

Ludwig von Mises on Principle

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Ludwig von Mises was one of this century's most principled and uncompromising defenders of laissez faire. He was also an outspoken advocate of utilitarianism and the doctrine of social expediency, and a critic of any kind of objective ethics such as natural law or natural rights. This raises the obvious question as to how successful Mises was in turning the sow's ear of social expediency into the silk purse of laissez faire.

Murray N. Rothbard's answer is that Mises was not successful—that no one, not even Mises, could accomplish such a feat (1982, pp. 205–13). Henry Hazlitt (1964) and Leland Yeager (1992), on the other hand, have argued that utilitarianism really is not the sow's ear that its critics have made it out to be—or at least not the brand of utilitarianism that they attribute to Mises: indirect utilitarianism. Furthermore, they argue that only utilitarianism, properly understood, can provide a moral foundation for laissez faire.

While I agree with Rothbard that utilitarianism, whether direct or indirect, cannot provide a principled defense of laissez faire, I shall argue that Mises's method of justifying laissez faire has more in common with the natural rights approach of Herbert Spencer and Auberon Herbert than the utilitarianism of Bentham and Mill. It should be stressed that I am not disputing the easily documented fact that Mises proclaimed himself to be a utilitarian, and was highly critical, even scornful of natural law and natural rights doctrines (Rothbard 1980). One can dredge up quote after quote where Mises defends utilitarianism and social expediency and attacks natural law and natural rights theories. On the other hand, one cannot ignore Mises's "apparent use of natural law-type constructs, in spite of his explicit rejection of natural law" (Tucker and Rockwell 1991, p. 48).

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In trying to understand Mises's relationship to the natural law tradition, one should keep in mind, as Mises pointed out, that the natural law tradition is made up of a "bewildering diversity of doctrines" (1957, p. 45). The same can be said of utilitarianism. Defenders, as well as critics, of these traditions rarely agree as to what constitutes their defining criteria. For example, if one believes that the essence of the natural law tradition is the fusion of the "ought" and the "is," or the doctrine that Nature has a purpose and morality consists in following Nature's intentions, then clearly Mises stands opposed to that tradition. There are, however, other important features of the natural rights tradition, especially with regard to methodology, that generally distinguish it from the utilitarian tradition.

In the next three sections I distinguish three different senses in which one may be properly labeled a utilitarian: (1) a nonmoral *functionalist* sense concerned with whether means are efficient; (2) a moral sense concerned with *social harmony*; and (3) a methodological sense in which alternative institutions and actions are *compared* with regard to how well they promote utility. It is my contention that Mises was a utilitarian in only the first two senses, and that his criticism of the natural rights tradition is aimed mainly at what he conceived to be its irrational, nonfunctional aspects—i.e., its appeal to intuition. In the remaining sections I argue that Mises's methodological approach to morality is more akin to the principled (or *categorical*) stance taken by defenders of the natural rights tradition rather than the *comparative* stance taken by utilitarians such as Bentham and Mill.¹

Functionalism versus Intuitionism

It is important to begin by clarifying what Mises means by utilitarianism, and this can best be done by understanding what he was contrasting utilitarianism with. For Mises the alternative to utilitarianism is an appeal to "intuition" (1922, p. 360; 1966, p. 883; 1957, pp. 53, 58), to an "inner voice" (1933, p. 41; 1957, p. 53), to

¹ I am not claiming that these three senses of utilitarianism are explicit in Mises's writings, but only that they help resolve the apparent conflict between Mises's principled stance toward liberty and his professed belief in social expediency. My approach to Mises's utilitarianism is similar to that taken by Hans-Hermann Hoppe with regard to Rothbard's natural rights: "my approach . . . seems to be more in line with what Rothbard actually does when it comes to justifying the specific norms of libertarianism than the rather vague methodological prescriptions of the natural rights theorists" (Hoppe 1988, p. 61). I hope to show that in spite of his professed utilitarianism, Mises takes a principled approach to ethics that has much in common with the approach taken by Rothbard and Hoppe.

"considerations hidden to the human mind" (1966, p. 148), to "arbitrary laws imposed upon man by a tyrannical Deity with which man has to comply without asking any further questions" (1962, p. 105). For the intuitionist moral laws are viewed as "instruments by means of which God or Nature directs human action according to inscrutable design" (1945, p. 223). Mises places natural law and natural rights in the intuitionist camp, and therefore rejects them as irrational and arbitrary.

Although I think that this turns the natural law tradition into a straw man, it must be admitted that there have been strong intuitionist elements within the natural law and natural rights tradition. For example, Aquinas postulated the special faculty of *synderesis* as the source of our knowledge of principles of natural law, and Locke's principal argument for natural rights seems to hinge on the premise that God is our Maker (1988, p. 271). What makes Bentham's utilitarianism appealing to many rationalists, including Mises, is that Bentham swept away the remaining intuitionist vestiges of natural law. Unfortunately, Bentham threw out more than the murky bath waters of intuitionism.

To avoid stacking the deck against the natural law and natural rights traditions by identifying utilitarianism with reason and natural law with intuition, I suggest that we re-label this contrast as "functionalism" versus "intuitionism." As Hayek pointed out, if we refer to "any critical examination of such rules and of institutions with respect to the function they perform in the structure of society" as utilitarianism, then "every one who does not regard all existing values as unquestionable but is prepared to ask why they should be held would have to be described as a utilitarian. Thus Aristotle, Thomas Aquinas, and David Hume, would have to be described as utilitarians" (1976, p. 17). What Aristotle, Aquinas, Hume, Bentham, Mill, and Mises have in common is not some appeal to "the greatest happiness for the greatest number," but a belief that morality serves some earthly social function and can be understood by reason, as opposed to something "imposed on mankind by mysterious powers" (1933, p. 42).

Although the term "utilitarianism" has become identified with Bentham's doctrine of "the greatest happiness for the greatest number," i.e., with the maximization of utility or social welfare, one must keep in mind that when Mises advocates utilitarianism he is often simply advocating that we ask what the purpose of a policy, institution, etc. is and judge it by how well it achieves this purpose. As such, functionalism is not a moral doctrine, although it can be applied to morality. In the next section I will examine functionalism as it relates

to morality, but here I am concerned with generic, nonmoral functionalism.

The functionalist judges acts (or policies) in terms of how adequate (or efficient) they are as means for accomplishing a given end. In other words, all "oughts" are hypothetical or conditional and are of the form: "If you want to accomplish *E*, then you ought to do *M*." The end or goal is not judged. Only the means are judged as to whether or not they are appropriate to the given end. Even if one considers the goal evil, one can still judge certain means as more appropriate for accomplishing that goal, and thus good, relative to the goal. Thus Mises, as a functionalist, says, "if there were people who consider it as the ultimate end of their endeavors to destroy civilization . . . , then we could not help applying to their doctrines the standard of their ultimate end" (1949b, p. 300). (There remains the question as to whether it would be ethical to give helpful advice to someone who is intent upon destroying civilization.)

This is the brand of utilitarianism with which Mises, like most economists, feels most comfortable. He can make judgments without abandoning the value-free stance of the economist. Mises speaks (1966, p. 764) as a nonmoral functionalist when he asserts, "Economics does not say that . . . government interference with the prices of only one commodity . . . is unfair, bad, or unfeasible. It says . . . that it makes conditions worse, not better, *from the point of view of the government and those backing its interference*." Rothbard (1982, p. 206) quotes this passage and asks, "[H]ow does Mises know *what* the advocates of the particular policy consider desirable?" But I do not think this criticism hits the mark. Mises's point is simply that such policies will not accomplish their proclaimed goals. Those who advocate a minimum wage, for example, may really want to make nonunion labor uncompetitive, but their *proclaimed* goal is that they want to help the poor. By showing that certain policies will have the opposite effect from that proclaimed, the functionalist can undermine the arguments used in support of these policies.

If people's goals were so diverse that hardly any two people shared the same goals, the functionalist would not have much to contribute. But Mises contends that most people share certain goals. In particular, he asserts that most "people prefer life to death, health to sickness, nourishment to starvation, abundance to poverty" (1966, p. 154). In so far as the socialist or interventionist argues that his policy will make people more prosperous, he is subject to criticism from the functionalist standpoint (1927, pp. 7–8; 1966, p. 183). It should be stressed that Mises is not giving any *moral* relevance to the fact that the majority prefers prosperity to poverty. For the

generic functionalist such facts concerning majority preferences have only practical relevance—i.e., arguments concerning appropriate means will be relevant to more people than if only a minority shared this goal.

In order for nonmoral functionalism to be an appropriate mode of argument, however, it is not enough that everyone agree upon the end in question. While it may be true that most people value prosperity and abundance, it is not true that these are their only goals (Rothbard 1982, p. 209). Almost any policy purporting to achieve a particular end will affect other ends as well. The functionalist cannot ignore these other ends. Suppose, for example, most people are willing to trade off some prosperity for increased economic equality. The functionalist's argument that certain alternative policies lead to greater prosperity is no longer relevant if these policies cause greater inequality. In fact, Mises recognizes this weakness in the functionalist argument. He suggests that the socialist might reply to the argument that there is greater prosperity under capitalism as follows: "Granted that each individual will be worse off under socialism than even the poorest under capitalism. Yet we spurn the market economy in spite of the fact that it supplies everybody with more goods than socialism. We disapprove of capitalism on ethical grounds as an unfair and amoral system. We prefer socialism on grounds commonly called noneconomic and put up with the fact that it impairs everybody's material well-being" (1966, p. 679). Mises's comment is, "If no other objections could be raised to the socialist plans than that socialism will lower the standard of living of all or at least of the immense majority, it would be impossible for praxeology to pronounce a final judgment" (1966, p. 679).²

Another problem with nonmoral functionalism is that it is not very useful for making a case against forms of statist intervention that have little effect upon prosperity, e.g., oppression of the majority against a small minority (Rothbard 1982, p. 211). In order to attack these forms of statist intervention, the laissez-faire liberal needs a stronger argument than nonmoral functionalism—he needs some kind of moral argument. As we will see in the next section, Mises indeed does resort to a form of moral functionalism when defending laissez-faire liberalism. I will argue in the subsequent sections, however, that his moral functionalism is not the moral utilitarianism of Bentham and Mill.

²Mises believes, however, that a "final judgment" can be made, because economic calculation is not possible under socialism, and so socialism is not a realizable system.

Social Harmony

The functionalist approaches morality by first determining the function or end of morality, and then assessing various moral rules according to how well they serve this function. For Mises, as for most moral functionalists, the function of morality is the preservation of the social order: "Everything that serves to preserve the social order is moral; everything that is detrimental to it is immoral" (1927, p. 34). "The ultimate yardstick of justice is conduciveness to the preservation of social cooperation. Conduct suited to preserve social cooperation is just, conduct detrimental to the preservation of society is unjust" (1957, p. 54). If man were not a social being, he would not need morality. "Morality consists in the regard for the necessary requirements of social existence that must be demanded of each individual member of society. A man living in isolation has no moral rules to follow" (1927, p. 33). Throughout Mises's writings the stress is on the "preservation of society" (1966, p. 149), the "preservation of peace" (1966, p. 149), and the "preservation of social cooperation" (1962, p. 105). For Mises, "Human society is an association of persons for cooperative action" (1927, p. 18), and cooperation presupposes peace. "Society has arisen out of the works of peace; the essence of society is peacemaking" (1922, p. 59). "The goal of liberalism is the peaceful cooperation of all men" (1944, p. 50).³

To avoid the ambiguities associated with "utilitarianism" as a moral theory and to avoid begging the question against "natural rights," I suggest we call anyone who views the primary aim of justice to be the "securing a peaceful living together" a *social harmonist*.⁴ A moral rationalist, in the sense of a social harmonist, is someone who believes that a society of morally rational individuals would exist in a state of social harmony. In other words, it would be a peaceful society with no need for coercion. Societies only have to resort to coercion because not everyone is rational in this social sense. Mises explicitly states that social harmony is the ideal and is possible: "The ultimate ideal envisioned by liberalism is the perfect cooperation of all mankind, taking place peacefully and without friction" (1927, p. 105). "If all men were able to realize that the alternative to peaceful social cooperation is the renunciation of all that distinguishes *Homo sapiens* from the beasts of prey, and if all had the moral strength always to act accordingly,

³This paragraph and many similar observations throughout this essay concerning Mises's social theory owe much to Joseph Salerno's essay, "Ludwig von Mises as Social Rationalist" (1990).

⁴I am borrowing the label "harmonist" from Mises, although giving it a somewhat wider connotation (1957, p. 40).

there would not be the need for the establishment of a social apparatus of coercion and oppression" (1962, p. 98).

Mises's stress upon preserving social peace certainly fits in with the utilitarian tradition of J. S. Mill. When discussing justice, Mill stresses social peace: "It is their observance [of the rules of justice] which alone preserves peace among human beings; if obedience to them were not the rule, and disobedience the exception, everyone would see in everyone else an enemy against whom he must be perpetually guarding himself" (Mill 1971, p. 54).

It should be pointed out, however, that this stress upon social harmony, although part of the utilitarian tradition, is not unique to that tradition. Herbert Spencer, for example, describes his theory of justice as an "attempt to find a definite expression for the fundamental principle of harmonious social order" (Spencer 1978, p. 66). Given that some utilitarians have claimed Spencer as a fellow-traveler, it should be noted that Lysander Spooner, who has never been mistaken for a utilitarian, states that the natural law is "the science of peace; and the only science of peace; since it is the science which alone can tell us on what conditions mankind can live in peace, or ought to live in peace, with each other" (Spooner 1982, p. 5). Along these same lines, Locke wrote that the law of nature "willeth the Peace and Preservation of all Mankind" (Locke 1988, p. 271).

More generally, according to A. P. D'Entrèves, one of the foremost scholars of natural law, the primary focus of much of the natural law tradition has been on the preservation of society:

No doubt natural law, as a moral precept, extends to "all acts of virtue." But human laws cover only those aspects of human behavior which imply a coordination with other men. Thus, properly speaking, the laws of men do not primarily aim at virtue, but only at securing a peaceful living together: they do not forbid all that is evil, but only that which imperils society. (D'Entrèves 1970, p. 84)

Thus, we must include as social harmonists not only utilitarians such as Bentham and Mill but also modern natural rights theorists such as Locke and Spencer and most ancient and medieval natural law theorists. If there are any natural law theorists who really advocate the principle, "let justice be done, though the world perish," as opposed to, "let justice be done, lest the world perish," then they are not social harmonists.

But if the debate between natural law theorists and utilitarians is not over utility as defined in terms of social harmony, then what is it about? I suggest that the basic difference is one of methodology.

This difference has been succinctly summarized by another modern defender of natural law, Paul Sigmund, as follows:

For natural law theorists . . . utility is a result of the observance of natural law principles, whereas for utilitarians the principles of justice are an indication or codification of long-run utility. Both take account of the same moral experience and both often come to the same conclusions, but one emphasizes the *a priori* and universal character of our moral conclusions about man in society, and the other emphasizes the basis for these conclusions in human desires and in a posteriori effects which follow their adoption. (1971, p. 152)

Among classical defenders of natural rights, Herbert Spencer most clearly articulated this methodological distinction in order to distinguish his moral theory from the utilitarianism of Bentham and Mill. Spencer did not reject the label "utilitarianism," since he too saw happiness as the "ultimate end" (1989, p. 109) or "creative purpose" (1970, p. 61). What he objected to was making happiness "the rule of human conduct" (1970, p. 60) since the idea of the greatest happiness was "capricious" (1970, p. 27). Instead of trying to estimate the empirical consequences of an action or a policy, morality should be concerned with ascertaining "the *conditions* by conforming to which this greatest happiness may be attained" (1970, p. 61). Spencer did not object to being called a utilitarian, provided this label was qualified with the word "rational" to distinguish his doctrine from the "empirical utilitarianism" of Bentham and Mill (Spencer 1978, p. 494).⁵

Utilitarians have tended to either dismiss or misinterpret Spencer's point about method (in so far as they have paid any attention to Spencer at all). J. S. Mill is typical in this respect. Mill, in reply to Spencer's criticism of utilitarianism, asserted that there was no essential disagreement between Spencer and himself (and Bentham), dismissing Spencer's stress upon necessary consequences as not very important (Mill 1971, p. 56). Others have taken Spencer's methodological point more seriously but have interpreted it as being the distinction between direct (act) utilitarianism and indirect utilitarianism. According to John Gray,

Indirect utilitarianism may be defined as that species of utilitarian theory in which a strong distinction is marked between the critical and practical levels of moral thought, and in which the principle of

⁵Locke, who wrote before utilitarianism had been developed as a distinct theory, made a similar methodological distinction: "Utility is not the basis of the law or the ground of obligation, but the consequence of obedience to it" (Sigmund 1971, p. 93).

utility is evoked, solely or primarily, at the critical level. Utilitarian appraisals apply, not to conduct, but to the considerations which govern conduct—not only social rules, but the whole body of sentiments, attitudes and dispositions which lead us to one thing rather than another. (Gray 1989, p. 122)

Gray classifies both J. S. Mill and Spencer as indirect utilitarians.

Although it is true that Spencer believed that direct utilitarianism would lead to social “confusion” (1970, p. 16), his objection was much deeper than this. What Spencer mainly objected to in the utilitarian philosophy was its lack of principle, i.e., its stress on expediency. Now this may seem to be consistent with Gray’s point about indirect utilitarianism: “Indirect utilitarianism is distinct from a sophisticated act-utilitarianism view, then, because it requires that certain practices and conventions be accorded enough weight for their claims to be able to *resist erosion* by utilitarian appraisals” (Gray 1989, p. 130, italics added). Spencer thought, however, that if anything, it was “incomparably less difficult” to “trace out the consequences a given act will entail” than to do so for “some public measure,” but that in neither case could one make “trustworthy inferences” (1970, p. 73). Ironically, in one of the key texts that is supposed to provide evidence that Mill was an indirect, and therefore, a principled utilitarian Mill states, “All persons are deemed to have a *right* to equality of treatment, except when some recognized social expediency requires the reverse” (Mill 1971, p. 56). A little later he says, “Thus to save a life, it may not only be allowable, but a duty to steal or take by force the necessary food or medicine, or to kidnap and compel to officiate the only qualified medical practitioner” (Mill 1971, p. 57). (Perhaps this is a utilitarian’s ideal of resisting “erosion,” but to nonutilitarians it looks more like a mud slide.)

Of course Mill’s failure to take a principled stance should not be used to convict all indirect utilitarians. I argue in the next section, however, that what I call the comparative–categorical contrast better captures the distinction Spencer was trying to make than the direct–indirect contrast. The direct–indirect distinction is a question of what one should compare. The direct utilitarian compares acts, choosing those whose consequences provide more utility. The indirect utilitarian compares rules, institutions, policies, sentiments, choosing those whose consequences provide more utility. In both cases, a *comparative* approach is taken. The distinction between direct and indirect utilitarianism is based on a distinction between what is being compared. Spencer, on the other hand, rejects the comparative approach, taking instead a *categorical* approach to social harmony.

Comparative versus Categorical Harmonists

The comparative harmonist compares the alternatives, whether they be acts, rules, institutions, etc. and picks the best from among these alternatives. Comparative harmonists differ as to how to choose among alternatives. Some argue that happiness should be maximized, others that pain and suffering should be minimized. Others argue for maximizing liberty instead of happiness. Still others, like Hayek, argue for maximizing expectations or "chances of anyone selected at random" (Hayek 1976, pp. 129–30). Some, like Bentham, presuppose that happiness can be quantified and summed, whereas others resort to devices such as taking the stance of an impartial spectator or making decisions behind a veil of ignorance. But in all cases these doctrines assume a moral framework in which the moral theorist chooses the best from among the alternatives. Thus the comparative harmonist can be described as a maximizer, although it should be stressed that this means choosing the best among known alternatives, not the best among all possible alternatives.

The categorical harmonist, on the other hand, believes there are only two moral alternatives: social harmony or social chaos, the way of reason or the way of the beasts.⁶ As Cicero put it, "There are two types of conflict: one proceeds by debate, the other by force. Since the former is the proper concern of man, but the latter of beasts, one should only resort to the latter if one may not employ the former" (Cicero 1991, p. 14). The categorical harmonist views those who are not rational, i.e., who seriously imperil social harmony, as enemies of the social order and thus subject to coercion. Whereas for the comparative harmonist the primary moral relationship is maximization, for the categorical harmonist it is reciprocity—social harmony is possible only among those who are committed to social harmony.

The categorical harmonist separates people into two general classes—those within the law and those outside. Those who by their actions demonstrate that they either have contempt for the social order or are incapable of acting in accordance with social harmony are declared outlaws and treated accordingly. Thus Locke writes, "In transgressing the law of nature, the offender declares himself to live by another rule than that of *reason* and common equity" (1988, p. 272). Furthermore, by putting oneself outside the reach of reason, one forfeits one's right to be treated as a reasonable being: "[O]ne may destroy a man who makes war upon him, or has

⁶Or to use Murray Rothbard's apt phrase, the categorical harmonist adopts a "polar analysis" (1970, p. 264).

discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence" (1988, p. 279).⁷

The comparative harmonist, on the other hand, does not automatically declare those who disregard the conditions for social harmony to be outlaws. His moral world is not so black-and-white, and for this reason gives the illusion of being more humane and tolerant. Since the underlying principle of morality for the comparative harmonist is to maximize utility (or happiness or social welfare), the fact that an individual is behaving irrationally—acting in ways that are harmful to the social welfare—does not exclude this individual from being included in the utility calculus.

This basic difference in moral outlook is reflected in how the categorical and comparative harmonist justify punishment. For both the categorical and the comparative harmonist, there is a presumption against the use of physical force. This is what distinguishes social harmonists from social nihilists—those who believe that might is right. Categorical and comparative harmonists differ, however, concerning what overrides this presumption against the use of force. For the categorical harmonist, force is justified only against someone who shows a disregard for social harmony. (The nihilist, by declaring through his actions that he believes that might is right, can hardly complain when we use force against him.) For the comparative

⁷In another passage Locke states, "a criminal, who having renounced reason, the common rule and measure, God hath given to mankind, hath by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a *lion* or a *tiger*, one of those wild savage beasts, with whom men can have no society nor security: And upon this is grounded the great law of nature, *who so sheddeth mans blood, by man shall his blood be shed*" (1988, p. 274). Auberon Herbert takes a similar stance: "My justification [in knocking a thief down] was, that he had established between himself and the rest of society the force relation, and therefore I had to deal with him as I should have dealt with a wild beast that had attacked me" (Herbert 1978, p. 101). "The men who do so restrain their neighbor, . . . are men who disallow this universal law [against aggression], and therefore lose the rights which they themselves possess under it" (p. 141). This same reciprocity based moral framework is presupposed by Rothbard's discussion (in the context of animal rights) of what he calls the "Martian problem": "If we should ever discover and make contact with beings from other planets, could *they* be said to have the rights of human beings? It would depend on their nature. If four hypothetical 'Martians' were like human beings—conscious, rational, able to communicate with us and participate in the division of labor, then presumably they too would possess the rights now confined to 'earth-bound' humans. But suppose, on the other hand, that the Martians also had the characteristics, the nature, of the legendary vampire, and could only exist by feeding on human blood. In that case, regardless of their intelligence, the Martians would be our deadly enemy and we would not consider that they were entitled to the rights of humanity" (Rothbard 1982, p. 156).

harmonist, on the other hand, force is justified only by showing that the consequences outweigh the intrinsically negative utility of the use of force. Thus, for a categorical harmonist punishment is viewed primarily as restitutorial and retributive, whereas for a comparative harmonist punishment is viewed primarily as a deterrent and for reforming the criminal. The former is backward looking and proper to a nomocratic social theory where justice is measured against one's relationship to law and the need to preserve social harmony. The latter is forward looking and proper to a teleocratic social theory where justice is measured against a goal—the maximization of utility.

In a society based on a categorical moral framework, if someone disturbs the order of society, he is expected to restore the order—to make restitution. If he refuses to be bound by that order, he, in effect, declares himself an enemy of that order and becomes an outlaw and is no longer protected by the law (or more precisely, not protected by the law to the extent of, and in proportion to, his disregard for social harmony). In a society based on a comparative moral framework, on the other hand, punishment is justified only if it positively contributes to the overriding purpose of maximizing utility. The murderer's happiness counts just as much as everyone else's, including his potential victims. (This is a logical consequence of the principle that "equal amounts of happiness are equally desirable, whether felt by the same or different persons" [Mill 1971, p. 56].) The reason the murderer can be justifiably restrained and punished is that the resulting pain and suffering caused to the murderer (and, indirectly, to his mother, friends, etc.) is outweighed by the pain prevented to the rest of society. Punishment is justified only if the pain inflicted by punishment is outweighed by the expected social benefits. Likewise, punishing someone who has not done anything that threatens the peace of society is justified if the pain inflicted is outweighed by the social benefit. Admittedly, comparative harmonists can come up with plausible rationales why punishing the innocent would rarely maximize utility. The point is, however, that, unlike the categorical harmonist, the comparative harmonist has to do this in a roundabout and rather tenuous manner, making some rather strong assumptions about future consequences and the interpersonal comparison of utilities.

Both the similarities and the differences between the comparative and categorical harmonists are illustrated by how their defenders attempt to justify these two moral frameworks. Both begin with the individual's desire for happiness, but even here there is a subtle difference in emphasis. Whereas the comparative harmonist stresses the individual's desire to maximize his own happiness, the categorical

harmonist tends to stress the universal law of self-preservation. Many categorical harmonists go so far as to argue that each individual has a duty to preserve himself. Locke, for example, attempted to ground this obligation by arguing that men are the "workmanship of one omnipotent, and infinitely wise maker" (1988, p. 271), and so are ultimately the property of God. Others, such as Aristotelian rights theorists, have argued that the duty of self-preservation follows from man's inherent nature. But the categorical harmonist is not necessarily committed to justifying a duty to preserve oneself—i.e., he need not be committed to the strong assumption that a person who fails to defend himself is irrational and violates his nature or God's trust, and so should be condemned. What distinguishes the categorical harmonist is that he starts with the fact that it is reasonable to expect most people to try to preserve themselves (whether they have a duty to or not), and, in particular, to defend themselves from attack.

It is in the next step of the argument, the move from the individual's desire for happiness to the derivation of the basic principle of morality, that the comparative and categorical harmonists most radically differ. The comparative harmonist's argument is always some version of Mill's notorious inference from the fact that each individual desires his own happiness to the desirability of the general happiness (1971, p. 37). The categorical harmonist, on the other hand, asks: Given the nearly universal law that people will defend themselves when attacked, under what conditions is social harmony possible? The prototypical answer is given by Spencer. After noting that the desire for self-preservation applies to all creatures, and thus lacks an ethical quality, he takes the next step:

Ethical character arises only with the distinction between what the individual *may* do in carrying on his life-sustaining activities, and what he *may not* do. This distinction obviously results from the presence of his fellows. Among those who are in close proximity, or even some distance apart, the doing of each are apt to interfere with the doings of others; and in the absence of proof that some may do what they will without limit, while others may not, mutual limitation is necessitated. The non-ethical form of the right to pursue ends, passes into the ethical form, when there is recognized the difference between acts which can be performed without transgressing the limits, and others which cannot be so performed. (Spencer 1981, p. 150)

Auberon Herbert makes a similar move. Beginning with the premise that "Underneath all life lies the great law of self-preservation," he

notes that this is "a law which we may fulfill either by using force as the animals do, or by universally accepting the reasonable relation which, forbidding force, guarantees equal freedom to all" (Herbert 1978, p. 101).

In brief, although the comparative harmonist shares with the categorical harmonist the goal of preserving society, this is seen only as a first step, albeit a necessary one, toward a more ambitious goal. The comparative harmonist judges the institutions of a society as inadequate, no matter how peaceful that society may appear on the surface, if these institutions can be modified so as to increase the total social welfare. Of course, one must weigh the costs of making any modification against future gains, and in practice a comparative harmonist may be very conservative in weighing these costs, as Bentham was, but in principle any institution is always subject to revision since someone may come up with a new alternative that is even better than any of the previous alternatives that have been considered in the past. In essence the comparative harmonist is always a social tinkerer.

Mises and Maximization

We can now address the question of whether Mises was a utilitarian in the maximizing, comparative sense or whether he was a categorical harmonist. In this section I argue that the evidence clearly indicates that he was not a maximizer, and in the next section I take up the question of whether he can more properly be classified as a categorical harmonist.

Now it may seem that when Mises says that laissez-faire liberalism promises "the most abundant possible satisfaction of all those desires that can be satisfied by the things of the outer world" (1927, p. 4), he does not leave much doubt that he is a moral utilitarian of the maximizing variety. But as was pointed out in the first section, when the issue is an agreed-upon policy goal, e.g., prosperity, then Mises can as a value-free economist recommend certain liberal policies as the best means for accomplishing this goal. In any case, one should not read too much into such statements. After all, natural rights liberals also believe that laissez faire will lead to a better world. More relevant are statements such as "the only yardstick that must be applied to [law and legality, the moral code and social institutions] is that of expediency with regard to human welfare" (1966, p. 147). Here Mises leaves no doubt that he is advocating a moral doctrine, not functionalism in general, and this moral doctrine seems to imply the maximization of social welfare. But compare this passage to a very similar passage: "The ultimate yardstick of justice

is conduciveness to the preservation of social cooperation. Conduct suited to preserve social cooperation is just, conduct detrimental to the preservation of society is unjust" (1957, p. 54). No categorical harmonist would have problems with this passage. Furthermore, in the former passage the very next sentence reads, "The utilitarian economist does not say: *Fiat justia, pereat mundus*. He says: *Fiat justia, ne pereat mundus*." This is one of Mises's favorite points: the utilitarian rejects "Let justice be done, though the world perish" for "Let justice be done, lest the world perish." The contrast is between destroying and preserving the social order, not between maximizing and failing to maximize utility. Or consider the following passage, "The policy of liberalism is the policy of the common good, the policy of subjecting particular interests to the public welfare" (1922, p. 456). Taken out of context, this is the kind of statement that one would typically attribute to a social harmonist concerned with maximizing utility. Mises immediately adds, however, that this is "a process that demands from the individual not so much a renunciation of his own interests as a perception of the harmony of all individual interests" (1922, p. 456). What Mises clearly means is that in order for social harmony to be possible, individuals cannot completely ignore other individuals. This is fully consistent with the categorical harmonist's argument for rights.⁸

It becomes even more difficult to attribute a maximizing interpretation to these passages in the light of other statements made by Mises that seem to explicitly reject a maximizing view of utilitarianism. These statements can be divided into two categories that parallel the two major objections that critics have raised against utilitarianism: (1) Utilitarianism demands that individuals be willing to sacrifice themselves to the greater good, but why should any individual agree to do this? (2) Utilitarianism presupposes that interpersonal comparisons of utility can be made; yet, this presupposition is highly dubious, if not incoherent.⁹

Mises employs both these objections against moral doctrines that he rejects. With regard to the first objection, Mises's major criticism of "anti-utilitarian" doctrines, in addition to his rejection of their

⁸Compare Herbert: "Man is predestined to find his complete happiness, as Mr. Spencer teaches, only when the happiness of others becomes to him an integral part of his own; but this development of his nature cannot take place unless he is living under those true conditions which belong to a free life" (Herbert 1978, pp. 116–17).

⁹See, for example, Narveson (1988, pp. 150–153). In addition to these two fundamental objections, critics have also argued that utilitarianism has certain counter-intuitive implications—e.g., the punishment of the innocent under certain circumstances.

appeal to intuition, is that they require self-sacrifice. According to Mises, one of the contributions of "utilitarianism" is that the "dualism of motivation assumed by most ethical theorists" was overthrown (1922, p. 357). "Utilitarian philosophy . . . reduced these apparent antagonisms [selfishness vs. altruism, economics vs. ethics, individual vs. society] to the opposition of short-run and long-run interests" (1957, p. 55). This may be true of Mises's brand of "utilitarianism," as it is true of those categorical doctrines of social harmony that stress reciprocity, but it is not true of any maximizing doctrine of social harmony.

It is instructive to contrast Mises with Henry Hazlitt on this point. Although Hazlitt, who describes himself as a utilitarian, believes that "for 99 percent of the people 99 percent of the time, the actions called for by enlightened self-interest and morality are identical" (1964, p. 124), "[t]here remains the rare case when the individual must be called upon to make a 'genuine' sacrifice" (p. 125). He cites Bentham's argument that we can be forced to help in Good Samaritan situations if the cost to us is not too great, and as an example he mentions forcing a doctor to "attend a patient suffering from a contagious disease" or to aid victims of an epidemic (p. 111). In these cases there is a conflict between long-term self-interest and social utility, and the maximizing-utilitarian sides with social utility. Mises, on the other hand, never admits to such a conflict, but repeatedly claims, as we have seen, that one of the major discoveries of "utilitarianism" is that there is no such conflict.¹⁰

With regard to the second objection to utilitarianism, given that Mises believes that only ordinal comparisons of utility can be made and that interpersonal comparisons of utility make no sense, it would be surprising if he were then to try to base his moral theory upon the maximization of utility. In fact, he is explicitly critical of any such doctrine:

Some economists believe that it is the task of economics to establish how in the whole of society the greatest possible satisfaction of all people or of the greatest number could be attained. They do not realize that there is no method which would allow us to measure the

¹⁰ Even Mises's defense of conscription (one of his few lapses from a pure libertarian position) is not cast in terms of maximizing utility, but as a condition that may sometimes be necessary in order to preserve society from "ruthless oppressors" (1966, p. 282). Underlying his argument is the assumption that defense is a public good. This assumption met with little resistance, even among categorical harmonists (Spencer, for example, makes a similar case for conscription [1978, p. 87]), until the public goods argument itself was challenged by Rothbard (1962, pp. 883-90; 1970, ch. 1).

state of satisfaction attained by various individuals. They misconstrue the character of judgments which are based on the comparison between various people's happiness. While expressing arbitrary value judgments, they believe themselves to be establishing facts. (Mises 1966, p. 242)

He then adds, "The reformers searching for the maximum of general satisfaction have told us merely what state of other people's affairs would best suit them" (1966, p. 243). In another context he raises the question, "Is society, people asked, merely a sum of individuals or is it more than this and thereby an entity endowed with independent reality? The question is nonsensical. Society is neither the sum of individuals nor more nor less. Arithmetical concepts cannot be applied to the matter" (1957, pp. 251–52).¹¹

It should be emphasized that a comparative harmonist cannot escape Mises's objection against making judgments based on interpersonal comparisons of utility by resorting to such devices as assuming the role of an impartial spectator or making decisions behind a veil of ignorance. In fact, Mises explicitly criticizes the "old liberals" for assuming the stance of a "perfect king" whose only objective is to make his citizens happy (a precursor to the impartial spectator):

[T]he economists compare this hypothetical system [embodying their own value judgments], which in their eyes embodies the moral law itself, with the market economy. The best they can say of the market economy is that it does not bring about a state of affairs different from that produced by the supremacy of the perfect autocrat. They approve of the market economy only because its operation, as they see it, ultimately attains the same results the perfect king would aim at. (Mises 1966, p. 691)

Mises contends that the fiction of the "perfect king" contributed to the modern notion of a godlike state.

Although one can find passages where Mises quotes Bentham's "greatest happiness" principle without comment (e.g., 1966, p. 175), on other occasions he is rather dismissive. For instance, he characterizes it as expressing "not very aptly" the view that *laissez-faire* liberalism does not favor any special group (1927, p. 7). In another passage he interprets it as simply meaning that social man "must adjust his conduct to the requirements of social cooperation and look upon his fellow men's success as an indispensable condition of his

¹¹Contrast Mill's statement that "the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities" (Mill 1971, p. 56).

own" (1966, p. 833). He goes on say that "if we interpret welfare in this manner, the concept is void of any special significance. It can be invoked for the justification of every variety of social organization. . . . A principle that is broad enough to cover all doctrines, however, conflicting with one another, is of no use at all" (1966, p. 834).¹²

In summary, Mises believed, like Spencer and Herbert, that it was legitimate to speak of the general welfare as the ultimate goal of morality, but also like Spencer and Herbert, he did not believe that one could give this principle any operational content. Its main value is that it distinguishes the social harmonist from the moral intuitionist, but there is always the danger that it will be used as a cover for special interests. As Mises stresses, "No decent man likes to be so rash as to raise objections against the realization of welfare"; however, "in the mouths of the welfare propagandists the notion of welfare has a definite meaning. They intentionally employ a term, the generally accepted connotation of which precludes any opposition" (1966, p. 834). Although Mises does not believe that an appeal to the general welfare can provide a definite guide to policy, he does not want to play into the hands of the welfare propagandists by being misinterpreted as being opposed to the general welfare.

Freedom is Indivisible

Having argued that Mises is not a comparative harmonist, but actually an astute critic of any maximizing moral framework, we must now consider whether he can more properly be described as a categorical harmonist. This brings us back to the central question with which we began: How could Mises be both a principled defender of *laissez faire* and a defender of the doctrine of social expediency? Our argument so far has been that the passages where Mises explicitly defends social expediency can be interpreted as defending the functionalist doctrine that morality is concerned with preserving society and attacking any appeal to mysteriously intuited principles. The question remains as to whether Mises's principled approach to *laissez faire* is a categorical approach.

¹²Mises made a similar statement in his final book: "That every human action has to be judged and is judged by its fruits or results is an old truism. It is a principle with regard to which the Gospels agree with the often badly misunderstood teachings of utilitarian philosophy. But the crux is that people widely differ from one another in their appraisal of the results. What some consider as good or best is often passionately rejected by others as entirely bad. The utopians did not bother to tell us what arrangement of affairs of state would best satisfy their fellow citizens. They merely expounded what conditions of the rest of mankind would be most satisfactory to themselves" (1962, pp. 96-97).

As we have seen, for the categorical harmonist social harmony is not a relative, i.e., comparative matter, but a black-and-white, i.e., categorical matter. In Auberon Herbert's words, "It must be the battle of principles—the principle of liberty against the principle of force" (Herbert 1978, p.51); "force and reason . . . are the two opposite poles" (p. 91). "Force—whether disguised or not under the forms of voting—has but one meaning. It means universal confusion and strife" (p. 335). Mises in very similar words contrasts the "principle of violence" and the "principle of peace": "Violence and law, war and peace, are the two poles of social life" (1922, p. 34). "History is a struggle between two principles, the peaceful principle, which advances the development of trade, and the militarist-imperialist principle, which interprets society not as a friendly division of labor, but as the forcible repression of some members by others" (1922, p. 268). Furthermore, the principle of violence cannot form the basis of a social coherent theory: "Try to realize completely the principle of violence, even only in thought, and its anti-social character is unmasked. It leads to chaos, to the war of all against all. No sophistry can evade that. All anti-liberal social theories must necessarily remain fragments or arrive at the most absurd conclusions" (1922, p. 37). "It is impossible to defend honestly the case for violence against the case for peaceful cooperation. Thus the advocates of violence are resorting to the trick of calling the methods of violence and threat of violence to which they resort 'nonviolence'. . . . The fundamental antagonism between the realm of mutual peaceful agreement and that of compulsion and coercion cannot be eradicated by idle talk about two 'sectors' of the economy, the private and the public. There is no conciliation between constraint and spontaneity" (1968, p. 37).

For Mises the sole justification for force is social preservation:

Society welcomes as members all who can see the benefit of peace and social collaboration in work. It is to the personal advantage of every individual that he should be treated as a citizen with equal rights. But the man who, ignoring the advantages of peaceful collaboration, prefers to fight and refuses to fit himself into the social order, must be fought like a dangerous animal. It is necessary to take up this attitude against the anti-social criminal and savage tribes. Liberalism can approve of war only as a defense. For the rest it sees in war the anti-social principle by which social cooperation is annihilated. (1922, p. 284)

Note that Mises, like Locke and other categorical harmonists, compares the anti-social individual to a dangerous animal. Likewise, for

Mises, "[a]n unbridgeable gulf separates man from all those beings that lack the ability to grasp the meaning of social cooperation" (1962, p. 105). Unfortunately, not every member of our species can cross this gulf, for "[t]here have always been people who were emotionally unfit to conceive the fundamental principle of cooperation under the system of the division of tasks" (1962, pp. 88–89).¹³

Mises's categorical approach is perhaps best represented by his claim that "freedom is indivisible" (1957, p. 376), and his rejection of a middle way between socialism and capitalism (1950b). "The liberal program is an indivisible and indissoluble whole, not an arbitrary assembled patchwork of diverse components. Its various parts condition one another. The idea that political freedom can be preserved in the absence of economic freedom, and vice versa, is an illusion" (1949a, p. 38). The same principle is appealed to when Mises argues against interventionism: "There is no middle way. Control is indivisible" (1949c, p. 55).¹⁴

¹³Mises has very little to say about the justification of punishment. On a number of occasions he does say that force must be used to protect society, e.g., "In order to preserve peaceful cooperation, one must be ready to resort to violent suppression of those disturbing the peace" (1950a, p. 303). He does note that, "To punish criminal offenses committed in a state of emotional excitement or intoxication more mildly than other offenses is tantamount to encouraging such excesses" (1966, p. 16). This might be taken to mean that he holds a deterrence theory of punishment. This does not mean, however, that his position is one of maximization. Categorical harmonists recognize that punishment has a deterrence effect, but they typically believe that this must be subject to proportionality—i.e., one must not punish a person more severely than his anti-social act would merit. According to Locke, one "may bring such evil on any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief," but one may do so "only to retribute to him . . . what is proportionate to his Transgression" (Locke 1988, p. 272). At least twice Mises mentions the possibility of considering criminals to be mentally ill, but he does so for the sake of argument, not because he agrees with this premise: "We may agree that he who acts antisocially should be considered mentally sick and in need of care. But as long as not all are cured . . . some provision must be taken lest they jeopardize society" (1966, p. 149; 1944, p. 48).

¹⁴Herbert likewise argued that freedom is indivisible: "The nature of man is indivisible; you cannot cut him across, and give one share of him to the state and leave the other for himself" (1978, p. 140). The view that there is no middle way is common to the natural rights tradition. As we have seen, Locke contrasted the "common law of reason" with the "rule . . . of force and violence" (1988, p. 279). He was just as explicit in his *Letter on Toleration*: "There are two sorts of contests amongst men; the one managed by law, the other by force: and they are of that nature, that where the one ends, the other always begins" (Locke 1991, p. 45). Lysander Spooner also makes use of a similar "no middle ground argument": "There is . . . no middle ground between absolute communism, on the one hand, which holds that a man has a right to lay his hands on any thing, which has no other man's hands upon it, no matter who may have been the producer; and the principle of individual property, on the other hand, which says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor, whether he retains them in his actual possession, or not" (Spooner 1855, p. 88).

Although he does not explicitly distinguish them, Mises has two arguments against a middle way.¹⁵ The first argument is the “tar-baby” argument. Like Br’er Rabbit and the Tar Baby, each act of intervention creates more problems than it solves and leads to new interventions. This process escalates until one has created such a mess that it is almost impossible to extract oneself. This argument is especially applicable to economic policies such as price controls (Mises 1950b, pp. 22–24), but it can also be applied to “social” policies such as drug controls (Thornton 1991).

Mises’s other argument against a middle way is the the “slippery-slope” argument. He argues, for example, that government intervention *implies* socialism:

All these champions of interventionism fail to realize that their program thus implies the establishment of full government supremacy in all economic matters. . . . Thus the doctrine and the practice of interventionism ultimately tend to abandon what originally distinguished them from outright socialism and to adopt entirely the principles of totalitarian all-round planning. (Mises 1966, pp. 723–24)

Mises is not saying that the slide to totalitarianism is inevitable. No one can predict the outcome. The slide down the slope may be slow or it may be fast, and it may be halted before descending all the way to the bottom. But assuming, as Mises does, that the social world is ultimately ruled by ideas, then to sacrifice principle for the sake of social expediency is to kick over the intellectual prop which has prevented descent down the slide to totalitarianism. Mises makes this quite clear when arguing against the regulation of drugs:

[O]nce the principle is admitted that it is the duty of government to protect the individual against his own foolishness, no serious objections can be advanced against further encroachments. . . . And why limit the government’s benevolent providence to the protection of the individual’s body only? Is not the harm a man can inflict on his mind and soul even more disastrous than any bodily evils? . . . The mischief done by bad ideologies, surely, is much more pernicious, both for the individual and for the whole of society, than that done by narcotic drugs. (Mises 1966, pp. 733–34)

¹⁵Note, however, that when discussing “why all men should receive equal treatment under the law” (1927, p. 28), Mises does explicitly distinguish two arguments that parallel the distinction I make above. The first is an economic argument concerning the conditions for prosperity, the second, a moral or social harmonist argument concerning the conditions for social peace.

For Mises the issue is one of principle: "We see that as soon as we surrender the principle that the state should not interfere in any questions touching on the individual's mode of life, we end by regulating and restricting the latter down to the smallest detail" (1927, p. 54).

The slippery-slope argument has played a central role in the categorical defense of rights.¹⁶ Unlike comparative harmonists, categorical harmonists are not moved by the purported fact that an exception will have certain positive consequences. They see this as the first step down a slippery slope. Although comparative harmonists may recognize the value of a principled approach and the danger of allowing exceptions, they argue that the absolutist, categorical approach implied by the slippery-slope argument is too extreme. They may admit that intervention often has negative consequences that outweigh any positive benefits, but insist that this must be established case by case.

Such an attitude is exemplified by Yeager in a panel discussion on utilitarianism and natural rights: "I do not know for sure what position to take on things. I do not have an infallible pipeline to the truth" (Shah 1988, p. 9). When questioned as to what position he takes with regard to insider trading his response is: "I cannot take a firm position for or against insider trading. If I were to study the actual factual details of particular cases, I do not know whether I would come out condemning it or not" (p. 5). Rothbard, another panelist, is quick to point out that Yeager's answer "shows the difference between viewing liberty and the free market as an organic tendency versus holding it as an absolute principle" (i.e., between what I have been calling a comparative and a categorical approach), and adds, "I am in favor of saying that there is nothing wrong with insider trading except for breach of contract" (p. 5).

It seems to me that there is little doubt that Mises, in spite of his professed utilitarianism, would have sided with Rothbard on this issue. It is because Mises takes such a principled stance with regard to government intervention that he is often perceived as "dogmatic." Critics ask how Mises can dismiss the middle way of intervention in such an *a priori* fashion? For the comparative harmonist one must weigh the evidence in each case—any *a priori* claim to the contrary is a veiled appeal to intuition or "an infallible pipeline to the truth."

¹⁶Herbert, for example, argues in response to those who do not see a sharp dichotomy between the principle of force and the principle of peace and who want to "judge each case on its merits" that "apart from any fixed principle, the merits will be always determined by our varying personal inclinations. It is all slope, ever falling away into slope, with no firm level standing place to be found anywhere" (Herbert 1978, p. 281).

Liberty of Conscience

The charge that the categorical harmonist must fall back on intuition has some historical justification. As we have seen, the categorical harmonist's stance is that force is only justified against those who are not reasonable—i.e., when rational interaction breaks down. The problem has always been deciding when this happens. Clearly, if one person uses force against another person who is amenable to reason, then the user of force is the one who has opted out of rational discourse. But this still leaves the problem of determining when the other party is or is not amenable to reason. The fact that my opponent does not agree with me may only mean that I have not given him a good reason to agree.

Up until the sixteenth century, categorical harmonists, as represented by natural law theorists, still relied heavily upon our supposed common religious and moral intuitions to determine what is reasonable. But in the context of the religious wars of the sixteenth century, social theorists started to face the fact that people's intuitions differed. Whereas during the Middle Ages the foundation for society had been considered to be "peace and unity," it was realized by a few social theorists in the sixteenth century, such as Sebastian Castellio, that coerced unity was the major cause of strife. This became the central insight of the seventeenth century defenders of toleration, e.g., Roger Williams, Henry Robinson, and the Levellers. The argument was summarized by Locke at the end of the seventeenth century: "It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion" (Locke 1991, p. 52).

The major theme of these social theorists was that any defense of toleration must be a principled defense. In discussing the question of a state sanctioned church, Locke asks which church are we to choose? He notes that it "will be answered, undoubtedly, that it is the orthodox church which has the right of authority over the erroneous or heretical." To which he scornfully replies, "This is, in great and specious words, to say just nothing at all. For every church is orthodox to itself; to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereupon it pronounces to be error" (Locke 1991, p. 24). Nor can we allow the prince to choose, for "the religion of every prince is orthodox to himself. . . . If it be once permitted to introduce anything into religion, by the means of laws and penalties, there can be no bounds put to it; but it will, in the same

manner, be lawful to alter everything, according to that rule of truth which the magistrate has framed unto himself" (Locke 1991, p. 37). In other words, there is no middle ground.

It should be stressed that Locke's insight that "every one is orthodox to himself" (Locke 1991, p. 14), did not imply relativism. Locke believed that there was "but one truth, one way to heaven" (Locke 1991, p. 19). His point was that men disagreed about what this truth was, and that it was intellectually dishonest to assume away this disagreement. Diversity of opinion must be our starting point—it is implied by each man's uniqueness, his fallibility, and the scarcity of time. No one has "the leisure, patience, and means, to collect together all the proofs concerning most of the opinions he has. . . . And yet we are forced to determine ourselves on the one side or the other. The conduct of our lives, and the management of our great concerns, will not bear delay" (Locke 1933, p. 382). Any moral theory that ignores scarcity (including that of time) and diversity (including that of opinions) fails to apply to the world as it is.

Thus if there is to be social harmony, there is no alternative but to tolerate each other. Quoting Locke again:

Since therefore it is unavoidable to the greatest part of men, if not all, to have several opinions, without certain and indubitable proofs of their truth; and it carries too great an imputation of ignorance, lightness, or folly, for men to quit and renounce their former tenets presently upon the offer of an argument, which they cannot immediately answer, and show the insufficiency of: it would methinks become all men to maintain peace, and the common offices of humanity and friendship, in the diversity of opinions; since we cannot reasonably expect, that anyone should readily and obsequiously quit his own opinion, and embrace ours with a blind resignation to an authority, which the understanding of man acknowledges not. (1933, p. 382)

Later natural rights theorists realized that this argument for religious tolerance could be generalized to apply to all opinions and practices. Spencer, for example, argued that just as "[t]he advocate of religious freedom does not acknowledge the right of any council, or bishop, to choose for him what he shall believe or what he shall reject[,] [s]o the opponent of a poor law, does not acknowledge the right of any government, or commissioner, to choose for him who are worthy of his charity, and who are not" (Spencer 1981, p. 197). Herbert applied this same argument against public education (1978, p. 73) and compulsory taxes. In the case of the latter he argued,

Because free countries have affirmed many years ago that a compulsory church rate is immoral and oppressive, for the sake of the burden laid upon individual consciences; and in affirming this truth they have unconsciously affirmed the wider truth, that *every tax or rate, forcibly taken from an unwilling person, is immoral and oppressive*. The human conscience knows no distinction between church rates and other compulsory rates and taxes. The sin lies in the disregarding of each other's convictions, and is not affected by the subject matter of the tax. (Herbert 1978, pp. 393–94)

Note that this general argument against coercion is basically the same argument that Locke used against religious intolerance—given that people disagree about the best course of action, on the one hand, and the necessity of action (and the impossibility of waiting until there is agreement), on the other hand, the only peaceful solution is toleration, i.e., the mutual respect of each other's rights. This argument was also the basis for Spencer's case against utilitarianism: Given all the conflicting alternative proposals advocated under the banner of utility, if nothing were "to be done till all agreed upon them, we might stand still to the end of time." On the other hand, "[i]f each man carried out, independently of a state power, his own notions of what would best secure 'the greatest happiness of the greatest number,' society would quickly lapse into confusion" (1970, p. 16). To avoid this dilemma, the utilitarian has to fall back upon an "umpire," i.e., the government, for without the authority of government "such a morality must ever remain inoperative" (p. 16). Consequently, "Let but rulers think, or profess to think, that their measures will benefit the community, and your philosophy stands mute in the presence of the most egregious folly, or the blackest misconduct" (Spencer 1970, p. 4). Once we clear away all the euphemisms, the stark reality of the comparative approach (whether direct or indirect) stares us in the face: whoever can gain control of government is who decides. Once the decision as to what is and is not permitted is given to government, then as Locke asserted, "there can be no bounds put to it" (Locke 1991, p. 37).

Central to Spencer's argument is the insight that utilitarianism as a moral doctrine is "inoperative" and has to fall back upon the authority of the government. In other words, utilitarianism fails to satisfy the requirement that a moral principle be "praxeologically realizable" or "operational," to use Hans-Hermann Hoppe's terminology (1988a, p. 261).¹⁷ This was also Spencer's objection against

¹⁷As Hoppe explains, "it must be possible for us, who invariably must act and employ resources, to actually implement such a criterion and consistently act upon it." Given

proposals for a "right to a maintenance":

One party says that a bare subsistence is all that is implied. Another, that the applicant can demand all the comforts usually enjoyed by those in his station. Another, that he may as fairly claim the luxuries of life as those above him. And the extreme party will be content with nothing short of the socialist principle, of community of property. Who is to say which of these is the true expression of the right? The gradations are infinite, and how can it be decided where the claim begins and where it ends? Who can tell the rate-payer how much of his property can be justly demanded by his fellow creature? Who can tell the pauper when he asks for more pay, that he receives just as much as he is entitled to? or can explain to him why he has a right to what he already receives, but no right to anything more? And yet, if this were really a right, ought it not be capable of such a definition? (Spencer 1981, p. 205)

This inherent indeterminacy was what Herbert had in mind when he said that no one can draw a "force line," i.e., a line between the legitimate (apart from self-defense) and illegitimate uses of force (1978, p.89). In response to the suggestion that we "allow society . . . to decide such matters as we are all pretty well agreed should be so decided," Herbert replies, "[t]here never can be agreement amongst men as to what these matters are" (p. 131). Ultimately, one ends up "sanctioning not only the right of some men to coerce others, but their right to decide how and when and for what purposes they shall coerce others. It is the power holders, freed from any general principle that controls and directs them, who have to decide as to the limits and application of their own power. For who else can do so?" (pp. 131–32). The argument is not that it is difficult to draw a line between the proper and the improper use of force. Anyone can draw a line. The problem is that no two people agree where this line should be drawn. There are only two stopping points—the doctrine that force can only be used in self-defense and the doctrine that might is right. The point that Herbert continually stresses is that when the issue is seen as where to draw this "force line," i.e., the attempt to find a middle way somewhere between these two points, the decision will always be

some criterion such as the greatest happiness or the stance of an impartial spectator, Hoppe asks, "what if [we] . . . do not choose the same but incompatible societies—the criterion of maximum average utility has already done its work—but there is still disagreement" (Hoppe 1988a, p. 262). Elsewhere Hoppe notes that "in advocating a consequentialist position, utilitarianism is strictly speaking no ethic at all when it fails to answer the all-decisive question 'what am I justified in doing now?'" (1988b, p. 54).

made by those who have the most power, i.e., the question will ultimately be decided in favor of might.¹⁸

This brings us to the most misunderstood part of the categorical harmonist's argument—the appeal to *equal* rights. In Spencer's words, quoted earlier, the crucial move was that "in the absence of proof that some may do what they will without limit, while others may not, mutual limitation is necessitated" (Spencer 1981, p. 150). Note the similarity between Spencer's argument and Locke's with regard to toleration. After arguing that all churches are orthodox to themselves, Locke concludes, "So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal" (Locke 1991, p. 24). The point is not that the doctrines are equally good, but that there is no evidence that anyone on earth has been given the prerogative to decide. As Herbert asks, "Who shall decide between us? There is no moral tribunal before which you can summon unlimited power" (1978, p. 312).

Mises's Categorical Defense of Liberty

In an earlier section we saw that Mises takes a principled stance to liberty, and how this is in line with the categorical moral tradition. In this section I argue that the basis for his principled stance is the same as that developed by Locke (and others before him) and generalized by Spencer and Herbert.

First, note that with regard to the critical issue of toleration, Mises takes a principled approach:

Liberalism demands tolerance as a matter of principle, not from opportunism. It demands toleration even of obviously nonsensical

¹⁸This is a common theme running throughout Herbert's writings: "Admit that any one . . . may restrain by force the exercise of the faculties of others, and in what sea of moral confusion you are at once plunged. Who is to decide which is the better man or the more civilized race, or how much freedom is to be allowed or disallowed. To settle this question men must sit as judges in their own case; and this means that the strongest will declare themselves the most civilized, and will assign such portions of freedom as they choose to the rest of the nation or the rest of the world as the case may be. Are you prepared for this?" (1978, p. 98). "Once admit that force is right in itself, and then you cannot pick out any special sect or party, confer special privileges upon them, and declare that they alone, and nobody else are entitled to use force. That would be a mere arbitrary and fanciful selection, as arbitrary and fanciful as picking out certain opinions, and declaring that these are orthodox, and that all other opinions are heterodox. If force is good in the hands of some men, it is good in the hands of other men; if it is a good instrument to serve some causes, it is good to serve other causes" (p. 231). "[U]ntil they have found some law by which they can distinguish the right from the wrong use of power, by which they can justly satisfy not only their own minds but the minds of others, they are simply leaving in suspension the greatest matter that affects human beings" (pp. 132–33).

teachings, absurd forms of heterodoxy, and childish silly superstitions. It demands toleration for doctrines and opinions that it deems detrimental and ruinous to society and even for movements that it indefatigably combats. For what impels liberalism to demand and accord toleration is not consideration for the content of the doctrine to be tolerated, but the knowledge that only tolerance can create and preserve the condition of social peace without which humanity must relapse into the barbarism and penury of centuries long past. (Mises 1927, pp. 56–57)

It should be emphasized that Mises's defense of toleration is "utilitarian" only in the sense that every categorical harmonist's argument is utilitarian—it is concerned with the conditions that make social harmony possible. It is only because most comparative harmonists abandon their comparative approach when it comes to the question of toleration and take a principled approach that this is not noticed.

Second, Mises, when discussing toleration, draws on the same insight expressed by Locke's slogan "everyone is orthodox to himself" (Locke 1991, p. 14): "Mere opportunists excepted, everyone is convinced of the rightness of his opinions. But, if such a conviction by itself were a justification for intolerance, then everyone would have a right to coerce and persecute everyone else of another way of thinking. . . . In such a case there must always be war and enmity between men" (1922, pp. 166–67). According to Mises, one of the major "blunders" of rationalism was its "neglect of the problem of erroneous thinking. Most of the rationalist philosophers failed to see that even honest men, sincerely devoted to the search for truth, could err. . . . A doctrine of which they disapproved could in their opinion have been prompted only by purposeful deceit" (1957, p. 270). Mises is here simply applying the insight of Locke concerning religious disagreements to rationalism.

Third, Mises, like Locke and Spencer, objects to the uniformitarian assumption that underlies most moral systems: "One of the motives that impel men to search for an absolute and immutable standard of value is the presumption that peaceful cooperation is possible only among people guided by the same judgments of value" (1957, p. 51). According to Mises, rationalists made a similar mistake, which is their other major blunder: "[T]hey assumed that all men are endowed with the same power of reasoning" (1957, p. 270). The fact of the matter is that there is diversity of opinion. Postulating immutable standards of value, even if true, will not make this diversity of opinion go away, nor will a faith in the rationality of man. The great insight of laissez-faire liberalism is that a free society "can function

in spite of the fact that its members disagree in many judgments of value" (1957, p. 61; 1966, p. 693).

Finally, Mises, like Spencer and Herbert, sees the case for liberty as a generalization of the case for religious toleration. The socialist is just as blind as the religious fanatic to the insight that everyone is orthodox to himself:

No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power . . . could act in a way which he himself disapproves. A socialist advocates socialism because he is fully convinced that the supreme dictator of the socialist commonwealth will be reasonable from his—the individual socialist's—point of view, that he will aim at those ends of which he—the individual socialist—fully approves, and that he will try to attain these ends by choosing means which he—the individual socialist—would also choose. Every socialist calls only that system a genuinely socialist system in which these conditions are completely fulfilled; all other brands claiming the name socialism are counterfeit systems entirely different from true socialism. (Mises 1966, pp. 692–93)

In another passage Mises is even more explicit in identifying socialism with intolerance and fanaticism:

It is customary to call the point of view of the advocates of the welfare state the "social" point of view as distinguished from the "individualistic" and "selfish" point of view of the champions of the rule of law. In fact, however, the supporters of the welfare state are utterly anti-social and *intolerant zealots*. For their ideology tacitly implies that the government will execute what they themselves deem right and beneficial. They entirely disregard the possibility that there could arise disagreement with regard to the question of what is right and expedient and what is not. (Mises 1922, pp. 520–21; italics added)

The parallels between Mises's case for a principled, categorical approach to social harmony and that of Locke, Spencer and Herbert is somewhat obscured by Mises's unfortunate insistence that all values are arbitrary. It should be stressed, however, that Mises's argument in no way depends upon this premise, and in fact would be strengthened without it. The fundamental premise is not that ultimate ends, unlike means, are arbitrary and not amenable to rational argument. The starting point for social philosophy, rather, is that people disagree with regard to both means and ends. Even if ultimate ends were totally arbitrary, as Mises asserts, there would be no

problem if everyone happened to agree on these ends. On the other hand, even if questions of means are in principle rationally determinable, insofar as we have not yet resolved which means are best and thus come to an agreement, we are faced with a moral problem of what to do in the meantime. In fact, in spite of Mises's stress on the arbitrariness of ends and the rationality of means, he admits that we often disagree about means (1966, p. 692; 1957, p. 174). He also points out that the distinction between ends and means is not always straightforward—that what are ends for some people may be means for others (1957, p. 37).

One must be careful to not let Mises's assertions about the arbitrariness of values cause one to miss his main point. When Mises attacks absolute values, he almost always has in mind the belief that such values are handed down from Providence (1922, p. 35) and are independent of society (1966, p. 720). Such "heteronomous doctrines" (1966, p. 883) are antithetical to Mises's methodological individualism: "The rejection of methodological individualism implies the assumption that the behavior of men is directed by some mysterious forces that defy any analysis and description" (1962, p. 82). Furthermore, when Mises asserts that all value judgments are personal (1957, pp. 14, 59), usually what he is attacking is the belief that one has the right to impose these absolute values on others. This may not be apparent to the reader because of an ambiguity in Mises's writings between "personal" in the sense of "arbitrary" or a "matter of taste" (like ice cream), and "personal" in the sense of "not to be imposed on others." Although Mises is not careful to distinguish these two senses of "personal," clearly it is only the latter with which he is concerned. This is illustrated by the following passage: "If a man assigns a higher value to the concerns of the collective than to his other concerns, and acts accordingly, that is his affair. So long as the collectivist philosophers proceed in this way, no objection can be raised. But they argue differently. They elevate their personal judgments of value to the dignity of an absolute standard of value" (1957, p. 59). As Mises makes clear a few pages later, he is not insisting that the collectivist admit that his beliefs are arbitrary; what he is attacking is coercion: "There is, of course, but one way to make one's own judgments of value supreme. One must beat into submission all those dissenting" (1957, pp. 60–61).

Finally, although I agree with Rothbard that Mises's sweeping statement that all values are arbitrary is itself arbitrary (Rothbard 1982, p. 212; see also Tabarrok 1990), it seems to me that a coherent and plausible case can be made for Mises's nonjustificationist stance with regard to social harmony. The categorical harmonist's argument

for rights presupposes a commitment to social harmony. Unlike many natural rights and natural law theorists, Mises believes that it is impossible to give any ultimate reason why one should be committed to peaceful cooperation. Instead, he treats this commitment as a hypothetical imperative: "Praxeology and economics do not say that men should peacefully cooperate within the frame of societal bonds; they merely say that men must act this way if they want to make their actions more successful than otherwise" (1966, p. 883). When face to face with the social nihilist, i.e., someone who believes that might is right, it is not clear what the social harmonist could say that would be relevant. This is not to say that one's commitment to social harmony is arbitrary. Mises *argues* that we can ignore those who have no regard for social harmony—e.g., such exceptional cases as Caligula—because of "their tendency to be self-destructive" (1933, p. 38). That is, we can give reasons for ignoring such cases. What we cannot do, however, is provide arguments that would convince the Caligulas of this world. The problem is that argument presupposes that conflict-free interaction is possible (Hoppe 1988a, p. 63; 1989, p. 132), whereas such interaction is precisely what the nihilist rejects. He may use words in ways that resemble, and are parasitic upon, argument, but he is not committed to resolving anything by argument. Argument for the nihilist is simply an expedient, an ammunition-savings measure. The most appropriate response to the nihilist (who has demonstrated by his actions that he really is a nihilist) is to reach for our clubs and hit him over the head. Given that he believes that might is right, he can hardly file a moral complaint against us for such actions.

The real intellectual challenge to the social harmonist comes not from the overt nihilist, but the righteous nihilist—the person who claims that he is committed to social harmony, but uses force against anyone who disagrees with him on the grounds that they are being irrational. It is the righteous nihilist (or "theocrat" [1966, p. 151; 1962, p. 107; 1949a, p. 43]) who is the target of Mises's charge of arbitrariness, just as he was the target of Locke, Spencer, and Herbert. And it is in this light, I believe, that we should read Mises's repeated attacks on absolute and immutable ethical principles. In fact, in this regard Mises often uses language that is reminiscent of that used by Herbert. For example, just as Mises sarcastically speaks of "those individuals to whom, by the mysterious decrees of some mysterious agency, the task of determining the collective will and directing the actions of the collective has been entrusted" (1962, p. 107), Herbert characterizes the socialist (and other users of force) as trying to persuade us "that there exists a mysterious

dispensation given from some unknown quarter in his own special favor" (Herbert 1978, p. 232).

Natural versus Conventional Property Rights

If Mises really is a categorical harmonist, then this should be reflected in his defense of private property. For the most part this is the case. Social cooperation under the division of labor, peace, and property are so closely tied together for Mises that he uses them interchangeably when talking about the nature of society and the goal of liberalism: "That Liberalism aims at the protection of property and that it rejects war are two expressions of one and the same principle" (1922, p. 59). "The basis and starting point of social cooperation lie in peacemaking, which consists in the mutual recognition of the 'state of property'" (1922, p. 467). "The program of liberalism, therefore, if condensed into a single word, would have to read: *property*, that is, private ownership of the means of production. . . . All the other demands of liberalism result from this fundamental demand" (1927, p. 19).

But what are we then to make of Mises's statement that private property "is a human device" and is "not sacred" (1966, p. 683)? Even more troublesome is his statement that if liberals "considered the abolition of the institution of private property to be in the general interest, they would advocate that it be abolished, no matter how prejudicial such a policy might be to the interests of property owners" (1927, p. 30).

The first statement is problematic only if we take it metaphorically to mean that property rights are arbitrary conventions. However, Mises is simply asserting, as the next sentence makes clear, that private property was not conferred on man by God or Nature, but is a human discovery which has a definite history. Although some natural rights theorists might disagree with this, Herbert Spencer would not be one of them. I believe the second statement (about his willingness to abolish property if it were in the general interest) should be taken with a rhetorical grain of salt. What Mises is stressing is that his defense of private property is not based on some special intuition, but upon the fact that private property is intrinsically linked with the very conditions for social harmony.

There is no question that Mises rejects the idea that private property is arbitrary. His major complaint against most moral philosophers was their conviction that "there was in the course of social events no such regularity and invariance of phenomena as had been found in the operation of human reasoning and in the sequence of natural phenomena. They did not search for the laws

of social cooperation because they thought that man could organize society as he pleased" (1966, p. 2). And he explicitly states that capitalism "is the only possible social system. One may undertake to modify one or another of its features as long as in doing so one does not affect the essence and foundation of the whole social order, viz., private property" (1927, p. 88).

The only question at issue is whether Mises's defense of property rights is a pragmatic defense of the status quo—i.e., a defense of currently existing titles regardless of how they were acquired. There are several passages that seem to suggest this: "The basis and starting point of social cooperation lie in peacemaking, which consists in the mutual recognition of the 'state of property.' Out of *de facto* having, maintained by force, arises the legal concept of ownership" (1922, p. 467). "Law is a *settlement*, and end to strife, and avoidance of strife" (1922, p. 34; italics added). "Possession is protected even though it is, as the jurists say, no title. Not only honest but dishonest possessors, even robbers and thieves, may claim protection for their possessions" (1922, p. 34).

If these passages are interpreted to mean that possession is the whole of the law, not nine-tenths, then one can argue that Mises does not provide a principled but only a pragmatic, *ad hoc* defense of property. As Rothbard points out, any ethic relying upon such an *ad hoc* defense of property rights, "pushed to its logical conclusion, must also defend every criminal in the property that he has managed to expropriate," and is thus "ethically nihilistic" (Rothbard 1982, p. 52). Such a doctrine would imply that if *A* steals *X* from *B*, then *A*, being in possession of *X*, has a right to *X*. But it would also imply that if *B* "steals" *X* back from *A*, then *B* has a right to *X*. In other words, whoever can retain possession of *X* has a right to it—i.e., might is right.

Given the incoherence of such a doctrine, however, we should first look for an alternative interpretation before attributing such a viewpoint to Mises. I believe that the key is to be found in a passage a few pages later where he notes that under "the domination of the principle of violence," which he contrasts with the principle of peace, there can be "no peace; at best there [can be] a truce" (1922, p. 58). Here it would seem he is explicitly rejecting the *ad hoc*, pragmatic doctrine of property as a mere "truce." The question, then, is what is the difference between a "settlement" (of the earlier passage) and a "truce"?

If we look at the context of Mises's statement that "even robbers and thieves, may claim protection for their possessions," we see that Mises is concerned to refute those who argue that since existing

property titles have "sprung illegally from arbitrary acquisition and violent robbery" in the distant past, they are not legitimate (1922, p. 34). Again it is illuminating to compare Mises's argument with a similar passage from Spencer. When faced with a related argument—in this case the right of the poor to be maintained by the rich because of the past transgressions of the rich—Spencer does not deny that there were past transgressions, nor does he assert, in an *ad hoc* fashion, that such transgressions are irrelevant. Instead, he insists that the burden of proof is upon those who advocate the right to maintenance (Spencer 1981, p. 201). In particular, "when it can be shown that our poor are the children of the oppressed, and those who have to pay poor rates are the children of the oppressors, then the validity of the objection will be admitted; but that until this is shown to be the truth, or an approach to the truth, the objection may be disregarded" (1981, p. 192). The issue is one concerning on whom the burden of proof falls. Spencer's (and I believe, Mises's) position is not that existing property rights cannot be challenged, but that the burden of proof must fall on the challenger of *de facto* property rights. Only this position is praxeologically operational. Those who place the burden of proof on the *de facto* owner, and demand that he justify his right to use and dispose the object in question, implicitly assume that we can somehow take a disembodied stance, hovering above the physical world until all questions of rights have been satisfactorily decided.¹⁹

As we have seen, any coherent, operational ethical theory that is to apply to the world as it is, not as it is imagined to be in the dreams of the philosophers, must take into account two facts—scarcity, including scarcity of time, and diversity, including the diversity of opinions. In particular, it needs to recognize that people are never going to agree on how various resources ought to be used. Given that consensual joint control is impossible, the only peaceful alternative is divided control, i.e., private property rights. Furthermore, any coherent, operational ethical theory needs to recognize that people

¹⁹Mises's assertion that the notion of justice "makes sense only when approving or disapproving concrete conduct from the point of view of the valid laws of the country" (1966, p. 721) might seem to imply that all rights, including property rights, are those defined by the legal system. Such a legal positivist interpretation, however, conflicts with what Mises says elsewhere. For example, when discussing the natural law, he is critical of its "arbitrary prepossessions" but praises it for rejecting "legal positivism" and substituting the "idea that every valid law of a country was open to critical examination by reason" (1957, p. 48). I believe Mises's statements to the effect that there is "neither right nor wrong outside the social nexus" should be interpreted as attacks upon intuitionist critiques that are not grounded in the realities of society rather than appeals to the legal status quo.

are never going to agree on how resources ought to be (optimally) divided up, any more than they are going to agree on how they ought to be used. Since man is a physical being who needs to use resources to survive and who at the very least needs a place to stand, the only peaceful alternative is to make a presumption in favor of current property holdings. This does not mean that robbers have the right to their plunder. The concept of a "presumption" in favor of current property rights only makes sense if it is coupled with the right to have restored property that has been taken.

This theory of rights, combining a presumption in favor of the *de facto* owner with the principle of restitution, might be appropriately labeled a *concrete* theory of rights. I believe that it is equivalent, at least in most essentials, to the Lockean *abstract* theory of rights. In particular, the libertarian homesteading axiom can be directly derived. Any ethic, if it is to be praxeologically operational—if it is to recognize the facts of scarcity and diversity—must start with the existing property distribution. Furthermore, if it is to really qualify as an ethical principle, providing a basis for conflict-free interaction and not be equivalent, for all practical purposes, to might is right, it must also provide for a principle of restitution. The *de facto* owner's presumptive right can only be challenged by showing that a prior right is being restored. By chaining this argument backwards until we reach the first user, the homesteading principle is established—the first user of something cannot have his possession challenged since there is no prior right to be restored. We are far removed from the Lockean state of nature, and there is little doubt that the chain of transfers from there to our current set of property titles has been broken by a large number of illicit acts. This often gives the (false) impression that according to the Lockean view we do not have any grounds to stand on. By starting with a presumption in favor of the current, *de facto* owner, and shifting the burden of proof to the challenger, hypothetical but unprovable past acts of usurpation are clearly seen as irrelevant. Although the passage of time does not turn crimes into venerable institutions, the passage of time does make the burden of proof for the challenger more and more difficult.

Finally, in passing, it should be noted that the right of the first user can be said to be an eternal right. Although Mises rejects all theories of eternal rights, what he is mainly concerned with attacking is the view that rights were somehow self-evident to everyone from the beginning of time. Property rights, however, are eternal in a different sense—they are not conventional. At no point in time did, or can, someone establish property rights willy-nilly. I cannot take your property, for example, and then declare that we will from now

on observe property rights. If I am serious about property rights, then I must make restitution. Even if the concept of property rights has not previously occurred to either of us, once it does, in order for us to observe these rights, we must be willing to make restitution for (recognized) past wrongs. Otherwise, our professed belief in property rights cannot be taken seriously. It is in this sense that property rights can be said to be eternal—they extend backward indefinitely in time.

Conclusion

Mises's utilitarianism is the exception that proves (i.e., tests) the rule, in this case, Rothbard's rule that utilitarianism cannot provide a principled defense of laissez-faire liberalism. Of course, Mises, like almost all defenders of laissez faire, used utilitarian (i.e., nonmoral functionalist) arguments to defend the unhampered market. But he also used moral arguments. My main purpose throughout this paper has been to show that Mises's moral "utilitarianism," in spite of his repeated attacks on natural law and natural rights, owes more to the principled, categorical moral framework of Spencer and Herbert, than to the maximizing, comparative moral framework of Bentham and Mill. Mises equated natural law and natural rights with intuitionism, and for this reason rejected them, but he did not reject the categorical moral framework that underlies much of that tradition. On the contrary, it was the comparative moral framework of utilitarianism that he rejected. Furthermore, the essential premises for his moral defense of laissez faire is not the arbitrariness of all values, but the facts of scarcity (including scarcity of time) and diversity (including diversity of opinion concerning values *and means*)—two facts that play an essential role in his praxeological methodology. Any coherent moral theory concerning the conditions for social harmony, as well as any coherent theory of economics, must take these two facts into account. It is this insight, articulated by Locke, that Mises turns into a powerful moral argument against socialism and in favor of laissez faire.²⁰

²⁰ Mises's arguments for laissez faire and against socialism can be usefully divided into three classes: (1) nonmoral functionalist arguments concerning the best policies for promoting prosperity; (2) the economic calculation argument that socialism leads to social chaos; and (3) moral arguments concerning the conditions for social harmony. There is an interesting parallel with St. Thomas Aquinas's three arguments for preferring private property to communal property: (1) communal property undermines the incentive to work; (2) communal property leads to social confusion; and (3) communal property undermines social peace (Aquinas 1959, p. 169 [*Summa Theologica* II-II 66 2]). In his book on the economics of the late-scholastics Alejandro A. Chafuen notes that Mises's defense of property is similar to that of the late-scholastics (1986, p. 155).

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