

Western New England Law Review

Volume 39 39 (2017)

Issue 4 SYMPOSIUM: CLASSCRITS IX

Article 4

2017

A DEARTH OF KINDNESS: USING BUDDHIST PSYCHOLOGY TO EVALUATE RAWLS, NOZICK, AND CONTEMPORARY CORPORATE IDEOLOGY

James G. Wilson

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

James G. Wilson, *A DEARTH OF KINDNESS: USING BUDDHIST PSYCHOLOGY TO EVALUATE RAWLS, NOZICK, AND CONTEMPORARY CORPORATE IDEOLOGY*, 39 W. New Eng. L. Rev. 499 (2017), <http://digitalcommons.law.wne.edu/lawreview/vol39/iss4/4>

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

A DEARTH OF KINDNESS: USING BUDDHIST PSYCHOLOGY TO
EVALUATE RAWLS, NOZICK, AND CONTEMPORARY CORPORATE
IDEOLOGY

*James G. Wilson**

John Rawls and Robert Nozick's pathbreaking books established enduring parameters for mainstream political and legal discourse. While the polarity can easily be exaggerated, Democrats invoked Rawls's extension of the New Deal while Republicans gravitated towards Nozick's libertarianism. This essay argues that both approaches are valuable but incomplete. Neither philosopher foresaw how centralized private power could corrode republican norms and cripple the middle class. The problem extends beyond material and political problems to the "spiritual" issue of kindness. Because neither philosopher adequately incorporated benevolence into their visions, they failed to offer a path to a middle class republic that was not only stable but also humane.

INTRODUCTION

In the 1970s, the American philosophers John Rawls and Robert Nozick reinvigorated Western political philosophy by reimagining such classic tropes as "natural right," "state of nature," and "social contract." They are often perceived as polarities, using different methodologies and perspectives to develop rival conceptions of justice. In *Anarchy, State, and Utopia*, Nozick was fiercely libertarian,¹ while in *A Theory of Justice* Rawls advocated an expanded version of the New Deal that permits wealth disparity so long as economic inequalities primarily benefit those who are "worse off."²

This Article's primary criticism of both systems (and thus of contemporary corporate ideology and neoclassical economics, to the degree that they have similar viewpoints) is that they

* Professor of Law, Cleveland Marshall College of Law.

1. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

2. See JOHN RAWLS, *A THEORY OF JUSTICE* 78–80 (1971).

inadequately explore, reflect, and incorporate the full extent of human nature, individually and collectively. By primarily utilizing “self interest” to determine the scope of state coercive power, the philosophers reinforced neoclassical economics’ circular argument that individuals always “rationally” maximize personal “preferences,” a technique that tends to exclude or obscure important distinctions among emotions, motivations, and actions.³ Buddhist psychology provides the alternative perspective of promoting kindness, an approach that may lead to greater social and individual happiness (at least for many people). This critique is far from absolute: we shall briefly explore both men’s analysis of “love” and “benevolence” in the final section of this Article.

While vast differences between the two philosophers are about as clear as anything can be in normative philosophy, this Article explores how their two seminal works helped define, perhaps even establish, the permissible parameters of moral discourse within the American elite and intelligentsia (even if relatively few people ever read those challenging books). Widespread acclaim in moral reasoning often reflects (and causes) an emerging zeitgeist that uses emergent philosophies for its own purposes. Thus, for the purposes of this Article, it does not matter that both philosophers would have rejected many subsequent interpretations, distortions, and applications of their visions.

The ideologies of many powerful American actors and institutions can be placed on a Rawls-Nozick spectrum. Supreme Court Justice Kennedy exemplifies how the two philosophies can be blended. Kennedy has been pivotal in expanding the constitutional rights of gay individuals,⁴ an anti-discrimination principle that can be easily inferred from Rawls’s methodology. If someone doesn’t know their sexual preference while contracting behind Rawls’s “veil of ignorance,” they probably will opt for a society that tolerates non-coercive sexual proclivities. Furthermore, consensual, adult sex satisfies Nozick’s libertarian principles that only permit the State to regulate nonconsensual

3. See, e.g., GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

4. Kennedy’s defense of gay rights culminated in a five-to-four decision establishing a constitutional right to gay marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

injuries.⁵ Kennedy has also been very libertarian when deciding political economy cases, empowering corporations and wealthy individuals in cases such as *Citizens United*.⁶

The major political parties can also be found along this continuum. While the Democrats are somewhat more like Rawls than their rivals in terms of income and wealth distribution, both parties' leadership have been strongly committed to Nozick's libertarianism as the economic default line: "free trade" and "austerity" (for the masses) have been bipartisan mantras. Both parties periodically alter the welfare state in either direction. Presidents Bush and Obama worked with Congress to expand health care for Americans,⁷ but Obama subsequently agreed with House Republicans to curtail social welfare benefits, a deal the Republicans ultimately rejected.⁸ Fortunately, Bernie Sanders's campaign and President Donald Trump's views on international trade⁹ reveal cracks in the intellectual monolith of neoliberalism that arose during the Carter and Reagan administrations (the same time as the publication of Rawls and Nozick's famous books).

We can also place most contemporary corporate ideologies within these boundaries. The Koch brothers and their plutocratic allies are exceptionally libertarian,¹⁰ while Silicon Valley, Wall Street, and many other major corporations pay more than lip service to emerging anti-discrimination norms. To take a recent example, the NCAA would not hold its annual basketball tournament in North Carolina after that State's legislature passed a law discriminating against the LGBT community.¹¹ Corporations

5. NOZICK, *supra* note 1, at ix.

6. *Citizens United v. FEC*, 558 U.S. 310, 318 (2010).

7. President Bush signed a law subsidizing drugs for seniors. The Medicare Prescription Drug, Improvement, and Modernization Act, 21 U.S.C. § 355j (2003), amended by 21 U.S.C. § 1102 (2003); 21 U.S.C. § 355 (2003), amended by §§ 1111–1118 (2003). President Obama signed a bill extending health insurance to millions. The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

8. Matt Bai, *Obama v. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES (Mar. 28, 2012), <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html> [<https://perma.cc/ZY5U-JRDW>].

9. Nicky Woolf et al., *Trump to Withdraw from Trans-Pacific Partnership on First Day in Office*, GUARDIAN (Nov. 22, 2016), <https://www.theguardian.com/us-news/2016/nov/21/donald-trump-100-days-plans-video-trans-pacific-partnership-withdraw> [<https://perma.cc/GGM2-V795>].

10. See, e.g., JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016).

11. Marc Tracy & Alan Blinder, *N.C.A.A. Moves Championship Events From*

often support anti-discrimination principles (so long as those norms are not extensively used against them): reduction of white male privilege at non-leadership levels increases the competitive labor force. Including a few minorities and women in leadership positions creates a patina of Rawlsian legitimacy. Furthermore, workers and consumers are more satisfied and productive when not encountering flagrantly invidious discrimination. Why would minorities prefer to buy products from an overtly racist manufacturer when more civilized alternatives exist?

Corporations can thereby operate pursuant to a hybrid political morality that exceeds undiluted self-interest, a move that is not always purely cynical.¹² Not every person or every institution is relentlessly sociopathic; most people want a moral code, not just for cover but also for self-rationalization and even for improving the life of others. I have known many people who have worked for corporate America; few are raging sociopaths. Most believe they provide value to others within and outside their organization. After all, two of the best things you can do for someone are to create a good job opportunity and a good product.¹³

We should not be surprised that these two powerful perspectives can be awkwardly integrated. They are nothing new. The politics of wealth inequality were a major issue in ancient Greek philosophy. Aristotle believed that a viable state had to be more than a trading consortium: “the state is not a mere society, having a common place, established for the prevention of mutual crime and for the sake of exchange.”¹⁴ The State must also protect the poor and the middle class from the ravenous rich.¹⁵ Jesus’s egalitarianism and Kant’s categorical imperative¹⁶ challenged

North Carolina, Citing Anti-Gay-Rights Law, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/sports/ncaa-moves-championship-events-from-north-carolina.html> [<https://perma.cc/UDY2-MDG7>].

12. Rawls and Nozick’s seminal books may have also been popular for not applying doctrines to such divisive issues as affirmative action or abortion. To broaden their customer base and maintain employee loyalty, many corporations avoid partisan politics and culture wars.

13. Conversely, one of the worst things you can do to fellow citizens and your nation is move many decent jobs abroad.

14. ARISTOTLE, *Politics*, in THE COMPLETE WORKS OF ARISTOTLE 1986, 2032 (Jonathan Barnes ed., B. Jowett, trans., 1984).

15. *Id.* at 2041.

16. IMMANUEL KANT, *The Metaphysics of Morals*, in KANT, POLITICAL WRITINGS 131, 133 (Hans Reiss ed., H.B. Nisbet, trans., 1991).

invidious discriminations. Herbert Spencer was one of many who advocated a minimal state.¹⁷

Of course, there is much truth in the Left's frequently made accusation that large corporate cultures are greedy, primarily committed to increasing wealth, power, and income for shareholders and management.¹⁸ Left-leaning scholars can cite extensive conservative law and economics literature making the same argument. Indeed, some judges and conservative economists¹⁹ believe corporations must maximize shareholder value at the expense of everything else.²⁰ That narrow perspective fails to fully explain how many corporate actors evaluate their institution or why many other citizens continue to support an economy dominated by consolidated and centralized private power.

The Left's harsh critique may also be politically counterproductive as long as private corporations continue to employ so many people and provide vast amounts of goods and services at relatively low costs. If Leftists dismiss everyone who works for corporations as alienated, deluded, or sociopathic, they toss aside many potential allies. Eliminating all private control and influence over the major modes of production would be a truly revolutionary act that many people are not willing to risk. Wherever economic power is located, there is the possibility of abuse. Over the intermediate term (the next fifty years or so) the least violent and disruptive path may be to weaken and decentralize private power, not eliminate it. We would have the

17. HERBERT SPENCER, *The Proper Sphere of Government*, in SPENCER POLITICAL WRITINGS 3, 6 (John Offer ed., 1994).

18. Sen. Bernie Sanders, *Corporate Greed Must End*, HUFFINGTON POST (June 24, 2015, 9:29 AM), http://www.huffingtonpost.com/rep-bernie-sanders/corporate-greed-must-end_b_7653442.html [<https://perma.cc/QP68-KG37>].

19. For a defense of maximizing shareholder value, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. OF FIN. ECON. 305 (1976).

20. Most courts believe corporations have a great flexibility under the business judgment rule. The Supreme Court recently stated, "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2771 (2014). Not everyone agrees. In 2010, Delaware Chancellor Chandler wrote, "I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce." *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

benefits of competition, market-directed allocation of capital, and some separation of political power from modes of production.

So what is morally troubling with the claim that corporate ideology can be described as a blend of Rawls and Nozick? First, Rawls and Nozick's psychologies were a murky blend of insights and misunderstandings. In particular, they did not fully understand the meaning of "kindness," thereby failing to appreciate its essential role in creating a decent, viable society that promotes individual well-being, diversity, and community. Employing the metaphor of contract, which is usually associated with maximization of self-interest, Rawls refined Kant's chilly categorical imperatives²¹ to defend the norms and institutions of New Deal style liberalism,²² while Nozick interpreted those same Kantian principles²³ to strip J.S. Mill's mature libertarian political philosophy of its restraint and common sense.²⁴ They made a narrowly defined conception of self-interest the most dynamic psychological assumption, following the highly rationalistic paths of Hobbes and neoclassical economics.

Second, they tended to equate the meaning of justice with the legitimate scope of state coercive power instead of also determining the essential roles of private power and individual conscience in creating and maintaining a just society. As a result, they did not adequately explore the appropriate morality of individuals and societies, some of the crucial relationships between state and society, the full extent of human nature, effective paths to happiness, and competing notions of vice or virtue. Finally, they believed their work was complete once their idealized state was operational; they did not employ the historical method to test their institutional recommendations. These three weaknesses made it relatively easy for the ruling class to pick and choose from their

21. RAWLS, *supra* note 2, at 251–57.

22. *Id.* at 258–65. Rawls's two clusters of principles echoes the New Deal Supreme Court's conclusion that core civil rights should receive more constitutional protection than economic and social controversies. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

23. NOZICK, *supra* note 1, at 32.

24. Henry Sidgwick described how Mill shifted from all-encompassing libertarianism to a more flexible approach: "[Mill] points out the error of demanding that a political constitution be thoroughly logical, i.e., should exhibit in all its details the application of some one fundamental principle." Henry Sidgwick, *Fitzjames Stephen on Mill on Liberty*, in *ESSAYS ON ETHICS AND METHODS* 181, 182 (Marcus G. Singer, ed., 2000).

philosophies to justify an emerging political economy based upon increased centralized power, credit, technology, and military assertiveness even though neither philosopher would approve of the current system. Nozick would have been appalled by the amount of transfer payments, while Rawls, already critical of destabilizing inequalities,²⁵ became increasingly critical of the American economic system but failed to offer adequate solutions. Like so many others, he emphasized campaign finance,²⁶ which is necessary but insufficient to alleviate accelerating wealth inequality.

I. A QUICK REVIEW OF RAWLS, NOZICK, AND THE BUDDHA

Rawls and Nozick turned to Immanuel Kant for two moral principles that echoed the Golden Rule. The first was procedural: rules can only be legitimate when universally applicable.²⁷ Kant's second, substantive rule promoted "human dignity" and "personal autonomy"²⁸ by maintaining that we should treat other people not solely as means but also as ends.²⁹ Of course, Rawls' and Nozick's radically divergent applications of Kant's principles indicate both philosophers used much more than pure reason to develop their competing hypotheticals. Many moral theories can be "derived," "implied," or "inferred" from Kant's majestic generalities, but that diverse outcome demonstrates that none can be "logically" proven. For starters, there is no clear line distinguishing behavior that treats people "solely as means" instead of as a mix of "ends" and "means."

25. RAWLS, *supra* note 2, at 284.

26. *Id.* at 407. Rawls made five specific proposals: public financing of elections, fair equality of opportunity, decent distribution of wealth and income, society as employer of last resort, and universal health care. JOHN RAWLS, *POLITICAL LIBERALISM* 407–08 (Expanded ed., 2005) [hereinafter *POLITICAL LIBERALISM*]. Perhaps because this book began to address the threat of private power to republican stability, *Political Liberalism* never had the influence of his earlier book.

27. KANT, *supra* note 16.

28. "Personal autonomy" and "human dignity" emphasize the isolated individual. They don't reflect humanity's needs for interconnectedness. Theories that focus predominately on individual human rights are much easier to integrate into neoclassical economics, reduces all choices to individual preference gratification. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT, *supra* note 16, at 41, 42.

29. Professor Hans Reiss discussed how Kant's various conceptions of the categorical imperative supported freedom. Hans Reiss, *Introduction to Immanuel Kant*, in KANT, *supra* note 16, at 1, 18–28.

A. *Rawls*

Rawls believed everyone would consent to his version of the state once placed behind a “veil of ignorance” that prevented them from knowing their complete ideologies, personality traits, biological characteristics, and historical circumstances: “I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.”³⁰ For instance, everybody would oppose sexist or racist systems because they could no longer discern their gender or race. Who would want to risk the chance of losing the genetic lottery in a society based upon race slavery? Anyone might be a member of an impoverished family, so contractors would want their family’s basic needs met and have Rawls’ recommended “fair equality of opportunity.”³¹

Based upon “rational self-interest,” they would unanimously adopt Rawls’s elaborate, two-tiered system of rights.³² The first cluster of rights strongly protects basic civil liberties, precludes invidious discrimination, and provides for necessities. The second, subordinate set of rights establishes a “fair equality of opportunity” and a “Difference Principle” that permits wealth disparity so long as that difference improves the lives of the “worst off” by providing incentives to others who will work harder and thus provide more value to themselves and the “least favored.”³³

Rawls offered the reader a process to verify his method and recommendations; we should engage in “reflective equilibrium” after lifting the veil.³⁴ He claimed people would recognize that his disembodied requirements were not all that different than their existing beliefs about social and economic justice.³⁵ In other words,

30. RAWLS, *supra* note 2, at 12. We shall see that Rawls sometimes seemed to import some conception of kindness into his model when he explored the “good.”

31. *Id.* at 83–90.

32. *Id.* at 139. In later works, Rawls concluded that his system would not generate unanimity because his approach was less universal than he thought. In other words, he had processed a humane, liberal perspective though a system that generated humane, liberal outcomes. Perhaps the most frustrating moment in *A Theory of Justice* arose when he did not describe in detail how he derived his two clusters of principles from his methodology: “I shall not, of course, actually work through this process.” RAWLS, *supra* note 2, at 21. A more detailed description of his derivation of particular substantive rules from his predominately procedural system would have been illuminating.

33. *Id.* at 302–03.

34. *Id.* at 20.

35. *Id.* at 48–49.

his two clusters of principles confirmed and reflected America's evolving social norms protecting fundamental civil rights, opposing invidious discrimination, and providing assistance to the poor. However, even a sympathetic observer may reflect his or her way to significantly different structures of rights and privileges. For instance, it is not clear why a "fair equality of opportunity" should be treated differently than satisfaction of basic needs. Obviously, a person cannot function effectively if they are hungry or homeless, but most people are effectively excluded from full citizenry if they don't have a real chance at upward mobility.

Rawls asserted that his contractors would not allow egoism to influence their system of justice,³⁶ but it was fairly easy for others to conclude that some degree of egoism is permissible while contracting or during the subsequent of reflective equilibrium. This move became even easier once Rawls subsequently conceded that his application of his method required that contractors have "a certain psychological nature."³⁷ They could take his basic structure—which is very individual-rights oriented and relatively unconcerned about kindness, either private or institutionalized, to create a more selfish version as their moral baseline.

Rawls almost certainly would have rejected the methods and outcomes of this neoliberal reconstruction project. Although he rarely discussed wealth in *Theories of Justice*, he assumed great wealth and income inequalities would not exist³⁸ (and seemed to implicitly assume such disparities would not arise under his system). In later writings, he was very critical of concentrated wealth and income that could lead to "political domination."³⁹

B. *Nozick*

Nozick extrapolated a doctrine of individual sovereignty that he believed was consistent with Kant's two core principles. Individual property rights arose before any consensual social contract, creating an inalienable baseline.⁴⁰ Thus, he did not

36. *Id.* at 136.

37. POLITICAL LIBERALISM, *supra* note 26, at 370.

38. RAWLS, *supra* note 2, at 158.

39. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 44 (2001) [hereinafter JUSTICE AS FAIRNESS].

40. See NOZICK, *supra* note 1, at 151. These natural property rights are often described as "Lockean." However, Locke never thought natural rights remained absolute. His social contract entrusted many rights to a legislative sovereign

consider Rawls's social contractual "consent" to be the primary legitimating factor. Unlike Rawls, Nozick reimagined the "State of Nature" in some detail, maintaining that every individual has many natural rights that can never be violated; those rights can only be relinquished or altered by express consent. There are three legitimate ways to obtain and retain property: every individual has an unlimited right to create wealth, contract for it, or receive it as a gift.⁴¹ Thus, "absolute" individual property rights predate all contracts, personal or social.⁴² By not divesting individuals of actual histories, skills, and wealth, Nozick argued that his "entitlement" approach better defends and promotes personal autonomy and dignity than Rawls's more disembodied social contract.

Rawls's vision—that people only agree after no longer knowing who they are—does seem a bit strange, which makes one wonder who or what is actually agreeing to anything. On the other hand, Nozick made his philosophy more vulnerable by imagining a complex social evolution from the original State of Nature to his recommended "minimal state" that only had the authority to protect individual property rights from internal or external threats.

Nozick claimed that individuals could initially defend themselves and their property by purchasing coercive services from private "protection agencies."⁴³ Otherwise, they risked unjustified loss from predators or rivals who would make biased decisions due to self-interest. Over time, a "dominant protective agency" would emerge that offered the best procedures to resolve disputes and the most resources to defend its members.⁴⁴ This organization would eventually capture the market, evolving into an "ultraminimal state" that regulated all disputes within a territory so long as nonmembers were compensated for any loss.⁴⁵ The private

representing the will of the majority. This power was based upon another Natural Law that contemporary conservative libertarians ignore: "[T]he *first and fundamental natural Law*, which is to govern even the Legislative it self, is *the preservation of the Society*, and (as far as will consist with the publick good) of every person in it." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 355, 401 (Peter Laslett ed., 1960). In other words, his book is as much a defense of legislative sovereignty and the right to revolt if that legislative power is abused, as it is a defense of individual property rights.

41. NOZICK, *supra* note 1, at 151.

42. *Id.* at 151.

43. *Id.* 12–15.

44. *Id.* at 15.

45. *Id.* at 26–28, 73–84.

organization next mutated into a more precisely defined “minimal state,” which only has authority to protect individuals from internal violence, fraud, contractual violations, and external threats. Nozick asserted this property-based approach surpassed Rawls’s contractually based hypothetical because of its historical roots: real people retain existing “entitlements” they actually earned in the past. In other words, Rawls’s system failed to provide individuals with Kantian dignity.⁴⁶

Nozick’s elaborate mythology apparently makes five interrelated points: (1) private market systems can adequately regulate coercion; (2) a minimal state can emerge out of individual contracts; (3) individuals never need relinquish any natural rights to preserve all their property when joining a state or society; (4) as a result, the newly formed state gains no additional powers beyond protecting pre-existing individual rights, no “attributes of sovereignty”; and (5) consequently, the State has no legitimate capacity to take wealth from one person and give it to another (except to maintain the minimal state).

As always seems to be the case with heroic attempts to create a comprehensive political system based upon a single principle or methodology, the inevitable exceptions—created by necessity and tragedy—partially undermine the edifice, particularly to the extent that it claims to be “absolute,” “scientific,” and/or “logically reasoned.” For example, Nozick claimed the “minimal protection agency” can become a legitimate “dominant protection agency” so long as it appropriately seizes property from nonmembers while providing compensation. If so, what became of the inalienable right to property?⁴⁷ Next, if the minimal state cannot take any property without express individual consent, where and when did it obtain the authority to seize some individual property from wealthier individual members to protect others within its jurisdiction?⁴⁸ Nozick also created exceptions for “catastrophes”⁴⁹

46. See *id.* at 213–14.

47. See Eric Mack, *Nozickian Arguments for the More-Than-Minimal State*, in *THE CAMBRIDGE COMPANION TO NOZICK’S ANARCHY, STATE, AND UTOPIA* 89, 100 (Ralf M. Bader and John Meadowcroft, eds., Cambridge Univ. Press 2011).

48. See *id.* at 108–09.

49. David Schmitz wondered how Nozick could draw lines after creating a “catastrophe” exception. See David Schmitz, *The Right to Distribute*, in *THE CAMBRIDGE COMPANION TO NOZICK’S ANARCHY, STATE, AND UTOPIA*, *supra* note 47 at 197, 225 n.13.

and extremely scarce goods—such as ownership of the only water well in a village.⁵⁰ Such exceptions intimate additional “attributes of sovereignty.” What if one believes that severe wealth inequality is catastrophic for any republic?

Both men relied upon truncated historical analysis. Nozick incorporated the past when establishing the initial extent of property rights. While Rawls initially stripped his social contractors of any historical knowledge, he brought historical awareness back when encouraging readers to compare his proposals with their pre-existing views through “reflective equilibrium,” a method that included “the tradition of moral philosophy and any further ones that occur to us.”⁵¹ However, both men failed to consult history to determine what forces might undermine their proposed systems. Quite simply, neither man adequately addressed Aristotle’s concern that, based upon historical experience, the wealthy tend to band together to plunder the middle class and poor through systemic corruption, creating widespread discontent that usually leads to demagoguery and despotism (a fear that the Clintons’ corrupt accumulation of wealth and the racially inflammatory campaign of President Donald Trump has validated). In particular, neither philosopher considered the threat of centralized private power to individual happiness, social cohesion, and republican stability. Rawls incorrectly assumed “that in a competitive economy (with or without private ownership) with an open class system excessive inequalities will not be the rule.”⁵²

More generally, they did not incorporate Aristotle’s definition of a country’s “constitution” as its distribution of power *and* wealth.⁵³ Any “theory of justice” that primarily explores the appropriate extent of coercive public power and fails to consider the significance of private wealth distribution and income inequality is incomplete. Furthermore, their focus on consent, rationality, and human autonomy tends to put environmental

50. Peter Vallentyne thought this exception demonstrated that “ownership in external objects is never full.” Peter Vallentyne, *Nozick’s Libertarian Theory of Justice* in THE CAMBRIDGE COMPANION TO NOZICK’S ANARCHY, STATE, AND UTOPIA, *supra* note 47 at 145, 162.

51. RAWLS, *supra* note 2, at 48–53.

52. *Id.* at 158.

53. ARISTOTLE, *supra* note 14, at 2030.

concerns in the background.⁵⁴ If one believes that our species faces profound environmental risks, some of which may destroy us, then any theory of justice must discuss limitations on human power as well as methods to increase human autonomy and happiness.

We can more effectively achieve a humane, stable society by first embracing the full complexity of human nature and then utilizing the two Kantian abstractions as helpful, secondary tools.⁵⁵ I prefer to start any “state of nature” or “social contract” analysis with Hobbes’s darker version of human nature.⁵⁶ Next, to soften Hobbes’s incoherent opposition to rebellion,⁵⁷ include Locke’s “right to revolt”,⁵⁸ include Rousseau’s more historically accurate claims that dangerously unequal and unjust distributions of wealth in the state of nature created the need for a state, but are likely to be domesticated and continued within any state;⁵⁹ and finally, supplement that coercive system with a political economy and a society based upon kindness as well as production.

Hobbes began with human passions instead of two inspiring Kantian principles that allegedly can be applied dispassionately and “rationally.” The three human motives of competition, diffidence, and glory⁶⁰ pressure us into joining a state. People competitively seek gain at the expense of others; they fear others will take their property; and some have an overwhelming desire to be acknowledged as superior to the rest. These interpersonal impulses are so dangerously compelling that “consent” may be theoretically voluntary but is functionally required. In other words, humans are under tremendous external and internal pressures to collaborate with others out of self-defense: consent is all but “coerced” because

54. Rawls discussed future generations at some length. RAWLS, *supra* note 2, at 284–293. Social contract theories tend to be human-focused in process and outcome. Only humans can reason well enough to form contracts and social contract theories are usually offered to improve the human condition.

55. Whatever else Rawls and Nozick accomplished, they demonstrated how quickly people can diverge when developing “secondary principles” from a few general Kantian norms.

56. Hobbes began his section on Commonwealths by observing that men “naturally love Liberty, and Dominion over others.” THOMAS HOBBS, *THE LEVIATHAN* 223 (C.B. Macpherson, ed., 1968) (1651).

57. LOCKE, *supra* note 40, at 406–28.

58. *Id.*

59. Victor Gourevitch, *Introduction*, in ROUSSEAU, *THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS* ix, xxiii (Victor Gourevitch, ed., Cambridge Univ. Press 1997).

60. HOBBS, *supra* note 56, at 185.

we otherwise face the internal threats of violent anarchy and crime and/or the external threat of conquest. If I am coerced when handing over money to an armed thief, I am quasi-coerced when delegating forcible power to a state to protect me from such robbers. In both situations, threats of violence were major motives for consent.

C. *The Buddha*

Ever since Descartes famously wrote, “I think, therefore I am,” Western philosophy has been extremely individualistic, often degenerating into alienating despair or addictive consumption. Even if one does not accept the Buddha’s moral code, his techniques, or his vision of permanent enlightenment, he developed a balanced, interdependent psychology. He believed we suffer by becoming entangled in a web of attachment, aversion, and delusion.⁶¹ Hobbes and many others would acknowledge attachment and aversion, which are self-interest’s positive and negative preferences. But what is the meaning of “delusion?” Based upon personal experience, the Buddha perceived that people ignorantly cling to pleasures and obsess about past and present threats and injuries.⁶² From this perspective, a leader like Adolph Hitler was profoundly miserable, because that villain foolishly lived in a world drenched with hatred, greed, and the lust for glory.

The Buddha provided a way out of this tar pit. Kindness is a crucial component, creating a purpose beyond self-gratification. We learn to accept pains and enjoy pleasures without becoming psychologically ensnared by life’s inevitable fluctuations, uncertainties, and eventual demise. We first undermine unhappy delusions by acting generously.⁶³ Giving time or property to others reduces the tendency to cling, to optimize personal wellbeing. You may notice internal resistance when you offer to help someone: that anxious tug comes from our desperate, aggrandizing part of consciousness. Generosity is also a socially cohesive act; kindness becomes an ethical obligation and a source of spiritual growth. We

61. THE BUDDHA, *Other Sects*, in THE NUMERICAL DISCOURSES OF THE BUDDHA 289–94 (Bhikkhu Bodhi trans., Wisdom Publications 2012).

62. THE BUDDHA, *Setting in Motion the Wheel of the Dhamma*, in THE CONNECTED DISCOURSES OF THE BUDDHA 1843, 1844 (Bhikkhu Bodhi trans., Wisdom Publications 2000).

63. THE BUDDHA, *Giving*, in THE NUMERICAL DISCOURSES OF THE BUDDHA *supra* note 61, at 899.

next decide to live by a basic moral code based upon the principle of not harming others.⁶⁴

We express kindness to others and ourselves in four ways, which the Buddha called the “four pāramitās.”⁶⁵ First, we become friendlier; instead of hating others and ourselves for inevitable fallibilities, we try to respond with warm gentleness.⁶⁶ Second, we celebrate others’ success instead of being envious. Most importantly, we compassionately act to alleviate other beings’ suffering. From the perspective of political philosophy, compassion is the most important factor. It is not enough to achieve personal enlightenment, or to tolerate others by adopting narrow conceptions of universality, human dignity, and autonomy. One has to get off the couch and actively alleviate other beings’ misery.

We approach these tasks with equanimity and a humble sense of our limited powers and responsibilities—as well as an understanding of every creature’s sovereignty. To make the point most bleakly, it is possible our species is making this planet uninhabitable for large species, perhaps for life itself. While this outcome is apocalyptic, I try to contemplate that future barren landscape with tender sadness. There is little one can do to control the mysterious flow of life. I care for living beings and their life force, but I cannot control anyone’s happiness or unhappiness (including my own). After all, there is life and thus there is hope. Regardless of whether life is ultimately absurd, each of us must decide to live only for ourselves or also for other beings. Whether one agrees with the Buddha’s solutions or not, kindness is needed to prevent the psychological forces of greed, fear, and delusion from corroding our society. Thus, his general psychology as well as his detailed description of decency provide a useful template for evaluating not only individuals but also societies.

Neoclassical economic psychology, the intellectual bulwark of contemporary corporate America, can awkwardly fold this analysis back into their conception of *homo economicus*, a creature that

64. See DALAI LAMA, *HOW TO PRACTICE: THE WAY TO A MEANINGFUL LIFE* 27 (Jeffrey Hopkins ed. trans., Pocket Books 2002).

65. Hobbes recommended society was quite civilized and humane, premised upon a version of Kant’s categorical imperative: A man should “be contented with so much liberty against other men, as he would other men against himself[.]” HOBBS, *supra* note 56, at 190.

66. This Article’s shifting moods—anger, despair, and gentleness—indicates its author’s limited commitment to Buddhist moral precepts and philosophical doctrines.

exclusively maximizes personal preferences.⁶⁷ Admittedly, there is no way to refute the argument that you do what you want to do, but that circular argument does not determine what a human *should* choose to do. Kindness and generosity can often be in one's self interest. Indeed, there is growing scientific research supporting the proposition that generous people are usually happier than misers.⁶⁸

However, people also make sacrifices and act according to a sense of duty, knowing their actions increase their pain and suffering or could terminate their life. When someone spends vast amounts of time and resources raising his or her child or nursing an adult relative, do they not experience a mix of love, gratification, duty, irritation, and sacrifice? Words like "endurance," "fatalism," and "obligation" often better describe the human condition than "happiness," "enlightenment," or "maximization of preferences." At some point, generosity and kindness can be seen as existential gestures, defiant refusals to let death's inevitable triumph and humanity's anxieties turn oneself into a craven, self-absorbed addict of distracting pleasure. We either take the path in Camus's *The Stranger*, committing murder because of life's apparent absurdity,⁶⁹ or we emulate Camus's doctor in *The Plague*, doggedly trying to help even when our actions seem futile.⁷⁰ One response to a possible global holocaust is to capitulate; another is to try to prevent nuclear war and environmental collapse, knowing that our tiny influence may be fruitless.

What can we infer from these musings? At a minimum, we shouldn't evaluate politics and ethics exclusively from the internal point of view of neoclassical economics, the intellectual superstructure that defends existing distributions of private power by reducing all emotions, values, and actions to one sterile, equal dimension which is then monetized. However, if one wants to describe human's internal choice mechanism, there is a fundamental moral indifference *to others* whenever one decides to

67. *Homo Economicus*, WIKIPEDIA, https://en.wikipedia.org/wiki/Homo_economicus [<https://perma.cc/LL5W-FYP2>].

68. CHRISTIAN SMITH & HILARY DAVIDSON, *THE PARADOX OF GENEROSITY: GIVING WE RECEIVE, GRASPING WE LOSE* 1–6 (2014).

69. See generally ALBERT CAMUS, *THE STRANGER* (Mathew Ward, trans., 1988).

70. See generally ALBERT CAMUS, *THE PLAGUE* (Stuart Gilbert, trans., 1948).

be greedy, cruel, indifferent, or kind.⁷¹ Even if one concedes that Mother Teresa and Stalin equally maximized preferences to achieve their chosen conception of the “good,” their emotions, motives, choices, and actions are morally distinguishable. We should be wary of any philosophical system built exclusively (or excessively) upon the inevitable human motivations of self-preservation and self-interest.

II. THE EMOTIONAL LANDSCAPES OF RAWLS, NOZICK, NEOCLASSICAL ECONOMICS, AND CORPORATE IDEOLOGY

This section explores the emotional universes of Rawls, Nozick, and corporate America by using the Buddha’s conceptions of fear, greed, delusion, and kindness.

A. *Aversion and Fear*

John Locke’s natural rights extended far beyond “property”—comprehending every person’s basic rights: “Life, the Liberty, Health, Limb, or the Goods of another.”⁷² We need life, liberty, and bodily integrity⁷³ to enjoy personal and real property. Most of us want to be safe—keeping what we own as well as having an opportunity to gain more. Thus, any defense of property is based upon the simultaneous tugs of attachment and fear. However, this can eventually degenerate into compulsive greed and self-righteous paranoia.

1. Nozick

Like Hobbes and Nozick, we begin the quest for a just and decent society in a fearful state of nature. In his book, Nozick mentioned fear seventeen times while discussing anarchy and the state, but never mentioned that emotion when later exploring

71. Heavily influenced by Eastern thought, Schopenhauer criticized Kant and Fichte for emphasizing egoism over decency. Fichte wrote: “To act in accordance with the impulse of sympathy, compassion, and philanthropy is not moral at all, but is to that extent contrary to morals[!]” ARTHUR SCHOPENHAUER, ON THE BASIS OF MORALITY 117 (E.F.J. Payne, trans., 1995). Schopenhauer believed the opposite: “The absence of all egoistic motivation is, therefore, *the criterion of an action of moral worth.*” *Id.* at 140 (italics in original). Thus, the moral worth of an act “can lie only in its reference to others.” *Id.* at 142.

72. LOCKE, *supra* note 40, at 271.

73. See generally Sheldon Gelman, “Life” and “Liberty”: Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights, 78 MINN. L. REV. 585 (1994).

utopia. For instance, he defined general criminal prohibitions as “public wrongs” because compensation for intentional injury cannot rectify the widespread apprehension to victims and non-victims that would arise if attackers could simply paid compensatory damages to directly injured victims through a tort system.⁷⁴

Nozick tried to narrow fear’s scope (and thus its authority) by claiming that “[f]ear is not a global emotion; it focuses on parts of packages, independently of ‘on-balance’ judgments about the whole.”⁷⁵ This sentence is hard to decipher because the phrase “global emotion” is unclear. All emotions are transitory, but often overwhelming in the moment. More importantly, anxiety cannot be precluded from innumerable “on balance judgments about the whole.”⁷⁶ We should be very worried that our global culture may culminate in nuclear war while generating destabilizing wealth inequality, religious conflict, and environmental catastrophes in the meantime. Nozick next turned this strange psychological conception of “global emotions” into a crucial component of his system: “Our present argument for the compensation of compensable border crossings rests on the non-global character of fear, anxiety, apprehension, and the like.”⁷⁷ Invasive actions should be compensated whether fear is global or not. Furthermore, Nozick had earlier argued that society should prohibit assaults because they generate widespread fear to victims and everyone else, an outcome that seems “global.”⁷⁸ However one resolves his muddled psychology, the Hobbesian fear of others seems like a reasonable “on balance judgment about the whole.”⁷⁹

Nozick reflected upon fear in other puzzling ways. He

74. NOZICK, *supra* note 1, at 66–68.

75. *Id.* at 71.

76. *Id.*

77. *Id.*

78. This criticism might miss understand his point, perhaps Nozick is only wrestling with the question he asked at the beginning of the paragraph, wondering if someone should be afraid even if he (or she) knew he would receive more than adequate compensation for his (or her) injury. At least for me, this sort of foginess permeates the book. I am torn between two maxims: Bob Dylan sang, “[d]on’t criticize what you can’t understand,” BOB DYLAN, *The Times They Are a-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964), while Edmund Burke concluded, “[t]hat where I am ignorant I am diffident.” EDMUND BURKE, A LETTER TO THE SHERIFFS OF BRISTOL 35 (JAMES HUGH MOFFATT eds, 1904).

79. NOZICK, *supra* note 1, at 71.

concluded that societies may compensate people for “unfeared actions,” which create “great benefits.”⁸⁰ It is hard to distinguish between “feared” and “unfeared actions” that injure others, much less to determine “great benefits.” Nozick’s solution was an economic balancing analysis that turned his allegedly inalienable property rights into an external model that created a wealth-distribution “pattern:”

The most efficient policy foregoes the fewest net beneficial acts; it allows anyone to perform an unfeared action without prior agreement, provided the transaction costs of reaching a prior agreement are greater, even by a bit, than the costs of posterior compensation process.⁸¹

This Coasian balancing of interests suggests that railroad engines can throw sparks on neighboring farmers’ crops, as long as the railroads’ “great benefits” outweigh the costs. Once again, Nozick moved from an absolutist theory of property rights to the less theoretical, but more flexible approach of English Common Law. For centuries, nuisance law has balanced interests to limit individuals’ usage of their real property. Neither the farmer nor his neighbor has absolute property rights.⁸²

Even if the above account of fear can be resolved, clarified, or even dismissed as secondary to his overall thesis, Nozick acknowledged that fear is the primary source of the minimal state’s ascendance. Some private protective associations will frighten the populace: “If the independent’s procedure is very unreliable and imposes high risk on others (perhaps he consults tea leaves), then if he does it frequently, he may make all fearful, even those not his victims.”⁸³ The “dominant protective association” becomes a “minimal state” by its eliminating fear-generating competitors: “If done frequently enough, such unreliable enforcement may be forbidden in order to avoid the general uncompensated-for fear.”⁸⁴

80. *Id.* at 73.

81. *Id.*

82. Blackstone believed that an existing landowner could prevent a neighbor from polluting the air but a new purchaser could not. 2 WILLIAM BLACKSTONE, COMMENTARIES *402. This “right of first use” later became a factor in a balancing test that weighed a variety of individual and social costs and benefits. See *Carpenter v. Double R Cattle Co.*, 669 P.2d 643, 655 (Idaho App. 1983), *rev’d*, 701 P.2d 222 (1985).

83. NOZICK, *supra* note 1, at 88.

84. *Id.* at 105. It is worth noting that one group is coercively preventing another group from providing a service.

Overall, Nozick's theory of fear seems obscure, internally inconsistent, and a threat to his libertarian vision. Isn't "general uncompensated-for fear" a "global emotion" that influences "on balance judgments about the whole?" Far more importantly, if someone joins a state and society to reduce fear of exploitation, why should all reasonable fears evaporate after the minimal state is created? What if one agrees with Aristotle and most other republican theorists that massive wealth inequality exacerbates class tensions, weakens the middle class, degrades the populace, and eventually leads to class war and dictatorship? The fear of environmental collapse is the ultimate global fear. We need extensive, detailed statutory prohibitions, not just the piecemeal, random tort system that Nozick recommended.⁸⁵ In other words, many of us have post-minimal state anxieties, requiring state action far beyond Nozick's prevention of limited "public wrongs" as criminal or fraudulent behavior.

2. Rawls

Rawls not only stripped his social contractors of any personal knowledge when they negotiated behind his "veil of ignorance," but also eliminated fear and greed: "the Kantian interpretation of the original position means that the desire to do what is right and just is the main way for persons to express their nature as free and equal rational beings."⁸⁶ In fact, "[a]nxiety and fear are not moral feelings at all . . ."⁸⁷ Thus, Hobbes and Nozick's psychologically based jurisprudences become irrelevant. Before and after the ratification of the social contract, Rawls's contractors and reflectors never had the unfortunate human emotions and motives that often lead us to often rip each other apart. Nor is it clear which social emotions count as "moral feelings." If one applies Hume's famous distinction between "is" and "ought" whenever intellectual confusion arises, doesn't it seem more accurate to describe "moral feelings" as any emotion that triggers a sense of ought—what Hume called the "moral sense?" Doesn't fear play a role as much as greed, delusion, kindness, or rationality? Hume believed humanity's "moral sense" emerges out of fear, interest, and sympathy. We are likely to agree with Rawls's anti-discrimination

85. *Id.* at 79–81.

86. RAWLS, *supra* note 2, at 445.

87. *Id.* at 481.

principles, not just because they are “fair,” but also because we fear exploitation by others after the veil of ignorance is lifted. While we can and should deter some actions triggered by inappropriate motives, it is dangerous to rely upon a moral theory of psychology that excludes major emotions. Fear is often an appropriate reaction, a valid preference that should be part of any moral and social code.

Fear makes its first, somewhat puzzling appearance in Rawls’s exploration of the “rule of law,” a norm that arises after the basic social contract has been developed and ratified: “The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise.”⁸⁸ Two pages later, he viewed the relationship between fear and liberty more absolutely: “While a coercive mechanism is necessary, it is obviously essential to define precisely the tendency of its operations One who complies with the announced rules need *never fear* an infringement of his liberty.”⁸⁹ How can coercive operations be defined precisely when liberty’s boundaries are uncertain?

3. Contemporary Corporate Culture

Many, if not most, large corporations trade in fear, greed, and delusion. Some of them, such as Costco⁹⁰ and Starbucks, try to provide good jobs, decent benefits to employees, and worthwhile products to consumers. Unless we want to forgo the vast benefits of the Industrial Revolution, society needs large, productive institutions that can accumulate enough capital to invest in technology and employ a well-educated workforce. Up to some uncertain point, I believe private property, market systems, division of labor, and economies of scale provide more material benefits than costs.

Libertarians fear public power far more than private power.⁹¹

88. *Id.* at 239.

89. *Id.* at 241 (emphasis added).

90. Rick Ungar, *Walmart Pays Workers Poorly and Sinks While Costco Pays Workers Well and Sails-Proof That You Get What You Pay For*, FORBES (Apr. 17, 2013, 10:49 AM), <http://www.forbes.com/sites/rickungar/2013/04/17/walmart-pays-workers-poorly-and-sinks-while-costco-pays-workers-well-and-sails-proof-that-you-get-what-you-pay-for/#6482fc38bc3d> [<https://perma.cc/HX6C-9EAV>].

91. See *generally* MILTON FRIEDMAN WITH ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM (40th anniversary ed., Univ. of Chicago Press 2002).

Yet history consistently demonstrates that private power easily collaborates with, and even seizes control of, public power, whatever its internal structure. In other words, an unregulated private sector is always likely to regulate the public sector for its own interests, violating Nozick's libertarian principles opposing corporate welfare and crony capitalism.

There are innumerable examples of corporate capture. The American political economy has revived Nozick's "private protective agencies." Currently, millions of Americans work as private security officers. More disturbingly, private corporations operate one of the state's primary coercive functions—incarceration.⁹² Not only are these private prisons expensive, but they also become a vested interest for excessive criminalization of nonviolent activities. The failed War on Drugs employs many people within the criminal justice system, creating perpetual tensions between the populace and the police and a source of outlandish profits.⁹³

President Eisenhower's dreaded "military-industrial complex" perpetually promotes war. Because of concerns about terrorism, this system has expanded into a vast "military-surveillance-industrial complex." Sadly, no political philosopher in the Hobbesian tradition can be a pacifist, but Hobbes—who translated Thucydides's *The Peloponnesian War*⁹⁴—must have agreed with the great historian's grisly description of Athenian decline through imperial overreach. Hobbes also warned that corporations resemble "worms" within the Leviathan's intestines: they can devour the state from within.⁹⁵

Media corporations promote and sell many modes of fear. When the nation was veering leftward in the 1960s, the mass media focused on local murders and crimes. This bloody journalism aggravated class and racial animus, stimulated mass incarceration,

92. *Private Prisons*, WIKIPEDIA, https://en.wikipedia.org/wiki/Private_prison [<https://perma.cc/UVF9-QGEX>].

93. If I were on the Supreme Court, I would be inclined to hold that private prisons are unconstitutional, because neither states nor the federal government should be permitted to delegate such fundamental aspects of sovereignty to private organizations.

94. THUCYDIDES WITH DAVID GRENE, *THE PELOPONNESIAN WAR: THE COMPLETE HOBBS TRANSLATION* (Thomas Hobbes trans., Univ. of Mich. Press 1959) (1989).

95. HOBBS, *supra* note 56, at 375.

and led many parents to not let their children play outside without supervision. Consequently, many children didn't learn how to play with their neighbors and became excessively wary of strangers. The entertainment industry's festival of gore and vindictive violence reinforces this nation's tendency to prefer force instead of diplomacy. Excessive fear of death creates a huge medical-industrial complex that extracts trillions by keeping miserable people alive for a few more months.

Unremitting advertising campaigns manipulate consumers' insecurities. Aside from using apprehension to sell such products as insurance policies and guns, every advertising campaign intimates that the consumer is underperforming and unsatisfied. We may have body odor or be uncool because we don't own some object, or haven't travelled to some locale populated by models whose beauty is yet another indictment of our mediocrity.

B. *Greed and Addiction*

Neither author mentioned greed in their two books, but Nozick referred to "desire" twenty-eight times and "preference" seventy times, while Rawls used "desire" 115 times and "preference" in sixty-six places. Desire and preference are more neutral, neoclassical economic concepts, while "greed" is a judgmental term, connoting an excessive desire that injures self and/or others. Aristotle warned that pursuit of excess wealth was a threat to self, community, and republic.⁹⁶ Perhaps Rawls relied more than Nozick on economic terminology because Nozick's model was more abstractly Kantian. By immediately assuming that a libertarian state best promoted human dignity and autonomy, Nozick did not have as great a need to fully explore human psychology, questions of economic efficiency, or any particular conception of the "good."

1. Nozick

Nozick's defense of the minimal state brims over with powerful libertarian arguments. For example, he supplemented the economists' efficiency-equilibrium argument with the insightful observation that it is hard for anyone to determine one's own

96. Aristotle believed a middle class republic was the most stable, because the rich tended to exploit and enrage the poor, who were normally content with their limited property. ARISTOTLE, *supra* note 14, at 2058-59.

preferences without also determining how much others are willing to pay to fulfill their different desires: “Distribution according to benefits to others *is* a major patterned strand in a free capitalist society”⁹⁷ For example, a person might prefer to play video games all day, but those preferences are likely to change once the video-game player learns that few people will pay for those skills. Another virtue of the market system is its neutrality towards people’s different desires: “It reflects and transmits widely scattered information via prices, and coordinates persons’ activities.”⁹⁸

According to Nozick, desire only becomes problematic when a government exceeds the minimal state. While we are entitled to pursue our goals by joining any group we want, we cannot imperialistically use the state or that group to impose a “version of unity” on other people.⁹⁹ Once the state exceeds its Nozickian jurisdiction (even if only to help the poor), economically powerful people will seek and obtain political power to transfer wealth to themselves. Nozick was aware that centralized private power could undermine the libertarian state but had no democratic solution to the dilemma.

Even if markets somehow efficiently maintain a perpetual, desirable equilibrium, it does not follow that unregulated markets can preserve Nozick’s political equilibrium. In the real world, economic power becomes political power. Even in a minimal state, arms merchants will promote war. Although I am wary to claim that a formal or logical “contradiction” exists in libertarian thought, there is a vast amount of historical evidence supporting Aristotle’s prediction that excessive private power eventually seizes control of any state. “The few,” forever insatiable, will never feel bound by Nozick’s principles. We need public laws—particularly robust anti-trust laws and tax laws—to prevent private power’s triumph. Only a non-minimal state can prevent private actors from obtaining the power to undermine valid libertarian and republican ideals and institutions.

Aristotle observed that the rich and the poor both have “partial justice” on their side: the rich claim they deserve more because of their superior talents, while the poor respond that they

97. *Id.* at 158.

98. *Id.* at 163–64.

99. *Id.* at 325.

deserve an equal share due to their shared citizenry. One can concede that Nozick has made a strong case for private property, market systems, and limited private power without adopting the intellectual absolutism that unfortunately led him to endorse voluntary slavery—a view he later retracted.¹⁰⁰

2. Rawls

Ever since Plato, Western philosophy has obsessed about the relationships between reason and passion. Emphasizing emotions, Hobbes and Hume maintained that reason is a tool for fulfilling motivating passions' aspirations, never an ultimate end. As part of his project to escape Hume's provocative claim that "reason is . . . the slave of the passions,"¹⁰¹ Kant did not adopt a theory of "pure reason" but asserted that reason could solve most problems after a society adopted his two moral principles of universality and not treating people solely as means.¹⁰² Rawls modified the Kantian vision by assimilating reason and emotion.¹⁰³ When people negotiate behind a veil of ignorance, they are no longer vulnerable to many desires: their egalitarian status encourages them to develop "rational preferences,"¹⁰⁴ a phrase that sounds an awful lot like "rational emotions." Rawls doubled down on that argument by claiming the same detachment would remain when people regain their full identity when verifying his approach through

100. *Id.* at 290–92.

101. DAVID HUME, A TREATISE OF HUMAN NATURE 266 (David Fate Norton & Mary J. Norton, eds., 2000).

102. One cannot just rely upon procedural rules like the Golden Rule or Kant's requirement of universality, because they do not preclude "might makes right." One can simply apply the substantive standard, "To the victor goes the spoils." Thus, Kant's notions of dignity, autonomy, and treating others solely as ends provides necessary but insufficient substance. We still need kindness. Yet Rawls and Nozick demonstrate how radically different conceptions of morality can be derived from Kant's principles. A deeper conception of human nature—of mankind's underlying emotions and motivations—drives their "reasoned" application of Kant's standards. This is not to say that Kant should be discarded. It is much harder to justify genocide, nuclear war, terrorism, racism, poverty, environmental destruction or many other odious acts if one includes some notion of egalitarianism among one's core moral assumptions.

103. Henry Sidgwick profoundly influenced Rawls's methods and norms. In the book, Sidgwick characterized Hume's moral sense as the "primary intuitions of reason." HENRY SIDGWICK, THE METHODS OF ETHICS 373 (John Rawls, Foreword, 7th ed. 1981) (1907). While it seems more accurate to describe moral reasoning as a combination of emotional intuitions and reasoning, I would prefer to reverse the order: moralists reason from their intuitions.

104. RAWLS, *supra* note 2, at 28.

“reflective equilibrium.” However, many people may not want to always act “fairly” to “express their nature as free and equal rational beings.”¹⁰⁵ Consulting their emotions and actual status, they discover internal limits to fairness, equality, and rationality. Conversely, they may conclude that Rawls has the argument backward; society (including its legal, economic, and political domains) should be based upon *humane preferences* and individuals should use reason as a technique to fulfill those emotional motivations.

Rawls conceded that his method was far from determinate; he claimed, “it is obviously impossible to develop a substantive theory of justice founded solely on truths of logic and definition.”¹⁰⁶ Nevertheless, Rawls continually grounded his system in the rhetoric of rationality. He used the phrase “rational preference” twenty-three times in the book, perhaps because he thought his method and proposals were so compelling that they would generate unanimous acceptance among “reasonable people.”¹⁰⁷

This approach seems neither psychologically accurate nor very persuasive. For example, his explanation of ranking some rights above others did not focus on fear or desire: “serial ordering of principles expresses an underlying preference among primary social goods. When this preference is rational, so likewise is the choice of these principles in this order.”¹⁰⁸ The first sentence’s assertion that there is a hierarchy of rights seems noncontroversial.

Do we primarily rely upon “rationality” when deciding which rights are more fundamental than others? In the First Amendment area, most people think the right to dissent is far more important than any alleged right to watch child pornography. Don’t we care more about open discourse as an essential part of elections and accountability than the horrific display of child abuse? The fear of fascism is an excellent but not purely rational reason for defending a wide range of expressive activities and advocating extensive procedural protections in criminal cases. First Amendment doctrine contains many doctrinal hierarchies that are “serial

105. *Id.* at 252.

106. *Id.* at 51.

107. Rawls later conceded that not everyone would accept either his process or all his outcomes. Rather, a “well-ordered society” would exist so long as there was an “overlapping consensus” about a “publicly recognized conception of justice.” JUSTICE AS FAIRNESS, *supra* note 39, at 35–36.

108. RAWLS, *supra* note 2, at 63.

ordering of principles.”¹⁰⁹ Emotionally generated sexual values underlie the Supreme Court’s conclusion that there is no right to watch child pornography,¹¹⁰ but there is a right for homosexuals to engage in consensual sex.¹¹¹

We have already seen how Nozick inferred from Kant radically different “rational preferences” to create a profoundly different social order from Rawls. The great moral philosopher Henry Sidgwick, who influenced Rawls in multiple ways, reluctantly concluded there are two competing “primary intuitions of reason” that cannot always be reconciled.¹¹² There is the utilitarian goal of providing as much happiness as possible to all sentient beings and the individual person’s desire to flourish. From that perspective, Rawls developed his model of the social good as a variant of Sidgwick’s Kantian utilitarianism that included a commitment to the common good as well as individual autonomy, while Nozick tried to convert the good of individual sovereignty into an absolute.

Perhaps Rawls and Nozick had such murky views of emotions because they were obsessed with “reason,” which is not surprising for two of the greatest academic philosophers of all time, both under Kant’s illuminating but arid influence. Having conceived novel models, they wanted to turn their systems into “absolutes,” a process that encouraged them to draw strong inferences that superficially appeared more reasonable than emotional. These highly abstract, universalistic celebrations of “reason” blended easily into corporate America’s neoclassical economic ideology, which claims that the free market status quo is not only optimally efficient but also is optimally rational. Sadly, excessive commitments to rationality and certainty fail to address life’s complex messiness. In fact, Sidgwick’s enduring tension between individual autonomy and societal functionality creates space for flexibility. The Eastern circle of yin and yang is a more desirable and accurate description of the human condition than the rigid hierarchies of monotheistic methodologies.

109. *Id.*

110. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

111. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

112. At the end of his book, Sidgwick seemed almost despondent when acknowledging that his dazzling reasoning abilities could not refute the skeptical claims that there is no single absolute, well-reasoned conception of justice because we base our moral philosophy on our “strong dispositions.” SIDGWICK, *supra* note 103, at 509.

3. Contemporary Corporate Culture

Private power institutionalizes avarice within and without the corporate structure. Management frequently extracts as much wealth and income as possible from shareholders. The two groups then band together, seeking as much profit as possible from consumers, taxpayers, and the environment.

Aristotle observed that every society creates an ideal type of “citizen” to perpetuate the system. In America, compliant, addicted worker-consumers are preferred to informed, involved citizens. Corporations produce pervasive advertising to create consumers who prefer consumption to education and civic virtue. Political ads are so vicious and uninformative that they all but exclude anybody aside from shameless grifters.

It is easy to see the attraction of Nozick’s libertarianism to the corporate elite and their advocates. Public power is presumptively illegitimate, dangerous, and ineffective. The government does not operate by a preferred “invisible hand,” disrupting the allegedly superior method of unregulated capitalism. Because the government has few legitimate powers, there will not be many taxes or regulations. His intricate philosophy became a sophisticated, intellectual justification for Ayn Rand’s more callous libertarianism that celebrates leaders as the sole source of wealth.¹¹³

In actuality, private power found Nozick’s minimal state not to be minimal enough. The Supreme Court doctrine protects many fraudulent and criminal corporate actions, particularly involving securities actions in federal court.¹¹⁴ Many law and economics theorists do not believe that fraud can even exist.¹¹⁵ Irrespective of statutory text or technical doctrine, intent has become the ultimate

113. See AYN RAND, *THE FOUNTAINHEAD* (Bobs Merrill eds., 1943); AYN RAND, *ATLAS SHRUGGED* (Random House eds., 1957).

114. See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REVIEW OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions> [<https://perma.cc/ZAB6-GZ6K>]. On the other hand, the Supreme Court recently made it easier for security fraud plaintiffs to file in state court. See *generally*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562 (2016).

115. Alan Greenspan, a disciple of Ayn Rand, allegedly told Brooksley Born, “I don’t think there is any need for a law against fraud.” Greenspan thought the market would protect everyone. Rick Schmitt, *Prophet and Loss*, STANFORD ALUMNI (March/April 2009), http://alumni.stanford.edu/get/page/magazine/article/?article_id=30885 [<https://perma.cc/5PRC-ARLD>].

defense for the powerful.¹¹⁶ Corporations shift dispute regulation to private arbitration, a process that favors their interests.¹¹⁷ Private power has gutted full compensation through tort reform. Rich people have an informal immunity against serious punishment. The billionaire Jeffrey Epstein, a friend of Bill Clinton and Donald Trump, sexually preyed on young girls but was only sentenced to thirteen months in prison.¹¹⁸ Above all, the federal government appears to be unwilling to indict any bankers for fraud or other criminal activities (such as drug money-laundering).¹¹⁹

Rawls's Difference and Opportunity Principles appear to be counterarguments to private power but can be easily converted into a defense of corporate libertarianism. Neoclassical economics arguably satisfies Rawls' abstract requirement of Pareto optimality. If one assumes that deregulated "free markets" are in a perpetual equilibrium and thus are always Pareto optimal, one can then argue that corporate capitalism not only produces the most goods and services for the least cost but also provides the most income, wealth, and opportunity for those who are worst off. "Trickle down economics" becomes the purest Difference and Opportunity Principle.¹²⁰

4. The Buddha and "Righteous Wealth"

While the Buddha thought that an austere monastic life provided the most direct path to enlightenment, he maintained that dedicated "householders" could also achieve nirvana. Their moral code was not as demanding; they could obtain "righteous wealth" by selling worthwhile products produced by well-treated

116. James G. Wilson, *Does Centralized Power Corrode the Rule of Law*, 64 CLEV. ST. L. REV. 157, 179 (2016).

117. See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

118. Rachel Stockman, *The Shameful Way Feds Protected Convicted Pedophile Billionaire Jeffrey Epstein*, LAWNEWZ (May 22, 2016). <http://lawnewz.com/high-profile/the-shameful-way-feds-protected-convicted-pedophile-billionaire-jeffrey-epstein/> [<https://perma.cc/S7BP-NGXV>].

119. Wilson, *supra* note 116.

120. The economist Arthur Laffer supplemented Nozick's moral libertarianism by arguing that wealth is created by the few and flows down to the many. Thus, taxing the rich impoverishes the poor. *Laffer Curve*, WIKIPEDIA, http://en.wikipedia.org/wiki/Laffer_curve (last visited May 29, 2017). Critics have labeled such schemes as "Trickle Down Economics." *Trickle-down Economics*, WIKIPEDIA, https://en.wikipedia.org/wiki/Trickle-down_economics (last visited May 29, 2017).

employees.¹²¹ In particular, followers should not sell poisons, intoxicating products, or weapons. Sadly, we are polluting land, sea, and air with toxins. The United States currently has the largest military in the world and is the world's biggest purveyor of weapons to other countries.¹²² Widespread obesity is just one example of the triumph of addictive consumerism over disciplined common sense.

C. *Delusion*

The American corporate system does not just manufacture consent about external political enemies, it also promotes modes of delusion extending far beyond Engel's conception of "false consciousness," which described the working class's allegedly deluded belief that capitalism benefitted them.¹²³ Greed and aversion are two sides of a biologically inherited delusion predating all economic systems. We think we will be happy by avoiding pain and obtaining pleasure. The commercial propaganda campaign turns basic necessities, luxuries, and wholesome distractions into compulsive addictions. Every advertisement hints that the consumer is special, a person to be wooed and admired. All the amazing television and all those dazzling movies are produced just for you.

Delusion extends beyond a flawed understanding of human motivations that encourages one to excessively elevate sensual pleasures and earthly powers over the joys of friendship, contemplation, and intellectual growth. Exxon spent millions to combat the evidence supporting the hypothesis that we are facing radical climate change. Tobacco, food, and drug companies pay scientists to create controversies where none exists.¹²⁴ The soft

121. THE BUDDHA, *Adiya Sutta*, in NUMERICAL DISCOURSES, *supra* note 61, at 665–67.

122. In 2014, the United States sold thirty-one percent of all exported arms. PIETER D. WEZEMAN & SIEMON T. WEZEMAN, SIPRI, TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2014 (March 2015), <http://books.sipri.org/files/FS/SIPRIFS1503.pdf> [<https://perma.cc/SU99-DVUU>].

123. Letter from Frederick Engels to Franz Mehring (July 14, 1893), https://www.marxists.org/archive/marx/works/1893/letters/93_07_14.htm [<https://perma.cc/UVF9-QGEX>].

124. Marion Nestle, *Coca-Cola Says Its Drinks Don't Cause Obesity. Science Says Otherwise*, THE GUARDIAN (Aug. 11, 2015), <https://www.theguardian.com/commentisfree/2015/aug/11/coca-cola-obesity-health-studies> [<https://perma.cc/7X7M-SAT2>].

drink industry is still putting out “studies” concluding that their products are harmless.¹²⁵ Americans are constantly told their society is exceptional while upward mobility, labor force participation, and the middle class continue to shrink compared to many other nations.

Delusion does not play a major role in neoclassical economics, Nozick, or Rawls. People can’t be greedy or ignorant because everybody rationally maximizes their preferences. Furthermore, homo economicus is fully informed, another dangerous fiction. Consequently, there can be “irrationality” about choice of means but no “delusions” about choice of ends. Meanwhile, Rawls’ citizens abide by “rational preferences.”

D. *Kindness, Love, Duty, and Sacrifice*

Intellectual history provides many perspectives on cultural evolution; it is interesting to determine which parts of seminal books fade into the background and which sections continually resonate. In the final part of his book, Nozick proposed a utopia consisting of a wide range of voluntary, non-coercive subgroups, but most scholarship focused on his defense of the minimal state.¹²⁶ Rawls’ last section on the “Theory of the Good” considered the relationship of ethics to justice,¹²⁷ but his book is primarily remembered for its social contract methodology and results. In other words, foundational books or articles create a few useful tropes and principles that interact with a culture’s ever-changing collective common sense. The “minimal state,” “absolute property rights,” “individual sovereignty,” “core civil rights,” “anti-discrimination principles,” and the “[d]ifference and [o]ppportunity principles” could be easily assimilated into neoliberalism’s defense of centralized private power. Discussions of love, utopia, and benevolence tend to be ignored.

This section argues that Rawls and Nozick’s analysis of love and goodness are unsatisfactory. Each of them only mentioned “compassion” once. By contrasting their conceptions of love with the Buddha’s four-pronged conception of kindness, we see the desperate need for spiritual practices of kindness within the individual, institutional, legal, and societal domains. If

125. *Id.*

126. NOZICK, *supra* note 1, at 297–334.

127. RAWLS, *supra* note 2, at 347–514.

corporations' commitment to profit maximization, a principle reinforced by the perpetual threat of Wall Street-financed mergers and acquisitions, requires most private productive organizations to be primarily committed to stimulating greed and fear, then we must limit their power by creating institutional counterweights and promoting norms committed to treating others with kindness.

1. Nozick

While Nozick remained a fierce defender of loosely regulated markets, he also envisioned a utopia of subcultures in which the narrow, circular apparition of neoclassical economics need not be the predominate force. People could agree to form sub-groups, such as communes or churches that might operate under a wide range of non-coercive principles.¹²⁸ Nozick did not foresee how unregulated private power would eventually gain so much control of states and societies through advertising, economic control of resources, and employment that it created less cultural diversity throughout the world.

Nozick used "love" to defend libertarianism by praising the autonomy of families.¹²⁹ Many people work hard not just for themselves but also for family members. These laudable, understandable goals threaten any theory of political economy that mandates income and wealth distributions. While there is partial justice in his argument, it does not necessarily follow that individuals or families should have the right to accumulate unlimited, extraordinary amounts of wealth.

2. Rawls

Rawls supplemented his more famous "theory of justice" with a psychologically richer "theory of the good"¹³⁰ which appropriately blurred the distinction between politics and ethics. In addition to deciding rationally to comply with duties formulated under his detailed social contract, people will be inclined to adopt its precepts to avoid negative emotions, the conscience's sanction of shame and the fear of "righteous anger or the possibility of reprisal."¹³¹ In

128. NOZICK, *supra* note 1, at 309–12.

129. *Id.* at 176.

130. RAWLS, *supra* note 2, at 395–404.

131. *Id.* at 445. Venality finally makes an appearance; Rawls insightfully explored between the unjust, bad, and evil individuals. *Id.* at 439.

other words, Rawls opened his methodology to a much wider range of emotions.

Numerous references to “love” in the second half of his book can be somewhat misleading. While “love” has universalistic implications, the word also refers to sexual, passionate, and intimate motivations. Nozick described love as historical and particular (the opposite of Kantian universalism).¹³² Most people cannot love strangers more than family members or close friends. In the political domain, love is usually too much to ask for, much less expect: kindness and generosity, tempered by the egalitarian sentiment of equanimity, can be achieved. We can never expect everyone to love everyone else, but we can encourage kind actions and attitudes.

Perhaps because Rawls emphasized love instead of kindness and compassion, he tended to limit humanitarian actions to extraordinary deeds, such as a soldier sacrificing his or her life to save others. Consider this discussion of “supererogatory acts,” a term suggesting rarity by including the term “super”:

These are acts of benevolence and mercy, of heroism and self-sacrifice. It is good to do these actions but it is not one’s duty or obligation. Supererogatory acts are not required, though normally they would be were not the loss or risk involved for the agent himself. A person who does a supererogatory act does not invoke the exemption which natural duties allow. For while we have a natural duty to bring about a great good, say, if we can do so relatively easily, we are released from that duty when the costs to ourselves is considerable.¹³³

This passage is packed with insights and puzzles. Are there not “natural” duties and “natural” obligations to take care of one’s family members, both legal and moral requirements that most of us struggle to satisfy? Often, the economic and psychological costs of family responsibilities are considerable. Good parenting is an intense spiritual practice that requires not just love but also benevolence, mercy, and sacrifice.

In the last section of his book, Rawls converts the “self interest” that is usually the primary motivator in contract negotiations into more humane sentiments. A particular

132. NOZICK, *supra* note 1, at 168.

133. RAWLS, *supra* note 2, at 117.

psychology that seems quite purposeful becomes central. His principles turn into tools of decency: “the moral sentiments are continuous [with natural attitudes] in the sense that the love of mankind and the desire to uphold the common good include the principles of right and justice as necessary to define their object.”¹³⁴ Elsewhere, his original principles seem to precede the content of kindness: “The reasonableness of the underlying ethical conception is a necessary condition; and so the appropriateness of moral sentiments to our nature is determined by the principles that would be consented to in the original position.”¹³⁵ But we have seen how those principles were incomplete in terms of distributions of wealth, power, and psychological understanding. Rawls’ legalistic proposals primarily focused on the appropriate scope of public power, not the functions of private power and individual morality. True compassion arises whenever the actor does not pursue a “rational preference” maximizing their interests. A compassionate person helps someone without expecting much or anything in return (internally or externally).

Perhaps we have a dispute over causation as well as definitions. Rawls appeared to claim the kindness emerged out of his system inspired by rational preferences, while I tend to think that kindness permeates and animates all worthwhile moral reasoning. Rawls believed that “goodness as rationality” includes all humane and just actions, but that potentially circular argument only makes sense if the rationality is grounded in goodness. “Rationality in service of goodness” seems more accurate and more desirable. Rawls might reply that kindness was always a major part of his system; the contractors had to do what was *just and right*. While contracting behind the veil, we should not only care about our future status but also the needs of others.

However, that concession appears to require major alterations of his original position. Earlier in the book, Rawls said his theory was not teleological.¹³⁶ But kindness is extremely purposeful: one is trying to improve the life of others. He also wrote that his system does not require self-sacrifice,¹³⁷ a fundamental element of true

134. *Id.* at 489.

135. *Id.* at 490.

136. *Id.* at 30.

137. *Id.* at 500. Neither man adequately explored the problem of war. Arguably, there can never be a draft because it would be coercive. *See generally* NOZICK, *supra* note 1. And a draft requires “self sacrifice for the common good.” *See generally*

compassion. But as the book evolves, Rawls' contractors were never optimizing personal interests. Finally, incorporating kindness reprises a recurring critique of Rawls: if we include kindness behind the veil of ignorance, why not greed, fear, ambition, or other social emotions?

Ronald Dworkin apparently acknowledged these conundrums by proposing that our society, including the legal system, be grounded in "equal concern and respect."¹³⁸ That phrase intimates a desirable dualism. First, we should care about others' happiness, wishing that everyone may be safe, well, happy, and live with ease. But we also ought to respect each person by acknowledging autonomy and individual sovereignty, giving every individual ample but not infinite room to pursue their chosen conception of the good. To use Sidgwick's framework once again, Dworkin's phrase acknowledges the "reasonableness" of bounded utilitarianism that seeks to increase the betterment of all beings, to respectfully not consider others solely as means, and to provide room for each individual "reasonably" to advance many of their preferences. As a result, many political issues are inherently difficult: "But in the rarer cases of a recognized conflict between self-interest and duty, practical reason, being divided against itself, would cease to be a motive for either side; the conflict would have to be decided by the comparative preponderance of one or other of two groups of non-rational impulses."¹³⁹

3. The Institutionalization of Kindness

In *The Republic*, Plato equated individual and social morality; what was good or harmful for society would have identical effects on people.¹⁴⁰ Machiavelli annihilated this moral equivalence by arguing that the state's morality must be more violent and aggressive.¹⁴¹ States authorize murder whenever going to war. Even if individual and collective moralities differ, a social system becomes unstable or profoundly immoral if it fails to

RAWLS, *supra* note 2. I would like to live in a world where a draft was never needed, just as I would like to be a pacifist and a Communist. But Hobbes prevents such sentimentality.

138. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 7 (1977).

139. SIDGWICK, *supra* note 103, at 508.

140. PLATO, *THE REPUBLIC* 58 (Robin Waterfield trans., 1993).

141. *See generally* NICCOLÒ MACHIAVELLI, *THE PRINCE* (Quentin Skinner & Russell Price, eds., Cambridge University Press 1989) (1532).

institutionalize the entire range of human motivations and/or fails to provide opportunities for the wide range of personality types that provide necessary diversity within human tribes.

If one conceives of institutions as repositories and reflections of collective emotions, the state controls fear and greed through violence; private corporations promote fear, greed, and delusion while also providing vital jobs, services, and products; and kindness can primarily be found in the innumerable gentle actions of individuals, public social welfare programs, corporate charitable activities, and charitable non-profit institutions. By themselves, private for-profit corporations are institutionally incapable of creating a culture that is sufficiently stable or humane. Wall Street takeover artists will purchase any business that is “too generous” in its treatment of employees, customers, or the surrounding environment. In other words, private power often provides worthwhile jobs, goods, and services at low cost but primarily reflects the constricted view of human nature imbedded in neoclassical economics.

It is hard, perhaps paradoxical, to use the state to support the institutionalization of benevolence. By definition, one cannot be coerced to be voluntarily kind. Nozick would assert that the state could only use the coercive tax code to support the state’s limited power to combat violence and fraud. Ronald Reagan’s famous quip sums up the libertarian position: “the nine most terrifying words in the English language are: ‘I’m from the government and I’m here to help.’”¹⁴² Once the government mandates kindness by taxing some to help others, it creates the precedent for other goals, including corporate capture. There are also Kant’s concern that state paternalism infantilizes citizens¹⁴³ and Schopenhauer’s fear that mandatory kindness is often a precursor to moral inquisition.¹⁴⁴

142. Ronald Reagan, President of the United States, Remarks to Representatives of the Future Farmers of America (July 28, 1988), <http://www.presidency.ucsb.edu/ws/?pid=36169> [<https://perma.cc/W27M-7RX4>]. I can think of many more dangerous words, such as “I am taking your life because you are black, atheist, Christian, etc.”

143. IMMANUEL KANT, *On the Common Saying: ‘This May be True in Theory, but it Does Not Apply in Practice’*, in KANT, *POLITICAL WRITINGS* *supra* note 16, at 74. Kant sounded like Reagan when he said that a benevolent government would be the “most despotic.” *Id.* On the other hand, he was wary of extreme wealth disparity. *Id.* at 76. He also thought some resources could be distributed to enable people to protect the country. *Id.* at 80.

144. SCHOPENHAUER, *supra* note 71, at 153.

Once again, we see that practical reason cannot resolve such recurring dilemmas by itself.¹⁴⁵

Religious institutions, libraries, hospitals, educational institutions, non-profit foundations, and unions can institutionalize decency to some degree. Sadly, these institutions are often corroded by greed, fanaticism, or external threats. America's more callous leaders proudly attack teachers, nurses, and public employees, claiming they are the most dangerous and selfish people in society.¹⁴⁶ Many universities have created a corporate culture designed to turn academics into a compliant, underpaid workforce.¹⁴⁷ Unions have lost influence due to internal corruption, lack of organizing, reduced power, and a hostile legal system.

Perhaps four specific recommendations can demonstrate why we sometimes need coercion to institutionalize institutions and laws that advance kindness. Even Schopenhauer agreed that the state could outlaw cruelty to animals for humanitarian reasons.¹⁴⁸ Next, some people oppose charitable tax deductions because they must pay more taxes than otherwise. But that relatively neutral law enables many nonprofit institutions to survive and provide a counterweight to excessive private power. Third, the Federal Reserve Board is the "lender of last resort," a phrase that obscurely describes its willingness to subsidize large banks and corporations with trillions of dollars whenever they screw up.¹⁴⁹ The government should also be the "employer of last resort" by providing more employment opportunities within the public and private spheres.

145. Peter Singer has wrestled with the legal and moral dimensions of benevolence. See generally PETER SINGER, *ETHICS IN THE REAL WORLD: 82 BRIEF ESSAYS ON THINGS THAT MATTER* (2016).

146. Chris Christie told one critical elementary teacher that he was "tired of you people" and that the American Federation of Teachers union deserved to be punched in the face. Lyndsey Layton, *Chris Christie to Teachers Union: You Deserve a Punch in the Face*, THE WASH. POST (Aug. 3, 2015), https://www.washingtonpost.com/local/education/chris-christie-to-teachers-union-you-deserve-a-punch-in-the-face/2015/08/03/86358c2c-39de-11e5-8e98-115a3cf7d7ae_story.html?utm_term=.6dd3eb6fca99 [<https://perma.cc/X5XW-TQJG>].

147. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* 131–66 (2011).

148. SCHOPENHAUER, *supra* note 71, at 180.

149. Matt Taibbi, *The Real Housewives of Wall Street*, ROLLING STONE (Apr. 12, 2011), <http://www.rollingstone.com/politics/news/the-real-housewives-of-wall-street-look-whos-cashing-in-on-the-bailout-20110411> [<https://perma.cc/W98J-9F55>].

The government should also violate libertarian principles by calculating and paying the payroll taxes of most small businesses as long as they pay all their low-level employees a living wage.¹⁵⁰ The rapid decline in labor force participation not only signifies economic decline but also widespread distress. Most people want to be needed, to be useful members of their society.

All these policies can be defended using arguments based upon self-interest: humane institutions not only help everyone at various times in their lives, but they also provide social stability and a counterweight to centralized public and private power. Nevertheless, kindness should not be a disqualifying motivation, anymore than the Ten Commandments provide some people with a religious reason to oppose murder. We can't force people to be kind, but we can force them to support kindness.

CONCLUSION

This Article has attempted to demonstrate how easily neoclassical economic theory, the ideological backbone of concentrated and centralized private power, can capture the brilliant philosophical explorations of Rawls and Nozick. America's elite could ignore Rawls's wariness of wealth inequality and commitment to decency as well as Nozick's opposition to corporate welfare and criminalization of fraud. Nozick's deregulatory skepticism combined with Rawls's civil liberties and anti-discrimination principles to create a moral framework that justifies the modern political economy.

But there is a far more dangerous, anti-democratic ideology thriving within the corridors of public and private power. Many leaders believe in subordination, perceiving democracy as a continual threat to their wealth and power. Libertarianism can be stripped down to a "free market" that permits the wealthy to do whatever they want. It does not matter if they injure or cheat others. This authoritarian libertarianism does not include basic civil liberties, such as the rights to vote and dissent. In a television interview, Wall Street financier Larry Fink observed that "markets [are] like totalitarian governments."¹⁵¹

150. I hope to write a law review article on this proposal with Professor John Plecnik.

151. *Head of World's Largest Asset Manager: Markets Like Totalitarian Governments*, WASHINGTON'S BLOG (Mar. 4, 2011), <http://www.washingtonsblog.com/>

Some readers might be inclined to dismiss Fink's comment as a joke or hyperbole, but some recent polls indicate a growing contempt for democracy, particularly among the young.¹⁵² When asked if it were essential to live in a democracy, thirty percent of those born in the 1980s said "no."¹⁵³ A slightly smaller percentage stated that democracy is a "bad" system.¹⁵⁴ Sixteen percent of all Americans believe it would be "good" if the military ran America.¹⁵⁵ These frightening developments are occurring throughout the Western world, which has been under the thrall of corporate neoliberalism for decades. Confirming Aristotle's warning that the wealthy are the biggest internal threat to a republic, illiberal views exist more frequently among wealthy (and generally more schooled) younger citizens.¹⁵⁶ Meanwhile, greed continues to dissolve all other adhesives (including kindness). The poor and middle class live under a system that protects the rich, while the rich fear a political system that could become more redistributive.

If these gloomy surveys are accurate, and if popular support for democracy continues to diminish, classical republican theory and Buddhist psychology have more to teach us than Rawls, Nozick, and neoclassical economics. Quite simply, extreme wealth disparity creates a culture of corruption that leads to crime, demagoguery, revolution, and eventually tyranny. We need more firm but gentle hands.

2011/03/head-of-worlds-largest-asset-manager-markets-like-totalitarian-governments.html [https://perma.cc/F9G3-6Z9U].

152. Roberto Stefan Foa & Yascha Mounk, *The Democratic Disconnect*, 27 J. DEMOCRACY 5, 7–8 (2016), <http://www.journalofdemocracy.org/sites/default/files/Foa%26Mounk-27-3.pdf> [https://perma.cc/V7KU-UMRZ].

153. *Id.* at 7–9.

154. *Id.*

155. *Id.* at 12.

156. *Id.* at 13.