

**On the Myth of the Founder-Legislator in Political Philosophy:
Synthesizing Some Ideas of Arendt, Aristotle, Ferguson, Hayek, and Locke That Have
Anarchist Implications¹**

By Geoffrey Allan Plauché
Ph.D. Candidate, Political Science
Louisiana State University

Last Revised: 12/19/2006

For at least two hundred years, social philosophers have known that association does not need government, that, indeed, government is destructive of association.
– Ronald Hamowy²

The word myth has several related meanings. Two in particular are relevant to the purpose of this essay. A myth can be a traditional or legendary story that provides a explanation or illustration of a group's origins or ideals. Myth is also used to refer pejoratively to fictitious, unproved or false collective beliefs – particularly, in the realm of politics and economics, those that are used to justify social institutions and policies. The original impetus of this essay was to critique the idea of the Founder or Legislator in political philosophy and history. As so often happens, the subject of the essay quickly broadened to include a critique of a related issue, that of the impulse to 'run' society via central planning as if it were an enterprise association rather than a civil association.³ The idea of the Legislator and that of central planning are related in that the former assumes a single individual (or small group of individuals) who creates or significantly re-engineers an entire society by laying down all or at least its central political, legal, economic, religious and other social institutions, laws and mores, often from scratch and generally with wise foresight as to the effect his Lawmaking will have on the society he is (re-) constructing. The Legislator too is a central planner who treats society as an enterprise

1 It's too late to change the title for the conference but, as the introductory paragraph suggests, the main title might more appropriately be “Spontaneous Order, Anarchism, and the Myth of the Founder-Legislator.”

2 Hamowy (2005), pp. 236-237.

3 On the distinction between enterprise and civil associations, see Michael Oakeshott (1975).

association, i.e., one in which the individuals have a common purpose laid down at the Founding (or re-Founding) and follow the wise plans of the Founder and their current rulers. (Note, also, the essential similarity between the view of society implied by the idea of the Legislator and that of social contract theory.) As a disclaimer, to avoid misunderstanding, I will be drawing upon some ideas of a number of disparate thinkers; I make no claims about their overall philosophies or how these ideas fit into them, but intend only to draw out what I see as their implications and move toward a synthesis of them.

On the Myth of the Founder-Legislator in Political Philosophy

What sort of myth is the idea of the Founder-Legislator? I think it fits both of the definitions given above. Given an understanding of politico-economic theory and an examination of the historical record, I think it is safe to conclude that Founder myths are traditional or legendary stories, generally greatly exaggerated or entirely fictitious, that explain or illustrate the origins or ideals of a people.⁴ Such shared beliefs serve to inflate self-worth, strengthen communal bonds and preserve tradition but they also serve to inculcate and preserve in the masses an obedient attitude to a supposedly wise and necessary ruling elite.⁵ In these myths, Founders or reformers are often said to have been divinely inspired,⁶ thus linking both the nation as a whole and its social institutions with the divine and the natural. Naturally, to question or deviate from what is widely considered divine and natural is, putting it mildly, a dangerous endeavor. Political philosophers would do well to be skeptical of Founder myths, even those

4 In criticizing Founder myths, I am not arguing that all myths are pernicious or that there is no legitimate role for myths to play. See Ferguson (1995), pp. 76-77.

5 See, e.g., Ferguson (1995), pp. 76-77.

6 See, e.g., Lycurgus of Sparta (Polybius VI 48.2; Plato, *The Laws* I 624a-625a, 632d) and Minos of Crete (Plato, *The Laws* I 624a-625a, 632d).

passed on, often uncritically, by eminent philosophers and historians like Plato and Aristotle; Polybius, Cicero and Tacitus; Machiavelli and Rousseau; John Adams and James Madison.⁷

A brief examination of some of the major Founder myths is in order. Sparta and Crete are both said to have been founded, by Lycurgus and Minos respectively, primarily with one view in mind: war.⁸ Both have been said to have been divinely inspired. Hannah Arendt, at least, disputes that one can conclude divine inspiration from ancient texts like Plutarch's.⁹ She does relate, however, that “the highest praise accorded to an ancient legislator was that his laws were so admirably framed that one could hardly believe that they were not made by a god.”¹⁰ One might interpret versions of some of the myths as telling of the Lawmaker receiving reassurance or confirmation from an oracle.¹¹ But a passage to which she refers in Polybius seems more than an “as if” sort of praise, viz., “It seems to me that from the point of view of ensuring harmony among the citizens, keeping Spartan territory intact, and preserving the liberty of his country, Lycurgus' legislation and the foresight which he displayed were so admirable that one can only regard his wisdom as something divine rather than human.”¹² It is noteworthy, for the purposes of this essay, to point out that even Rousseau, in a chapter of *On the Social Contract* entitled “On the Legislator,” recognized that a Legislator must have superhuman or divine abilities in order to accomplish the tasks assigned or credited to him:

The discovery of the best rules of society suited to nations would require a superior intelligence, who saw all of men's passions yet experienced none of

7 On Adams, see his *A Defense of the Constitutions of Government of the United States of America*, 1778, *Works* vol. IV (Boston: 1851), p. 291. On Madison, see *Federalist* #38. For a critique of these passages from Adams and Madison, particularly on Adams' uncritical acceptance of divinely inspired foundings, see Arendt (1963), p. 186 & pp. 312-313 n. 11.

8 Plato, *The Laws* I 630d.

9 Arendt (1963), p. 312 n. 11.

10 Ibid. Arendt herself calls such founding, legislating or lawmaking pre-political. If such events actually occurred or were possible I would be inclined to agree with her; however, when the criteria for politics are restricted to the institutions of the polis, the theory of social evolution blurs the line between political and pre-political.

11 In addition to Arendt, see Orrieux and Pantel (1995) p. 70.

12 Polybius (1979), *The Rise of the Roman Empire*, VI 48.2, p. 342.

them; who had no relationship at all to our nature yet knew it thoroughly; whose happiness was independent of us, yet who was nevertheless willing to attend to ours; finally one who, preparing for himself a future glory with the passage of time, could work in one century and enjoy the reward in another. Gods would be needed to give laws to men.

One who dares to undertake the founding of a people should feel that he is capable of changing human nature, so to speak[.]¹³

We will return later to both the monumental task of Founding or Lawmaking as well as its questionable morality.

Lycurgus is said to have crafted Sparta's constitution. Not only did he arrange Sparta's political institutions, making it a mixture of monarchic, aristocratic and democratic elements, but he also redistributed land in order to eliminate inequality and luxury and devised a comprehensive educational system of institutions and laws with the aim of instilling in the citizens selfless community devotion, spartan discipline, health and endurance, strength, and warrior skills. And yet we cannot even be certain of his existence.¹⁴

Solon has been acclaimed the democratic reformer of Athens. We actually have fragments of writings attributed to Solon himself, but even here the only deeds that can be unquestionably attributed to him are his agrarian land reforms, which involved annulling all debts and doing away with slavery for debt. Solon did not, however, redistribute land from the aristocracy to the poorer inhabitants. "Although [his solution] may have warded off the civil war that was threatening, it did not get to the roots of the crisis[.]"¹⁵ Reforms attributed to Solon by Aristotle and Plutarch but which probably occurred in the fifth and fourth centuries, not the sixth, include: "the economy (measures concerning craftsmen, the system of weights and measures, the

13 Rousseau (1978), pp. 68. The last sentence continues: "of transforming each individual, who by himself is a perfect and solitary whole, into a part of a larger whole from which this individual receives, in a sense, his life and his being; of altering man's constitution in order to strengthen it; of substituting a partial and moral existence for the physical and independent existence we have all received from nature." Recall my parenthetical remark at the end of the introductory paragraph.

14 Orrieux and Pantel (1995), p. 70.

15 Ibid., p. 80.

ban on the export of all produce except oil); justice (the constitution of a court open to all citizens, the *Heliæa* and the right of any citizen to lodge a legal complaint); social mores (regulations on marriage, the luxurious lifestyle of women, funerals);...kinship and the place of the *oikos* [household] in the city”; dividing “the citizen body into four census classes”; and “the creation of a council of 400 members (the *boulè*).¹⁶

We also do not know if Romulus, the famed founder of Rome, ever truly existed or did everything claimed of him. Important religious reforms in Rome are attributed to Numa,¹⁷ but Rousseau holds Numa to be of greater importance to Rome than even Romulus:

Those who have seen in Numa only a creator of religious rites and ceremonies have sadly misjudged this great man. Numa was the true founder of Rome. If Romulus had done no more than to bring together a pack of brigands who could have been scattered by a single set-back, his imperfect work would not have been able to withstand the ravages of time. It was Numa who made it solid and enduring by united these brigands into an indissoluble body....¹⁸

Editor Roger Masters’ remarks in one of his editor's notes that though “the history of Romulus and Numa may be a 'fable', it nonetheless reflects the true origin of Rome.”¹⁹ What exactly he means by 'fable' and true origin, he does not explain, but I take it to be agreement that many of the specific details of these myths are probably fictitious.

Aside from lack of historical evidence and the general observation of the incentives people and their rulers have for creating these exaggerated or fictitious Founding myths, what reason do we have for rejecting them as largely fictitious? In answer to this question I turn now to the theory of social evolution developed during the Scottish Enlightenment.

16 Ibid., pp. 80-81.

17 See Jones and Sidwell (1994), 1.9, p. 6; and Tacitus (2004), 3.26.4, p. 96.

18 Cited in Rousseau (1978), p. 151 n. 121.

19 Ibid.

Spontaneous Order and Social Evolution

Scottish Enlightenment thinkers such as Bernard Mandeville, Adam Ferguson, David Hume and Adam Smith, in the wake of the new state-of-nature theorizing, examined the historical record and developed ideas on spontaneous order and social evolution. More recently, Austrian School political economist Friedrich Hayek built on the ideas of these thinkers, distinguishing sharply between spontaneous orders like society, markets, language and law from planned orders or organizations like the business firm and the state. Michael Oakeshott developed a similar theory distinguishing civil associations from enterprise associations.

Ferguson in particular is one to look to as a predecessor of Hayek's theory of spontaneous order and social evolution. At several points in his *Essay on the History of Civil Society*, Ferguson criticizes state-of-nature theorizing for a number of reasons: reductionism, lack of historical support, indeed, being contrary to historical evidence, and so forth.²⁰ Like Aristotle, he recognizes that man is by nature social and quotes Montesquieu: “Man is born in society and there he remains.”²¹ He points out that “Mankind are to be taken in groupes, as they have always subsisted.”²² Contra the social contract theorists, he argues “If both the earliest and the latest accounts collected from every quarter of the earth, represent mankind as assembled in troops and companies...; these facts must be admitted as the foundation of all our reasoning relative to man.”²³

None of the foregoing yet tells against the Founder myths, but Ferguson also points out that “Natural productions are generally formed by degrees.”²⁴ In addition to biological evolution, however, mankind also evolves socially: “they build in every subsequent age on foundations

20 See, e.g., Ferguson (1995), pp. 7-12, 14, 15, 16, 21, 73, 75-76. In quotations from Ferguson, I leave his antiquated spelling intact.

21 Ibid., p. 21. For more on human sociality, see pp. 9, 15-17, 19-21, 23-24, 28, 38-40, 59, 81.

22 Ibid., p. 10.

23 Ibid., p. 9.

24 Ibid., p. 7.

formerly laid and, in a succession of years, tend to a perfection in the application of their faculties, to which the aid of long experience is required, and to which many generations must have combined their endeavours.”²⁵ He adds: “When nations succeed one another in the career of discoveries and inquiries, the last is always the most knowing. Systems of science are gradually formed. The globe itself is traversed by degrees, and the history of every age, when past, is an accession of knowledge to those who succeed.”²⁶ As with science, so too with industry: “Thus mankind acquire industry by many and by slow degrees. They are taught to regard their interest; they are taught to abstain from unlawful profits; they are secured in the possession of what they fairly obtain; and by these methods the habits of the labourer, the mechanic, and the trader, are gradually formed.”²⁷ Constitutional limits on government have also evolved over time: It “is not till after mankind have committed many errors in the capacities of magistrate and subject, that they think of making government itself a subject of rules.”²⁸ Finally:

The history of mankind is confined within a limited period, and from every quarter brings an intimation that human affairs have had a beginning. Nations, distinguished by the possession of arts, and the felicity of their political establishments, have been derived from a feeble original, and still preserve in their story the indications of a slow and gradual progress, by which this distinction was gained. The antiquities of every people, however diversified, and however disguised, contain the same information on this point.²⁹

25 Ibid., p. 10.

26 Ibid., p. 33. Ferguson does not think that history is one of steady and constant progress, however; regression can and does occur; see p. 15.

27 Ibid., p. 95.

28 Ibid., p. 64. Even Tacitus (2004), who uncritically accepts the Founder myths, seems to agree: “but some, either at once or after they had tired of kings, preferred laws. And at first, given the rawness of men's minds, they were simple enough” (3.26.3, p. 96).

29 Ibid., p. 74.

For Ferguson, social evolution is driven by internal dissensions within states as well as by competition among states which leads them to emulate those that seem successful.³⁰ Social evolution is also driven by the often unintended consequences of human action.

Mankind, in following the present sense of their minds, in striving to remove inconveniences, or to gain apparent and contiguous advantages, arrive at ends which even their imagination could not anticipate, and pass on, like other animals, in the track of their nature, without perceiving its end. He who first said, 'I will appropriate this field: I will leave it to my heirs;' did not perceive, that he was laying the foundation of civil laws and political establishments. He who first ranged himself under a leader, did not perceive, that he was setting the example of a permanent subordination, under the pretence of which, the rapacious were to seize his possessions, and the arrogant to lay claim to his service.

Men, in general, are sufficiently disposed to occupy themselves in forming projects and schemes: but he who would scheme and project for others, will find an opponent in every person who is disposed to scheme for himself. Like the winds, that come we know not whence, and blow whithersoever they list, the forms of society are derived from obscure and distant origin; they arise, long before the date of philosophy, from the instincts, not from the speculations, of men.

Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design. If Cromwell said, That a man never mounts higher, than when he knows not whither he is going; it may with more reason be affirmed of communities, that they admit of the greatest revolutions where no change is intended, and that the most refined politicians do not always know whither they are leading the state by their projects.³¹

H. B. Acton points to “two factors” that “make it certain that unintended results of actions will be constantly occurring in all human societies” - error and conflict of wills.³²

What the foregoing suggests is that we should be cautious of Founder myths. Indeed, all this tells strongly against their validity. Ferguson agrees:

30 Ibid., p. 61-64, 121-124. Of Sparta, Ferguson interestingly remarks: “Crete, which is supposed to have been a model of military policy, is commonly considered as the original from which the celebrated laws of Lycurgus were copied” (141); cf. Aristotle's *Politics* II.10-11 1271b20-1273b26.

31 Ibid., p. 119.

32 Acton (1993), p. 184.

If conjectures and opinions formed at a distance, have not sufficient authority in the history of mankind, the domestic antiquities of every nation must, for this very reason, be received with caution. They are, for most part, the mere conjectures or the fictions of subsequent ages; and even where at first they contained some resemblance of truth, they still vary with the imagination of those by whom they are transmitted, and in every generation receive a different form. They are made to bear the stamp of the times through which they have passed in the form of tradition, not of the ages to which their pretended descriptions relate.³³

We are therefore to receive, with caution, the traditionary histories of ancient legislators, and founders of states. Their names have been celebrated; their supposed plans have been admired; and what were probably the consequences of an early situation, is, in every instance, considered an effect of design. An author and a work, like cause and effect, are perpetually coupled together. This is the simplest form under which we can consider the establishment of nations: and we ascribe to a previous design, what came to be known only by experience, what no human wisdom could foresee, and what, without the concurring humour and disposition of his age, no authority could enable an individual to execute.³⁴

Two points in the second passage bear further elaboration: the tendency to ascribe an author to nature and social institutions, and the line about requiring 'the concurring humour and disposition of his age' in order for a legislator to get his plans carried out. First, Ferguson speaks of the human tendency toward superstition, "a perplexed apprehension of invisible agents, that are supposed to guide all precarious events to which human foresight cannot extend."³⁵

Second, Ferguson hints at the kind of primitive social, political and economic conditions that might have made Lycurgus' alleged deeds easier and less spectacular. Referring to the conditions of Native American Indians:

Were Lycurgus employed anew to operate on the materials we have described, he would find them, in many important particulars, prepared by nature herself for his use. His equality in matters of property being already established, he would have no faction to apprehend from the opposite interests of the poor and the rich; his senate, his assembly of the people, is constituted; his discipline is in some measure adopted; and the place of his helots is supplied by the task allotted to one of the sexes. With all these advantages, he would still have had a very important

33 Ferguson (1995), p. 76. On the point of the last sentence, see also Orreix and Pantel's (1995) remarks about Aristotle's account of Solon's reforms, pp. 70-71.

34 Ibid., p. 120.

35 Ibid., p. 89.

lesson for civil society to teach, that by which a few learn to command, and the many are taught to obey: he would have all his precautions to take against the future intrusion of mercenary arts, the admiration of luxury, and the passion for interest: he would still perhaps have a more difficult task than any of the former, in teaching his citizens the command of appetite, and an indifference to pleasure, as well as a contempt of pain; in teaching them to maintain, in the field, the formality of uniform precautions, and as much to avoid being themselves surprised, as they endeavor to surprise their enemy.³⁶

But this is still probably to give too much credit to Lycurgus. Ferguson maintains that “Although free constitutions of government seldom or never take their rise from the scheme of any single projector, yet are they often preserved by the vigilance, activity, and zeal, of single men.”³⁷

Furthermore, “The croud of mankind, are directed in their establishments and measures, by the circumstances in which they are placed; and seldom are turned from their way, to follow the plan of any single projector.”³⁸ Indeed, Ferguson remarks on the conservative nature of mankind and suggests that men in antiquity would have been even more so.

If men, during ages of extensive reflection, and employed in the search of improvement, are wedded to their institutions; and, labouring under many acknowledged inconveniences, cannot break loose from the trammels of custom; what shall we suppose their humour to have been in the times of Romulus and Lycurgus? They were not surely more disposed to embrace the schemes of innovators, or to shake off the impressions of habit: they were not more pliant and ductile, when their knowledge was less; not more capable of refinement, when their minds were more circumscribed.

We imagine, perhaps, that rude nations must have so strong a sense of the defects under which they labour, and be so conscious that reformation is requisite in their manners, that they must be ready to adopt, with joy, every plan of improvement, and to receive every plausible proposal with implicit compliance. And we are thus inclined to believe, that the harp of Orpheus could effect, in one age, what the eloquence of Plato could not produce in another. We mistake, however, the characteristic of simple ages: mankind then appear to have the fewest defects, and are then least desirous to enter on reformation.³⁹

36 Ibid., p. 93.

37 Ibid., p. 130. “No constitution is formed by concert, no government is copied from a plan” (120).

38 Ibid., p. 119. A piece of anecdotal evidence: Aristotle, criticizing the license of Spartan women, remarks of Lycurgus: “But, when Lycurgus, as tradition says, wanted to bring the women under his laws, they resisted, and he gave up the attempt” (*Politics* II.9 1270a6-8).

39 Ibid., pp. 120-121.

Ferguson continues, speaking of Rome and Sparta specifically:

The reality, in the mean time, of certain establishments at Rome and at Sparta, cannot be disputed: but it is probable, that the government of both these states took its rise from the situation and genius of the people, not from the projects of single men; that the celebrated warrior and statesman, who are considered as the founders of those nations, only acted a superior part among numbers who were disposed to the same institutions; and that they left to posterity a renown, pointing them out as the inventors of many practices which had been already in use, and which helped to form their own manners and genius, as well as those of their country men.

If we consider Romulus as the founder of the Roman state, certainly he who killed his brother that he might reign alone, did not desire to come under restraints from the controuling power of the senate, nor to refer the councils of his sovereignty to the decision of a collective body. Love of dominion is, by its nature, averse to constraint; and this chieftain, like every leader in a rude age, probably found a class of men ready to intrude on his councils, and without whom he could not proceed. He met with occasions, on which, as at the sound of a trumpet, the body of the people assembled, and took resolutions, which any individual might in vain dispute, or attempt to controul; and Rome, which commenced on the general plan of every artless society, found lasting improvements in the pursuit of temporary expedients, and digested her political frame in adjusting the pretensions of parties which arose in the state.⁴⁰

We may conclude Ferguson's criticisms of the Founder-Legislator myths with the following:

“The consideration due to these objects will be pleaded in every public assembly, and will produce, in every political contest, appeals to that common sense and opinion of mankind, which, struggling with the private views of individuals, and the claims of party, may be considered as the great legislator of nations.”⁴¹

To Ferguson's arguments against the Founder-Legislator myths, we may add the more recent research and arguments of Friedrich Hayek. Hayek argues that law is older than legislation:

40 Ibid., p. 121. Though believing in the deeds of Lycurgus, with regard to Rome at least Polybius agrees with Ferguson: “The Romans, on the other hand, although they arrived at the same result [as Lycurgus] as regards their form of government, did not do so by means of abstract reasoning, but rather through the lessons learned from many struggles and difficulties; and finally, by always choosing the better course in light of experience acquired from disasters, they have reached the same goal as Lycurgus, that is, the best of all existing constitutions” (VI.10, p. 311).

41 Ibid., p. 131.

Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder. Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind....It will certainly remain an exceedingly dangerous power so long as we believe that it will do harm only if wielded by bad men.

Law in the sense of enforced rules of conduct is undoubtedly coeval with society; only the observance of common rules makes the peaceful coexistence of individuals in society possible.⁴²

The idea of law as a deliberate product of human design was first fully developed in ancient Greece, largely died out during the Age of the Roman Empire and the subsequent Dark Ages, and then was revived in recent centuries in the form of legal positivism.⁴³ For the reasons heretofore given, and many that have not been, Hayek observes why

in all early civilizations we find a law like that 'of the Medes and the Persians that changeth not', and why all early 'law-giving' consisted in efforts to record and make known a law that was conceived as unalterably given. A 'legislator' might endeavor to purge the law of supposed corruptions, or to restore it to its purity, but it was not thought that he could make new law. The historians of law are agreed that in this respect all the famous early 'law-givers', from Ur-Nammu and Hammurabi to Solon, Lykurgus and the authors of the Roman Twelve Tables, did not intend to create new law but merely to state what law was and had always been.

Nevertheless, law did not remain static, but those “changes which did occur were not the result of intention or design of a law-maker.”⁴⁴

It remains to point out that there are problems with the idea of the Legislator *even if* a single individual (or small group of individuals) should somehow attain the influence to enact his plans. The Legislator can easily be in error as to the proper end of the polis and the proper means (i.e., constitution, laws, and mores) to achieve this end. Aristotle, although he praises Lycurgus in places, roundly criticizes the Spartan Lawgiver for having the wrong end in view and for his

42 Hayek (1973), p. 72.

43 Ibid., p. 82.

44 Ibid., p. 81.

faulty constitutional arrangement and laws.⁴⁵ Most important of Lycurgus' failures is his orienting Sparta toward the wrong end: “the excellence of the soldier, which gives victory in war,” is only one part of human excellence (*eudaimonia*: well-being, flourishing, happiness). Lycurgus and the Spartans made an error equally great in supposing that “the goods for which men contend” are “to be preferred to the excellence which gains them.”⁴⁶ Similarly, Ferguson observes that Rome's very greatness and splendor “was ruinous to the virtue and happiness of mankind; it was found to be inconsistent with all the advantages which that conquering people had formerly enjoyed in the articles of government and manners.”⁴⁷ Echoing Aristotle:

Great and powerful states are able to overcome and subdue the weak; polished and commercial nations have more wealth, and practise a greater variety of arts, than the rude: but the happiness of men, in all cases alike, consists in the blessings of a candid, an active, and a strenuous mind. And if we consider the state of society merely as that into which mankind are led by their propensities, as a state to be valued from its effect in preserving the species, in ripening their talents, and exciting their virtues, we need not enlarge our communities, in order to enjoy these advantages. We frequently obtain them in the most remarkable degree, where nations remain independent, and are of a small extent.⁴⁸

The sections that follow drift away from the subject of the Founder-Legislator into critiques of legislation in the popular sense, representative democracy, the impulse to “run” society like an enterprise association and “make” men _____ as if they were raw materials,⁴⁹ and even the state itself. Nevertheless, all that will be said is equally applicable to the idea of the Founder-Legislator.

45 See Aristotle, *Politics* II.9 1269a29-1271b19. Cf. Orrioux and Pantel (1995), p. 256.

46 Ibid., p. 1271b1-11. Plato makes similar criticisms in the *Laws*. On the second error, c.f. Ferguson (1995), p. 51.

47 Ferguson (1995), p. 60.

48 Ibid.

49 Fill in the blank: e.g., “make” men moral, patriotic, obedient, do this or don't do that, pursue a unified goal like cogs in a machine, and so forth.

On “Making” Men _____

Hannah Arendt's analysis of the differences between action (*praxis*)⁵⁰ and work – and between politics, which involves action, and fabrication or making (*poiēsis*), which involves work – also has anarchist implications. In particular, I have in mind her criticism of Plato, and to a lesser extent Aristotle, regarding their tendency to view society as a sort of enterprise association and politics as the running of society as such – or, in their words, politics as akin to household management. Action, Arendt defines as “the only activity that goes on directly between men without the intermediary of things or matter”;⁵¹ it is directly and intimately related to politics, which Arendt links to Scottish notions of spontaneous order.⁵² “To act, in its most general sense, means to take initiative, to begin (as the Greek word *archein*, “to begin,” “to lead,” and eventually “to rule,” indicates), to set something into motion (which is the original meaning of the Latin *agere*).”⁵³ Work, on the other hand, is

the activity which corresponds to the unnaturalness of human existence, which is not imbedded in, and whose mortality is not compensated by, the species' ever-recurring life cycle. Work provides an 'artificial' world of things, distinctly different from all natural surroundings. Within its borders each individual life is housed, while this world itself is meant to outlast and transcend them all.⁵⁴

We need not accept in its entirety Arendt's conception of action and work with all its implications and baggage in order to appreciate the difference between dealing with other human beings as ends in themselves (i.e., voluntarily and politically) and treating them like beasts who must be tamed or raw materials for the shaping or living tools or mere parts of the machinery of the state.⁵⁵

50 Arendt uses the term action more narrowly than do the praxeologists of the Austrian School.

51 Arendt (1958), p. 7.

52 Ibid., p. 185.

53 Ibid., p. 177.

54 Ibid., p. 7.

55 On the different ways in which the ancients and the moderns viewed men as less-than-human objects of legislation, see p. 188 n. 15.

Each and every human being is an individual person possessed of the capacity for self-direction and therefore excellence. The threat or use of physical force compromises that capacity for self-direction. Arendt identifies an element of violence in all making (fabrication),⁵⁶ and observes foundation and legislation to be a kind of making.⁵⁷ In legislating and execution of decisions by vote” men “act like craftsmen’: the result of their actions is a tangible product, and its process has a clearly recognizable end.” Plato and Aristotle prefer ‘making’ because “of its greater reliability. It is as though they had said that if men only renounce their capacity for action, with its futility, boundlessness, and uncertainty of outcome, there could be a remedy for the frailty of human affairs.”⁵⁸ This aversion to spontaneous order and true politics is pervasive in political philosophy.

Escape from the frailty of human affairs into the solidity of quiet and order has in fact so much to recommend it that the greater part of political philosophy since Plato could easily be interpreted as various attempts to find theoretical foundations and practical ways for an escape from politics altogether. The hallmark of all such escapes is the concept of rule, that is, the notion that men can lawfully and politically live together only when some are entitled to command and the others forced to obey.⁵⁹

In applying to “its administration the [then] currently recognized maxims for a well-ordered household,” Plato was quite aware that he was proposing “a revolutionary transformation of the *polis*.”⁶⁰ The treating of society as an enterprise association to be run with a plan has the effect of “banishing the citizens from the public realm” while they leave the ruler to “attend to public affairs.”⁶¹ (See the discussion on division of labor and representative democracy below.)

Arendt calls a delusion the idea “that we can ‘make’ something in the realm of human affairs - ‘make’ institutions or laws, for instance as we make tables and chairs, or make men

56 Ibid., pp. 139-140, 153.

57 Cf. p. 228.

58 Ibid., p. 195.

59 Ibid., p. 222.

60 Ibid., p. 223. Cf. p. 230.

61 Ibid., p. 221.

'better' or 'worse' - or it is conscious despair of all action, political and non-political, coupled with the utopian hope that it may be possible to treat men as one treats other 'material'.”⁶²

In the *Republic*, the philosopher-king applies the ideas as the craftsman applies his rules and standards; he 'makes' his City as the sculptor makes a statue, and in the final Platonic work these same ideas have even become laws which need only be executed.

Within this frame of reference, the emergence of a utopian political system which could be construed in accordance with a model by somebody who has mastered the techniques of human affairs becomes almost a matter of course; Plato, who was the first to design a blueprint for the making of political bodies, has remained the inspiration for all later utopias.⁶³

Such centrally planned schemes of government must inevitably “break down quickly under the weight of [the] reality...of the real human relationships they [cannot] control.”⁶⁴ Beyond the impracticability of central planning, of running society like an enterprise association, there is the moral dimension that legislation in both the technical and popular sense, insofar as it rests upon force, treats human beings as means rather than as ends in themselves and thus gives us reason to condemn it as immoral and unjust.

On the Division of Labor and Representative Democracy

In his Essay, Ferguson evinces some worries about the increasing division of labor of modern commercial societies, though he does not repudiate this outright and even sees benefits in it. I contend that his worries about the division of labor have negative implications about representative democracy. We have already seen that he preferred small nations and we know that beyond a certain extent (ignoring for the moment technological advances) a representative or authoritarian system becomes necessary for the state to function. A small nation makes direct,

62 Ibid., p. 188.

63 Ibid., p. 227. The last phrase in the second quoted passage implies that Plato was the first to actually attempt the feats mistakenly credited to the great Founder-Legislators.

64 Ibid. On the divine qualities such administration would require, see p. 227.

participatory democracy possible while representation, I will argue, encourages division and specialization of labor in the realm of politics and security. But before going further, let us see what Ferguson has to say on the division of labor.

Ferguson observes that “By the separation of arts and professions, the sources of wealth are laid open”⁶⁵ But for Ferguson, “It is in conducting the affairs of civil society, that mankind find the exercise of their best talents, as well as the object of their best affections.”⁶⁶ And so he is concerned about the effects of increasing division of labor on active man and active citizenship: “This description does not pertain to any particular craft or profession; or perhaps it implies a kind of ability, which the separate application of men to particular callings, only tends to suppress or to weaken. Where shall we find the talents which are fit to act with men in a collective body, if we break that body into parts, and confine the observation of each to a separate track?”⁶⁷ He sees in the shift from citizen militias to professional and mercenary armies, that even republics have undergone, the cause of a “breach” in “the system of national virtues.”⁶⁸ It disarms the populace, removes from most of them an avenue of active citizenship, promotes a more bureaucratic and obedient sensibility in the soldiers, and is more conducive to offensive wars that are destructive of domestic liberty. Just as excessive division of labor in defense and its consequent professionalization is undesirable, so too is such a division of labor and professionalization in politics. Ferguson says of both that it helps “to break the bands of society, to substitute form in place of ingenuity, and to withdraw individuals from the common scene of occupation, on which the sentiments of the heart, and the mind, are most happily employed.”⁶⁹

65 Ferguson (1995), p. 173.

66 Ibid., p. 149.

67 Ibid., p. 32. See, also, pp. 58-59.

68 Ibid., p. 146.

69 Ibid., p. 207. See, also, the paragraph immediately following the quoted passage.

So Ferguson was willing to accept division of labor in the economic spheres of activity, but he saw the same in the realm of defense⁷⁰ and politics to have a destructive influence on active citizenship and on liberty, for it encourages the bulk of the citizenry to be apathetic about political issues. It also encourages the formation of a professional political class that will make careers out of their political offices, giving them a dangerous amount of power and influence. Thus, I argue, that Ferguson's worries over the division of labor in defense and politics, particularly combined with his preference for small nations, have anarchist implications. A vast multitude of small nations with direct, participatory democracy approaches philosophical anarchism and, so long as they are completely voluntary, are entirely compatible with it. On the other hand, large representative democracies are destructive of active citizenship and liberty. And, as we have seen, the former is more conducive to beneficial spontaneous social processes while the latter is decidedly not.

On Legislation in the Popular Sense

In connection with the Founder-Legislator myth, we have been primarily discussing legislation in a technical sense, as founding or construction of a nation's constitution, but the term is also used in a more popular sense to mean the constructing of laws by a legislative governmental body. Legislation is problematic, however, because just as the actions of individuals and private groups of individuals often have unintended consequences, so too does legislation but only much more so. This is due to the fact that legislation potentially and often affects the whole of the society within the territorial jurisdiction of the state by which it is passed. The effects of legislation pervade society and all legislation is backed by the threat or use

⁷⁰ I would argue that the existence of professional security firms in an anarcho-capitalist society is not excessive division of labor so long as people do not come to rely upon them as the sole means of defense, that is, so long as people retain the responsibility to defend themselves both individually and in groups like civil militias.

of initiatory physical force, carried out by the organized martial manpower of the state and coercively funded by various means such as inflation and taxation.

The unintended consequences of human action within spontaneous orders can have beneficial effects, especially in the realm of economic activity. This has been famously remarked upon by Adam Smith. Speaking of the owner of capital, Smith says:

He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such manner as its produce may be of the greatest value, he intends only his own gain, as he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.⁷¹

In a similar vein, Ferguson observes:

Men are tempted to labour, and to practise lucrative arts, by motives of interest. Secure to the workman the fruit of his labour, give him the prospects of independence or freedom, the public has found a faithful minister in the acquisition of wealth, and a faithful steward in hoarding what he has gained. The statesman in this, as in the case of population itself, can do little more than avoid doing mischief. It is well, if, in the beginnings of commerce, he knows how to repress the frauds to which it is subject. Commerce, if continued, is the branch in which men committed to the effects of their own experience, are least apt to go wrong.⁷²

Smith echoes Ferguson's warning against governmental interference with markets:

The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.⁷³

Yet it is not only the realms of the economy and population levels from which legislators should refrain from interfering. In comparison with spontaneous social and market processes driven by

71 Smith (1981) IV.ii.10, p. 456.

72 Ferguson (1995), p. 138.

73 Smith (1981), IV.ii.10, p. 456.

voluntary cooperation and transactions, the state is unfit to conduct or interfere with any human activities whatever.

Hayek argues at length “that the spontaneous collaboration of free men often creates things which are greater than their individual minds can ever fully comprehend.”⁷⁴ An understanding of the importance and prevalence of spontaneous order in human history ought, Hayek thinks, to produce “an acute consciousness of the limitations of the individual mind which induces an attitude of humility toward the impersonal and anonymous social processes by which individuals help to create things greater than they know.”⁷⁵ Society is so complex, especially modern society with its increasing globalization, social and commercial interdependence and technological advancement, that no individual or group of individuals could have deliberately organized it. State interference in an attempt to produce desired outcomes different from what the spontaneous processes themselves would produce are generally ineffective if not counterproductive and pernicious. Hayek offers a number of reasons for this, but according to Acton the most important is “that any man or group of men must be ignorant of many of the circumstances and consequences of their policies, whereas the adjustments of a multitude of individuals to one another frequently achieve a harmony too complicated for individual comprehension.”⁷⁶ For Hayek,

the fact of necessary or inevitable ignorance...provides the chief reason for allowing the fullest possible scope to individual freedom. It is because of this ignorance that it is better to allow society to develop by spontaneous adjustment than to control it all by some central agency. Those who recognize the inevitability of ignorance will not pin their hopes on plans for society as a whole, but will want there to be scope for everyone to gain from the impersonal beneficence of transactions that are imperfectly understood.⁷⁷

74 Hayek (1949), p. 7.

75 Ibid., p. 8

76 Acton (1993), p. 193.

77 Ibid., p. 197.

Acton continues: The “men who would be called upon to devise and implement a comprehensive social plan cannot possibly know enough for their project to be a reasonable one. The likelihood is that it will misfire, prove unsatisfactory to those for whom it is devised, give rise to all sorts of unforeseen reactions, and ultimately appear pointless in light of future systems of valuation.”⁷⁸

Anthony de Jasay observes that the “attraction of spontaneity is both moral and prudential.”

When the elements [of a spontaneous order] are human beings, their property and their choices, nobody's dispositions are imposed on him by another's command. Everybody chooses for himself what seems to him the best, given that everybody else chooses likewise. All choices are interdependent, and made mutually compatible by property rights and their voluntary exchanges. None dominates and none is subordinated. This lends the order in question a moral *laissez passer*, while nonspontaneous orders, constructed by imposing some alternative on the participants by authority or the threat of force, are morally handicapped by their coercive element. If they are to pass for legitimate, they need to show some compensating merit. Spontaneous social orders, in other words, have a *prima facie* moral standing. Constructed orders must first earn it, or do without.

The prudential attraction of spontaneous orders springs from the belief, strongly held by Hayek and fairly well supported by historical evidence, that since the knowledge required for successfully designing a complex order is either irretrievably dispersed or latent or both, the constructed order runs a high risk of being inefficient if not grossly counterproductive.⁷⁹

Absent sound theoretical arguments that certain public goods cannot be provided voluntarily by society and the free market, then we have reason to believe that “ordered anarchy is possible.”⁸⁰

On Aristotle and Anarchism

Some ideas held by Aristotle also have anarchist implications. Roderick Long has discussed the importance of voluntary government to Aristotle and David Keyt has gone even further by explicitly drawing out the anarchist implications of some of Aristotle's ideas. In

78 Ibid., p. 198.

79 De Jasay (1997), p. 126.

80 Ibid., p. 123.

Nature, Justice, and Rights in Aristotle's Politics, Fred Miller argues that consent is merely evidence of a just constitution for Aristotle: “Aristotle gives no indication of...treating the consent of the governed as a *justification* for political authority. Rather, his view is that the voluntary compliance of the subjects to political rule is *evidence* that the political rule is justified.”⁸¹ But as Long points out, in “Aristotle's Conception of Freedom,” Aristotle suggests otherwise:

Yet it would, like as not, seem highly absurd to those willing to reflect, if this should be the task of the πολιτικοῦ: to be attending to how he can rule and despotize (δεσπόζει) over his neighbors, both those who are willing and those who are not willing. For how can that be πολιτικόν, or appropriate to a lawgiver, which at any rate is not even lawful? Now to rule not only rightly but wrongly is unlawful, and to dominate is not also to do so rightly. Nor yet do we see this in the other sciences; for it is not the task (ἔργον) of a healer, nor of a steersman, to either persuade or coerce, the one his patients and the other his passengers [but only to persuade them]. But most people seem to think despotic art is πολιτικήν. And precisely what they each will say is neither right nor advantageous with regard to themselves, this they are not ashamed to practice toward others; for they seek rightful rule for themselves, but toward others they have no concern for the things that are right.⁸²

Long argues that this passage is a reply to Plato's argument in the *Politicus* that, analogous to a good physician, the “true πολιτικός...is not one who rules over willing subjects, but rather one who rules wisely, be his subjects willing or unwilling.”⁸³ Aristotle here turns Plato's argument on its head by denying his “assumption that the consent of the patient is irrelevant to the ἔργον of medicine; and he insists that to rule against the will of the ruled is a violation of [natural] law and [natural] justice.”⁸⁴

This consent of the governed is no mere consent of the majority but must be unanimous consent. This is the case because, as Miller convincingly argues,

81 Miller (1995), p. 273.

82 *Politics* VII.2 1324b22-36; Long's (1996: 790) translation. The brackets are his. Cf. *Politics* VII.14 1333B5-1334a10.

83 Long (1996), p. 790. Cf. Plato's *Politicus* [Statesman] 276d-277a and 291e-293e.

84 *Ibid.*

Aristotle implies that the best polis is a group of individuals co-operating for *mutual* [not the overall] advantage, when he characterizes it as 'a community of similar persons for the sake of the best possible life' ([VII.8] 1328a35-7). It is implied that all members of the polis must take part in the good life, since the inhabitants who play a merely functional role in promoting the end without partaking are adjuncts rather than members (cf. IV 4 1291a24-8).⁸⁵

As evidence, among others, Miller cites the following passage from Aristotle's *Politics*:

But a polis is excellent due to the fact that the citizens who partake in the constitution are excellent; but in our case all the citizens partake in the constitution. We must therefore enquire as to how a man becomes excellent; for even if all the citizens could be excellent without each of the citizens [being excellent], the latter would be more choiceworthy; for 'all' follows from 'each'.⁸⁶

In other words, a polis that does not have the consent of every citizen and does not promote the eudaimonia of every citizen is not a just polis. Consent, of course, is not enough by itself to establish political autonomy and justify political rule. As the foregoing has suggested, it is also necessary that the constitution of the polis be in accord with natural justice and, more generally, that it promotes the eudaimonia of each and every one of its citizens.

Long and Keyt alike point to Aristotle's infamous argument in defense of slavery. Long reconstructs of Aristotle's theory of natural freedom, which he sees as a corollary of Aristotle's theory of natural slavery:⁸⁷

Our rational capacities give us the ability to stand in judgment over our natural impulses instead of being controlled by them; natural slaves lack this ability entirely, while free women are said to have it only imperfectly (the capacity is ἄχρουν, noncontrolling),⁸⁸ while free adult Greek males have it in complete functionality (which is not to say that they always make proper use of it). Anything which lacks a rational capacity is the deterministic slave of the forces acting upon it; in a given set of circumstances, a nonrational potentiality can only produce a single outcome.⁸⁹ The rational capacities of humans in normal condition, by contrast account for their possession of free will and moral responsibility – the fact that at least some actions are up to us to perform or not, as

85 Miller (1995), p. 219.

86 *Politics* VII.13 1332a32-38; Miller's (1995: 222) translation. The brackets are his.

87 Long (1996), pp. 801-802. See *Politics* I.3-8, 12-13.

88 See *Politics* I.13 1260a13.

89 See *Meta*. IX.5 1047b35-1048a25.

we choose.⁹⁰ Human free choice breaks the chain of necessitation and allows us to transcend the natural order.⁹¹ Rational potentialities are what enable us to choose the bad as well as the good,⁹² because they enable us to control how the end appears to us;⁹³ thus rational potentialities are also at the root of our liability to weakness of will,⁹⁴ since the key to weakness of will lies in our capacity to focus our attention on some values and avoid thinking of others.⁹⁵ Thus Aristotle's theory of the right to freedom, like the Kantian liberal theory, bases itself on the metaphysico-ethical capacity of autonomous rational agents to transcend the motivational force of sensible appearances.⁹⁶

Key quotes Aristotle's report of an argument against slavery put forth by unnamed opponents:

Some maintain that it is contrary to nature (*para phusin*) to be a master [over slaves]. For [they argue] it is [only] by law (*nomoi*) that one man is a slave and another free; by nature (*physei*) there is no difference. Hence it is not just; for it rests on force (*biaion*).⁹⁷ Consistently held, the principle that all legitimate government must be voluntary implies philosophical anarchism. And if the argument put forth by Aristotle's opponents is right, as most believe today, this implication is extended to all adult human beings – for all, not merely a few, are naturally free.

On Aristotelian Liberalism, the Right to Liberty, and the Illegitimacy of the State

Aristotle, of course, was no liberal and certainly no anarchist. There is, however, a burgeoning tradition of Aristotelian liberalism. Douglas Rasmussen and Douglas Den Uyl are proponents of one version of this new version of liberalism but are also no anarchists, while Roderick Long explicitly embraces anarchism as a logical conclusion of his Aristotelian

90 See *EE* II.6 1222b41-1223a15; *NE* III.5 1113b2-1114a3; *MM* I.11 1187b10-20, I.18 1189b37-1190a2.

91 See *On Interpretation* 9 18b31-19a12; *Meta.* VII.3 1027a29-b16.

92 See *EE* II.10 1227a21-32.

93 See *NE* III.5 1114a30-1115a3.

94 See *DA* III.9 433a1-4; *Problems* XXX.12 956b33-37.

95 See *NE* VII.3 1146b31-1147a24; cf. *EE* II.9 1225b10-16 and *DA* II.5 417b21-27.

96 Long (1996), p. 802. For a more detailed defense of these interpretive claims, see Long (1992). Long's account of Aristotelian autonomy here seems to correspond to two aspects of autonomy: what I call global autonomy or self-direction and the political dimension of local autonomy that liberals commonly refer to as liberty. It also bears pointing out that Aristotle's notion of rational choice is not one of radically free choice; he does not build his philosophy on a concept of pure reason.

97 Keyt (1993), p. 133. Keyt's translation has the advantage over the Oxford of being closer to the original and retaining the explicit reference to force. The Penguin Classics translation by T.A. Sinclair is similar.

liberalism. In the remainder of this essay, I will attempt to synthesize the two versions of Aristotelian liberalism expounded by these scholars while maintaining that Long's position that anarchism is the logical conclusion of an Aristotelian-liberal political philosophy.

In the liberal tradition, rights have, at least since Locke, generally been grounded in self-ownership, and liberalism has generally been viewed by defenders and critics alike as having little or nothing to say about ethical issues beyond justice. An Aristotelian liberalism, on the other hand, grounds rights precisely in man's obligation to pursue *eudaimonia*, his natural and ultimate end, which is a life of flourishing or well-being, a life proper to man. Since man is a rational, political and social being, a fully human life is one lived in accord with these essential aspects of his nature within the context that he is neither a god nor a mere beast but a *human* being who must make his way in the world in all his vulnerable embodiedness without giving in to the baser aspects of his nature.

First and foremost, *eudaimonia* requires living a life of reason, which means using one's rational faculty to discover the ends one ought to pursue and the proper means for achieving them, both in solitary situations and in social and political life. The virtues are constitutive of a life of *eudaimonia*, principles of proper conduct both for when we are alone and in our relations with others. Like the virtue ethics of Aristotle, Aristotelian-liberal virtue ethics focuses on the moral agent; it offers a *supply-side* approach rather than a typically modern *demand-side* approach to morality and rights. As Roderick Long (1994/95) explains: "According to a demand-side ethics, the way that A should treat B is determined primarily by facts about B, the *patient* of moral activity; but for a supply-side approach like Virtue Ethics, the way that A should treat B is determined primarily by facts about A, the *agent* of moral activity."⁹⁸ The central question of a

98 Long (1994/95).

eudaimonistic virtue ethics is not “What consequences should I promote?” or “What rules should I follow?” but rather “What kind of person should I be?”

It is the very nature of *eudaimonia* and virtue, or more narrowly of moral acts, that they must be desired and freely chosen for the right reasons.⁹⁹ The pursuit of *eudaimonia*, the practice of virtue, must be self-directed. Coercive interference, or the threat or use of initiatory force, compromises self-direction and therefore moral agency. An act of mine does not count as virtuous and therefore contributory toward my *eudaimonia* if you force it upon me, even if it otherwise would have been had I desired and freely chosen it for the right reasons. The right to liberty proscribes the threat or use of *initiatory* physical force. From the structural level of analysis, of the ordering principle of society, we can see that the right to liberty protects the possibility of self-direction, which is the central and fundamental feature common to all forms of human flourishing. The right to liberty thus does not bias the structure of the political/legal order in favor of any form of human flourishing.¹⁰⁰ In this sense, the right to liberty is a *metanormative* principle. This is essentially the argument made by Douglas Rasmussen and Douglas Den Uyl. While I think this argument is correct and certainly important, from the point of view of virtue ethics this point that the right to liberty is a metanormative principle is not the whole story or even the most important part, and certainly not the most fundamental part.

David Gordon points out one deficiency of a primarily demand-side defense of rights, like that of Rasmussen and Den Uyl: “[I]t does not follow from the fact that others must respect your rights, if you are to flourish, that you have an obligation to respect their rights. You may well have such an obligation, but more than an appeal to the conditions of your own flourishing

99 See Aristotle, *Nicomachean Ethics*, II.4 (1105a18-1105b17) and III.1-5 (1109b30-1115a6).

100 On this issue of not biasing the structure of the political/legal order, see also Acton (1993), pp. 194, 201.

is needed to show this.”¹⁰¹ Arguing that the right to liberty is necessary for protecting the possibility of everyone's flourishing goes some distance in shoring up this deficiency, but it still seems too consequentialist, not quite Aristotelian enough. Since Rasmussen and Den Uyl argue that rights-respecting behavior does not directly contribute to human flourishing, respecting the rights of others seems to be of instrumental value only.¹⁰² Why should I not violate your liberty for my own benefit, or the benefit of others, if I think I have a reasonable chance of getting away with it (with or without doing irreparable harm to societal order)? To answer this, we need an account of rights as interpersonal ethical principles the respecting of which is constitutive of all forms of flourishing worthy of the name.

The Rasmussen and Den Uyl account of rights as metanormative principles operates at the structural level of analysis, the level of political and legal theory. From the personal level of analysis, the level of ethical theory, we can draw on the supply side-demand side distinction to arrive at the realization that rights do not derive primarily from facts about the rights-bearer qua moral patient but rather derive primarily from facts about the moral agent. In other words, it is not that rights are first properties of individuals and thereby produce obligations in others. On the contrary, it is rather our prior obligations as human beings to live a life of reason from which rights are derived. As Long argues,

just as courage, generosity, and temperance are the virtues that define the appropriately human attitudes toward danger, giving, and bodily pleasures respectively, so the virtue of justice defines the appropriately human attitude toward violence. A maximally human life will give central place to the distinctively human faculty of *reason*; and one's life more fully expresses this faculty to the extent that one deals with others through *reason* and persuasion, rather than through violence and force. To choose cooperation over violence is to choose a human mode of existence over a bestial one. Hence the virtuous person will refrain from initiating coercion against others.¹⁰³

101 Gordon (2003), p. 2.

102 Rasmussen and Den Uyl (2005), pp. 90 and 91.

103 Long (1994/95).

For Locke, the origin and purpose of government, and its only justification, is the protection of the individual's rights to life, liberty, and property. If the state is to have any justification in light of a Lockean or Aristotelian liberalism, it will at least have to meet this criterion. A careful examination of the nature of the state, however, reveals that it cannot. The state is an organization that claims a territorial monopoly on the legal use of force and ultimate decision-making. Consider, also, that states generally acquire their revenue by physical coercion (taxation). Now, taxation is theft and therefore a violation of property rights. While it is conceivable that in principle a state could acquire its revenue purely from voluntary contributions, it would be a misnomer to call this taxation.¹⁰⁴ If tax 'contributions' were truly voluntary, there would be no need to back up their collection with the threat or use of force. As a self-proclaimed territorial monopolist, even the most minimal libertarian state, should it seek to enforce its claim, must necessarily violate the rights of any of its rights-respecting subjects who prefer an alternative. When the state attempts to prohibit competitors in the voluntary production, purchase and sale of defense and legal services, it violates the rights of all the parties involved. Even if we put all this aside, no state known to history has been so constituted as to provide a reasonable assurance that the exercise of its power will not be arbitrary, that the laws it passes will be just, that it will not seek continually and increasingly to expand the size and scope of its activities beyond the protection of rights.

It would be correct to point out that none of the foregoing precludes the possibility of a state actually acquiring the explicit and unanimous consent of its subjects. It is, after all, conceivable that a state could, at least in principle, manage to do so. A few points can be made in

104 One possible means of voluntary revenue for the state that has been suggested is a lottery. However, one wonders how any state would effectively enforce its claim to a territorial monopoly with voluntary contributions as its only source of revenue. Hence, one sees in history the inherent tendency of states to impose and increase taxation on their subjects.

reply. First, while this may in principle be possible, in actual practice such an occurrence is exceedingly unlikely and like to be of only transitory duration. Second, this in-principle-possibility is no justification of a state that does not have explicit and unanimous consent in reality. Third, although consent is necessary, it is not enough to justify the state, to make the state just. A state that has the explicit and unanimous consent of its subjects but violates the rights of other persons who are not its subjects is still unjust, as are its agents and supporters.

More to the point, a contract with the state (whether explicit or implicit) is no more valid than, and is essentially the same as, a slavery contract.^{105,106} This is essentially because the state claims a territorial monopoly on the legal use of force and ultimate decision-making. In both cases (of state contracts and slavery contracts), to paraphrase Spooner, an individual delegates, or gives to another, a right of arbitrary dominion over himself, and this no one can do, for the right to liberty is inalienable. If the subject/slave later changes his mind, exit from the agreement would be barred to him by the terms of the contract; a state contract with the right of secession (down to the individual level), or a slavery contract with the right of exit, would be a contradiction in terms. Moreover, even if the contract stipulates what the state/master can or cannot do to the subject/slave, aside from those stipulations the state/master has been delegated or given arbitrary dominion over the subject/slave. If anything, the state contract is the worse of the two because states generally have greater power and perceived legitimacy than individual

105 Henceforth, for lack of a better term, I will use “state contract” to refer to such explicit contracts with the state (in contradistinction with the implicit consent-based social 'contract'.)

106 Locke's contention that the people have a right to revolution because the relationship between a people and their state is contractual notwithstanding; that this ought to be the case is true. Moreover, a truly voluntary government will recognize an unlimited right of secession (making revolution unnecessary). But it is the argument of this section that Locke's normative claim about states does not reflect reality – states do not behave as if their relationships with their people are contractual, and no such contract has ever been signed by all of the people in any case. Furthermore, it is not enough for the rights to secession and revolution to reside only in the people as a whole.

persons and private organizations. To whom does the subject turn when the state begins exceeding the limits of the contract?

For an explanation of why the right to liberty is inalienable, and why one cannot therefore delegate or give to another a right of arbitrary dominion over himself, two points can be made, the first suggestive and the second decisive.¹⁰⁷ First, since we all have an obligation to live a life of *eudaimonia*, which requires self-directed action, person A cannot morally abdicate his responsibility by delegating or giving to person B a right of arbitrary dominion over himself. While this claim does not by itself establish the right to liberty or its inalienability, it does point out the moral impropriety on the part of the would-be subject/slave to enter into a state or slavery contract. Second, recall that for Aristotelian liberalism rights derive primarily from the moral agent's obligation not to initiate aggression against other rational beings. Rights do not simply reside in the moral patient and thereby produce obligations for others. Person A's right not to be aggressed against by person B cannot simply be abdicated by an act of will to B, for B's obligation not to aggress against A depends on B's calling as a human being, something which is not in the control of A. The right to liberty is therefore inalienable. It follows from this that both state contracts and slavery contracts are illegitimate because they are fraudulent on the part of the would-be subject/slave and more generally unjust on the part of the would-be state/master, for the former is attempting to transfer something that is not his to transfer and the latter is attempting to receive and exercise a power to which he has no right. The state, therefore, can never be just, even in the extremely unlikely event it should somehow garner the explicit and unanimous consent of its subjects.^{108,109} That the state is inherently unjust is a conceptual truth,

107 The argument that follows is heavily indebted to Roderick Long's (1994/95) "Slavery Contracts and Inalienable Rights: A Formulation."

108 This is not to say that everything a state may do or require of us is unjust.

whether any given organization in society counts as a state is a separate empirical matter that must be left up to analysis of history and the present. I dare say, however, that every one of the national governments currently existing is a state.

This essay finds support for the epigraph with which it began: “For at least two hundred years, social philosophers have known that association does not need government, that, indeed, government is destructive of association.”¹¹⁰ Both the historical record and the Scottish Enlightenment theories of spontaneous order and social evolution tell against the Founder-Legislator myth. The latter also, especially when combined with Austrian School politico-economic analysis, warns against the central planning of society as if it were an enterprise association. Moreover, as De Jasay has argued, “Spontaneous social orders...have a prima facie moral standing. Constructed orders [because they rest upon the threat or use of initiatory physical force] must first earn it, or do without.”¹¹¹ Additionally, Ferguson's worries about the negative consequences on active citizenship and liberty of a division of labor in the spheres of security and politics imply that we should prefer direct, participatory democracy over representative democracy, the former of which if fully voluntary is compatible with philosophical anarchism. Arendt's critique of legislation as 'making', that is, her critique of the tendency to turn politics into household management writ large parallels the spontaneous order/social evolution critique in its devastating import for statism. It has also been shown that we can even turn to Aristotle for support for philosophical anarchism, albeit so long as we reject some of his ideas and arguments

109 If the foregoing has raised the worry that the Aristotelian liberal account of rights undermines the making of contracts in general, it is beyond the scope of this essay to allay those concerns but I happily refer the reader to Long (1994/95) wherein this worry has already deftly been dealt with. It also bears pointing out that a similar critique of the state can be made on purely Lockean grounds, although Locke's conception of the inalienability of the right to liberty hinges upon God's ownership of us rather than on a supply-side justice argument.

110 Hamowy (2005), pp. 236-237.

111 De Jasay (1997), p. 126.

that lead him mistakenly away from it. Finally, in Aristotelian liberalism we can find the overall political philosophy whose logical implications, consistently drawn out, lead to an outright rejection of the state, for since the right to liberty is inalienable even a voluntary relationship with the state is akin to voluntary slavery and therefore unjust. Nothing in this essay, of course, precludes the possibility of a non-market, polycentric system of government in addition to and alongside informal and market provision of legal, security, and welfare services.

References

- Acton, H. B. 1993. *The Morals of Markets and Related Essays*. Indianapolis: Liberty Fund.
- Arendt, Hannah. 1963. *On Revolution*. New York: Penguin Books.
- Arendt, Hannah. 1958 [1998]. *The Human Condition*. Chicago: University of Chicago Press, 2nd Edition.
- Aristotle. 1995 [1984]. *The Complete Works of Aristotle*. Revised Oxford translation, Bollingen Series LXXI-2. 2 vols. Edited by Jonathan Barnes. Princeton: Princeton University Press.
- Barnett, Randy. 2004 [1998]. *The Structure of Liberty: Justice and the Rule of Law*. New York: Oxford University Press.
- Bell, Tom W. 1991. "Polycentric Law." *Humane Studies Review* Vol. 7, No. 1 (Winter); <<http://www.theihs.org/libertyguide/hsr/hsr.php/12.html>>.
- Benson, Bruce L. 1990. *The Enterprise of Law: Justice Without the State*. San Francisco: Pacific Research Institute for Public Policy.
- De Jasay, Anthony. 1997. *Against Politics: On Government, Anarchy, and Order*. London and New York: Routledge.
- Gordon, David. 2003. "Freedom or Slavery: A Review of Edward Feser's On Nozick." *The Mises Review: A Quarterly Review of Books*, Vol. 9, No. 2 (Summer). Published by The Ludwig von Mises Institute.
- Hamowy, Ronald. 2005. *The Political Sociology of Freedom: Adam Ferguson and F.A. Hayek*. Cheltenham, UK: Edward Elgar (New Thinking In Political Economy).
- Hayek, Friedrich A. 1973 [1978]. *Law, Legislation and Liberty, Volume 1: Rules and Order*. Chicago: University of Chicago Press.
- Hayek, F. A. 1949. *Individualism and Economic Order*. London: Routledge.
- Higgs, Robert. 1987. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. New York: Oxford University Press.
- Hobbes, Thomas. 1994. *Leviathan*. Edwin Curley, ed. Indianapolis, IN: Hackett Publishing.
- Jones, Peter and Keith Sidwell, eds. 1997. *The World of Rome: An Introduction to Roman Culture*. Cambridge: Cambridge University Press.
- Keyt, David. 1993. "Aristotle and Anarchism." *Reason Papers* 18 (Fall): 133-152.
- Lavoie, Don and Emily Chamlee-Wright. 2000. *Culture and Enterprise: The Development, Representation, and Morality of Business*. New York: Routledge, A Cato Institute Book.
- Loan, Albert. 1991. "Institutional Bases of the Spontaneous Order: Surety and Assurance." *Humane Studies Review* Vol. 7, No. 1 (Winter); <<http://www.theihs.org/libertyguide/hsr/hsr.php/13.html>>.
- Locke, John. 1993 [2003]. *Political Writings*. David Wootton, ed. Indianapolis, IN: Hackett Publishing.
- Long, Roderick T. 2000. *Reason and Value: Aristotle versus Rand*. New York: The Objectivist Center.
- Long, Roderick T. 1996. "Aristotle's Conception of Freedom," *The Review of Metaphysics* Vol. 49 (June): 775-802.
- Long, Roderick T. 1994/95. "Slavery Contracts and Inalienable Rights: A Formulation," *Formulations* Vol.2, No. 2 (Winter); <<http://www.libertariannation.org/a/f2211.html>>.

- Miller, Jr., Fred D. 2002. "Aristotelian Autonomy." In *Aristotle in Modern Politics: The Persistence of Political Philosophy*. Aristide Tessitore, ed. Notre Dame: University of Notre Dame Press.
- Miller, Jr., Fred D. 1995. *Nature, Justice, and Rights in Aristotle's Politics*. Oxford: Oxford University Press.
- Oakeshott, Michael. 1975. *On Human Conduct*. Oxford: Oxford University/Clarendon Press.
- Orrieux, Claude and Pauline Schmitt Pantel. 1995 [1999]. *A History of Ancient Greece*. Translated by Janet Lloyd. Oxford: Blackwell Publishers Limited.
- Polybius. 1979. *The Rise of the Roman Empire*. New York: Penguin Books.
- Rasmussen, Douglas B. and Douglas J. Den Uyl. 2005. *Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics*. University Park, PA: Pennsylvania State University Press.
- Rousseau, Jean-Jacques. 1978. *On the Social Contract*. Masters and Masters, eds. Boston, MA: Bedford/St. Martin's Press.
- Rousseau, Jean-Jacques. 1964. *Rousseau's First and Second Discourses*. Roger D. Masters, ed. New York: St. Martin's Press.
- Sciabarra, Chris Matthew. 2005. "Dialectics and Liberty." *The Freeman: Ideas on Liberty*, Vol. 55, No. 7 (September), pp. 34-38; <<http://fee.org/pdf/the-freeman/Sciabarra0905.pdf>>.
- Sciabarra, Chris Matthew. 2000. *Total Freedom: Toward a Dialectical Libertarianism*. University Park: Pennsylvania State University Press.
- Sciabarra, Chris Matthew. 1995. *Marx, Hayek, and Utopia*. New York: State University of New York Press.
- Smith, Adam. 1981. *Wealth of Nations*. Glasgow Edition. Indianapolis: Liberty Fund.
- Tacitus. 2004. *The Annals*. A.J. Indianapolis: Hackett Publishing Co.