, 1978). See also my "Natural Law Without Metaphysics: The Case of John Finnis," *Cleveland Law Review*, forthcoming.
 38. Cf., also, John Gray, *Liberalism* (Minneapolis: University of Minnesota Press, 1986).
 39. I do not mean that such ideas are without value; only that I do not see what is gained by appealing to them if they are rejected by those with whom one is in dialogue.
 40. It might be thought that this is a strange approach to be taken by someone who is working in the tradition of Karl Popper, for whom—one might think—the correct, non-justificatory approach would be simply to advance some claim and see if anyone has a cogent objection to it. This is indeed the case where one's concern is simply with truth; but where—as in the case of rights—one's concern is for mutual recognition and collaboration, I think that one has, first, to proceed as in the text. The same may also hold in respect of practical action.
 41. Cf., in this connection, Karl Popper's "Toleration and Intellectual Responsibility," in S. Mendus, ed., *On Toleration* (Oxford: Clarendon Press, 1987), in which, when discussing the exchange between Bohr and Einstein, he stresses that while they both learned much from each other, they did not end up in agreement. In this paper, Popper is critical of the idea that fruitful discussion must be expected to lead to agreement.
 42. Indeed, my own suggestions depend on the idea that, whether directly or through representatives, dialogue can take place, to consensus, concerning