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# On the Nature of Civil Society

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CHARLES K. ROWLEY

**T**he collapse of the Soviet Empire and the efforts made in Central and Eastern European countries to construct or reconstruct civil society as the salvation of their nations have inspired Western intellectuals to reconsider the concept of civil society and to ask whether it may also help us to understand the condition of Western societies. In both cases, the crisis of socialism, as an ideology and as a practical experience, has proved to be the fulcrum of this search for alternative concepts. For the most part, the concept of civil society is viewed by those active in its renaissance as an attractive combination of domestic pluralism and a continuing role for extensive state regulation and guidance. As such, it offers a broad tent capable of sheltering a multitude of diverse political systems. So broad indeed is this tent that it may be defined more appropriately as an *empty shell* (Rowley 1996, 6).

In this article, I shall review briefly the history of the concept of civil society and evaluate its relevance for classical liberal political economy. I shall suggest that the concept of civil society advanced by John Locke, the young John Stuart Mill, and other like-minded classical liberal scholars best encapsulates the classical ideal and provides an intellectually rigorous basis for defining the appropriate role of government, for protecting individual liberties, and for stimulating those private associations of individual citizens, all of which, in combination, constitute the fundamental basis for human flourishing and the wealth of nations.

## **The Concept of Civil Society in Historical Perspective**

Until the end of the eighteenth century, the term “civil society” was synonymous with the state or political society. In this respect, the term reflected precisely its classical

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origins as a translation of Aristotle's *Koinonia politike* or of Cicero's *societas civilis*. In this conception, civil society expresses the growth of civilization to the point where society is civilized as classically expressed in the Athenian polis or the Roman republic. It represents a social order of citizenship in which men (more rarely women) regulated their relationships and settled their disputes according to a system of laws, where civility reigned, and where citizens took an active part in public life (Kumar 1993, 377; Ferguson 1991; Roepke 1996).

Following directly in this tradition, John Locke (1690) employed civil government as a synonym for civil or political society, Kant defined *bürgerliche Gesellschaft* as that constitutional state toward which political evolution tends, and Rousseau defined the *état civil* simply as the state. In all these usages, civil society is contrasted with the uncivilized condition of humanity in a hypothetical state of nature or under an unnatural system of government that rules by despotic decree rather than by laws.

In *Democracy in America*, Alexis de Tocqueville narrowed the concept of civil society along sociological lines by delineating three realms of society. First, there is the state, which comprises the system of formal political representation, with its parliamentary assemblies, courts, bureaucracies, police, and army. Second, there is civil society, which essentially comprises the system of private and economic interests. Third, there is political society with its political associations such as local government, juries, and political parties and its civil associations such as churches, schools, scientific societies, and commercial organizations.

The life of all these associations, the "super-abundant force and energy" they contribute to the body politic, constitutes political society. Political society supplies "the independent eye of society" that exercises surveillance over the state. It educates us for politics, tempers our passions, and curbs the unmitigated pursuit of private self-interest.

In the postcommunist order, Tocqueville's third category, political society, has become the principal fulcrum for the reconstructed concept of civil society. The tendency has been for ex-Marxists and non-Marxists alike to stress the specifically non-economic and nonstate dimensions of civil society and to focus attention on civic, cultural, educational, religious, and other organizations operating at the periphery of the capitalist system, yet essentially autonomous from the state itself.

In a sense, this preoccupation is entirely understandable, though misguided, among the intellectuals of Central and Eastern Europe, where prior to 1989 the elevation of civil society was perceived not as constituting a new relationship between state and society but rather as an uncoupling of that relationship. Because the state could not be effectively challenged, it was to be ignored. The supporters of civil society aspired to make it an alternative society, a parallel society coexisting for the time being with a delegitimized and weakened official state (Kumar 1993, 386). Nothing better illustrated this parallel than Solidarity in Poland, which remained cohesive from the late 1970s until the collapse of communism but thereafter fragmented into sectorial

squabbles and personal rivalries and became incapable of evolving the institutions necessary for a safe transition to constitutional democracy.

In no small part because intellectuals had evaluated civil society above the state, viewing it as the solution to all problems accumulated by socialism, they evinced a serious lack of concern after 1989 with regard to the reconstitution of the state and the private economy from the broader perspective of civil society in its classical conception. This lack of concern was especially serious (Klaus 1996) because communism was not defeated but simply collapsed, leaving weak and inefficient markets and weak and inefficient democracies, conditions that continue to plague the entire postcommunist order, the Czech Republic included. As Tocqueville noted, politics spreads “the general habit and taste for association,” not vice versa. In the absence of an appropriately formulated polity, civil society in both its broad classical sense and its narrow late-twentieth-century conception simply will not exist.

Much less excusable, and at least equally misguided, has been the post-1989 reaction of too many Western intellectuals. By claiming “the end of history” (Fukuyama 1992) and assuming too easily that the collapse of communism implied the success of U.S.-style capitalism, the large majority of Western intellectuals forgot the maxim that “eternal vigilance is the price of liberty” and focused attention excessively on the resurrection of civil society in the narrow “political association” sense of Tocqueville.

By inferring the final victory of democracy and capitalism over autocracy and socialism, these Western intellectuals proclaimed, at least implicitly, that any preoccupation with classical political economy was unnecessary and suggested instead that the results of majoritarian democracy represented the highest level of politicoeconomic achievement (Nozick 1989; Gray 1989, 1993). These judgments were (and are) misguided.

Certainly the free society rests upon and is intended to nurture a solid foundation of competent, self-governing citizens, fully capable of and personally responsible for making the major political, economic, and moral decisions that shape their own lives and those of their children. Certainly, such personal qualities are nurtured and passed on to future generations by healthy families, churches, neighborhoods, voluntary associations, and schools, all of which provide training in, and room for, the exercise of genuine citizenship. Certainly, this expansive understanding of citizenship is challenged in the late-twentieth-century United States, as it was not when Tocqueville wrote *Democracy in America*, by contemporary forces and ideas that regard individuals as passive and helpless victims of powerful external forces.

It is a fundamental error, however, to assume that these contemporary forces and ideas are exogenous elements of the state of nature to be counteracted by some narrow retreat into civil society or by some program that seeks directly to reinvigorate and to reempower the traditional local institutions that provide the environment for the exercise of genuine citizenship. In truth, the forces and ideas that now erode good citizenship emanate from the consequences of an ill-directed twentieth-century politi-

cal economy, not from any neglect of civil society in its narrow late-twentieth-century form.

### **Before Resorting to Politics**

“Why does anyone want to resort to politics, and why does anyone put one kind of political order above another?” Anthony de Jasay (1996) suggests that those who are both very earthy and very frank approve the political order that they believe is doing the most good for them. Such a “grand criterion” of political hedonism has no prospect of generating basic agreement about the respective merits and consequences of political systems except for the lowest common denominator of democracy, namely, the shared redistributive advantage of a winning over a losing coalition.

What is true in this crude and obvious way about the system of political hedonism in which the state caters to some interests and neglects others is also true, if less conspicuously, about any other political order that fosters one value and neglects others. Not all values are compatible; most compete with one another. A political order reveals a hierarchy of values by what it promotes and demotes, by the marginal rates of substitution between them that it establishes through policy interventions.

Predictably, the value-orientated political order will be an imperfect match for those who live within it if the citizens are heterogeneous with respect to the values they uphold. No discernible mechanism would make global choice coincide with the best available choice of each individual consistent with the best available choice of every other—the equilibrium condition of ordered anarchy. Value neutrality, where there is not too much of one thing and too little of another, can be achieved by individuals for themselves, but not by a political order for many, let alone for everybody (Jasay 1996, 5).

Jasay (1996, 7) notes the pronounced danger for the equilibrium condition of ordered anarchy posed by the narrow consequentialism of utilitarian philosophy when promoted through the political process. Within the logic of consequentialist ethics it is all but incoherent to want to limit the scope of government. Limiting government on purpose would be rational only if the scope for doing good were itself limited, which no doubt it is not.

Yet the utilitarian ethic as deployed in its late-twentieth-century form ignores its own value judgment, namely, the impossibility of comparing utilities across individuals. If alternatives are incommensurate, no balance can be struck between the good and the bad consequence, and consequential reasoning is simply out of place. This difficulty leads Jasay (1996, 10) to deploy his first warning to those who would resort to consequentialist politics: *first, avoid doing harm*.

In this view, a political authority simply is not entitled to employ its power of coercion for imposing value choices on society. Its sole guiding principle in all such

cases can only be: *when in doubt, abstain*. This principle can be applied retrospectively to dismantle polities that have become suffused with consequentialist ethics as well as prospectively, in the state of nature, to prevent such a suffusion from ever occurring.

One implication of this guiding principle for political ethics is that applying coercion is legitimate only when it is positively invited by those who will be coerced. Assuming that property rights are given, the only circumstances in which rational individuals might choose coercion would be if transaction costs, default, and free-rider and hold-out temptations obstructed the solution of bargaining problems. In such circumstances, Jasay, (1996, 7) suggests that hypothetical invitations to be coerced have no better standing than hypothetical contracts. Those who will be coerced must actually invite coercion. Only then do certain tasks become duties that the state must assume.

Circumstances endow each individual with a set of actions that are feasible from a material perspective. Some of these actions are inadmissible because they would harm others in a way that would constitute a tort by the conventional norms of the society. Other actions are inadmissible because individuals have contracted with others not to choose them. To choose such actions would constitute a default or a breach of an obligation. Every other feasible act is admissible (Jasay 1996, 29–30).

With torts and obligations taken care of, the set of admissible actions becomes a residual. Harm and obligations together constitute the full set of valid objections, establishing a strong presumption that all other actions should be allowed.

Coercion by the state fits well into this categorization of feasible actions. Applied to the inadmissible subset, coercion functions to deter tortious harms and contract breaches. State coercion applied to the admissible subset of actions *prima facie* is illegitimate. It deforms the value of rights and liberties by threatening or committing a tort (in principle, if not by social convention). Only by the explicit invitation of those who are coerced can this presumption conceivably be overruled. Doubt about an issue creates a presumption to abstain from resolving it by state coercion (Jasay 1996, 54).

## Of Property

For those who accept this delineation of the role of politics, the twentieth-century view that notions of fairness call upon the state to play a deliberately redistributive role seems mistaken. Redistributive politics clearly creates gainers and losers. Therefore, it necessitates a balancing of the good of some and the bad of others. If such a balancing is ruled inadmissible, redistribution cannot serve as a warrant for the use of coercion. If consequentialism is disallowed, politics can play no legitimate role with regard to redistribution.

Fundamental to this thesis is the presumption that property is partitioned before resorting to politics, that it is not some common-pool resource the use of which and

the partitioning of which remain permanently under the control of the political process. This presumption runs counter to late-twentieth-century practice, which emphasizes a redistributionist ideology. The only difference between this redistributionist ideology and socialism is that the former still pays lip service to efficiency gains and accepts on consequentialist grounds some limited version of the exclusion principle implied by private property, whereas the latter does not. The tragedy of the commons overhangs all societies in which property is not strictly partitioned among private individuals, quite independently of whether such societies are redistributionist or socialist, autocratic or democratic.

In the view of John Locke ([1690] 1991), even prior to the social contract that establishes political or civil society, every individual has a property in his own person and a right to the product of his own labor. In addition, individuals create property rights out of the common pool of available resources by mixing their labor with such resources and thereby annexing them. These rights are natural rights, at least if the Lockean proviso is satisfied:

Whatsoever then he moves out of the State that Nature hath provided and left it in, he hath mixed his *labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the labourer, no Man but he can have a right to what that is joyned to, at least where there is enough and as good left in common for others. (288)

It is important to note that this natural right to property is not an inalienable right, at least in the sense I shall outline. For this reason the United States founders, who were influenced greatly by Locke's writings, failed to list property as one of the inalienable rights in the preamble to the Constitution. If we define an inalienable right as a right that cannot be lost in any way, then such a right would incorporate both a disability and an immunity: the possessor of the right would not be able to dispose of it voluntarily or involuntarily, nor would any other person, group, or institution be able to dispossess him of it. Property clearly does not fall into this category of a right, as it can be given away or exchanged voluntarily (*alienated*) and it can be lost involuntarily through negligence or wrongdoing (*forfeited*).

The natural right to property does imply, however, that it cannot be taken away by some other party, including a government (*prescribed*). In this sense, we may denote the natural right to property as an *imprescriptible right*. What revolutionary authors such as Locke had in mind was not that no government could take away the right to property but rather no state legitimately could take away this right without the owners' consent. The force of this claim can be appreciated only when we remember

that Locke wrote his *Treatises* under the influence of contractarian accounts of government authority (Simmons 1993, 107).

The Supreme Court cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have property*, without which they must be suppos'd to lose that by entering into Society which was the end for which they entered into it, too gross an absurdity for any Man to own. (Locke [1690] 1991, 360)

The Lockean assertion that each individual is born free in the state of nature correctly recognizes that we are not born into political communities. We are not naturally citizens; we must do something to become citizens. Locke clearly depicted the state of nature as one of “*perfect freedom* to order their Actions, and dispose of their Possessions, and Persons, as they think fit, within the bounds of the law of Nature, without asking leave, or depending on the Will of any other Man” (bk. 2, para. 4). The state of nature has a law to govern it, which obliges every individual: no individual “ought to harm another in his Life, Health, Liberty or Possessions” (bk 2, para. 6).

The law of nature essentially reflects the moral claim of each individual to negative freedom and the duty and responsibility of each individual to respect the negative freedoms of all others. To this end, each individual has an executive power to punish transgressors of the law of nature “to such a Degree as may hinder its Violation” (bk. 2, para. 7). Indeed, those who transgress the law of nature to a sufficient degree may forfeit their own rights to life, liberty, and property. Only the constant danger of the degeneration of the state of nature into a state of war leads individuals to commit to a social contract that creates civil society and to a limited government entrusted with the executive authority to preserve and protect their natural rights.

Civil societies and governments do not possess rights naturally; only individuals do. By agreeing to leave the state of nature and enter into civil society, individuals necessarily sacrifice their right to judge and punish breaches of their natural rights by others. This is no small sacrifice and will not be countenanced unless civil or political society is strictly limited with respect to the powers it exercises. With respect to natural rights of individuals to life and liberty, Locke implied that persons cannot make transfers to government even by consent, for these rights are inalienable. With respect to the natural right to property, individuals can make transfers to government by consent, for these rights are not inalienable. Individuals cannot legitimately have these rights taken without consent (except perhaps by forfeiture), because these rights are imprescriptable.

Although Locke viewed natural rights essentially as a gift from God, he justified the natural right to private property primarily on utilitarian grounds, rejecting Robert

Filmer's argument that original communism could not give way to private property without the universal consent of mankind:

God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational... not to the Fancy or Covetousness of the Quarrelsome and Contentious. (bk. 2, para. 34)

Locke's theory of first possession as the fundamental basis for property rights offers an essentially utilitarian justification for privatizing the initially common gift from God on a basis that confirms a clear-cut route to the determination of title. Because his focus naturally was on land, he was overly concerned to condition privatization by the proviso that "there is enough, and as good left in common for others" (bk. 2, para. 27). In countries where available land has been largely privatized, this proviso may seem to threaten the natural-right proposition, even to lend succor to socialism.

Such an interpretation, however, is incorrect. The modern theory of property rights concerns itself more with legitimate exploitation of opportunities than with the narrow concept of ownership focused on by Locke. If "the right to property is a right to action" (Rand 1961, 94), a theory of property rights relates much more to the intellectual and physical efforts of individuals than to a common stock of assets. Property rights concern allowable acts of transformation of the material world among which individuals possessing such rights are free to choose.

Because property is created largely through an act of transformation rather than a circumstance of possession, the Lockean proviso seemingly is moot. For there can never be "enough and as good" left for others if every action issues in a unique transformation (Rasmussen and Den Uyl 1991, 120). Acts of transformation under conditions of original acquisition are not rights-violating, because no one has rights to the pretransformed objects under consideration. (I shall argue later that this concept of property rights has powerful implications for the nature of civil society.)

For those who do not subscribe to Locke's notion of a natural right, Jasay (1996) outlines an alternative notion that is fully compatible with Locke's first-possession commitment. Jasay's defense of the first-possession rule is general and unambiguous. If an individual is in a position to take first possession, then such a taking is admissible if it does not constitute a tort (trespass) and if it violates no antecedent right (the case by definition). In such circumstances, taking exclusive possession is a liberty that can be obstructed only by a contrary right, which does not exist.

Two alternative acts constitute an appropriation that vests ownership in the performer, namely, (1) finding and keeping and (2) enclosure. Because the right to property is the fulcrum of a civil society, it is worthwhile to review briefly each of these

constitutive acts. Accepting the notion of finding and keeping as the basis for property rights involves respecting the moral arbitrariness of luck. Redress then cannot be called for on moral grounds. Any judgment that the resulting distribution of wealth is right or wrong involves a category mistake by reference to the finding-and-keeping rule. Finding and keeping poses no question of justice and creates no liability to compensate or redress.

Suppose alternatively that the potentially useful resource is there for all to see—neither chance nor finding cost is required to realize its existence—yet it has not been appropriated. Any squatter can establish first possession by enclosing it, thus excluding everyone else's access to it. However, in this case, the analogy with finding is incomplete, because those who used to enjoy access to the resource are now denied such access.

The enclosure worsens their situation even though it does not violate their rights. If the unowned resource has been used regularly by identifiable individuals, common-pool ownership may be implied, and these individuals should be paid compensation in the form of reliance-based damages. Enclosure itself is not a tort. It constitutes a clash of two liberties, not a clash of liberty and a right. If exclusion is successful and just claims for compensation on grounds of reliance are satisfied, the resource passes legitimately into the ownership of the finder-encloser.

## **The Law of Nature and Human Flourishing**

The state of nature, as earlier defined, is not a state of license, even though people in that state have an uncontrollable liberty to dispose of their property. The state of nature has a law of nature to govern it, which obliges everyone (Locke [1690] 1991, bk. 2, para. 6). As every individual is equal and independent under that law, no one ought to harm another in his life, liberty, or possessions. In the state of nature, the law of nature provides that every man has a right to punish the transgressions of that law to such a degree as may hinder its violation. All who are damaged by the unlawful act have a particular right to seek reparation from the transgressor. In this sense, every individual has executive power in the state of nature.

Because men are free, equal, and independent by nature, no one can be subjected to the political power of another without his own consent. Why would people give such consent? Locke's answer is that although in the state of nature men have such rights, the enjoyment of them is uncertain and constantly exposed to the invasion of others (Locke [1690] 1991, bk. 2, para. 123). People create civil society mainly for the mutual preservation of their lives, liberties, and estates, which Locke calls by the general name *property*.

Although man gives up the executive power to protect his own property when he enters into civil society, he does so only to better preserve his property. The power of civil society is constrained to secure everyone's property by providing against the de-

facts inherent in the state of nature. Even if, as Locke supposed, majority rule governs society, it does so subject to the strict requirement that every man's life, liberty, and estates must be protected at least as well as he could protect them in the state of nature. Evidently, such an outcome can be achieved only by the *minimal state*, that which exists solely to determine and defend property rights against potential internal and external aggression. Note that this definition of the minimal state permits a state whose size may vary according to the nature and scale of the forces of aggression it is obligated to resist.

I shall now argue that human flourishing occurs best in the environment provided by the minimal state; that political societies composed of individuals with diverse interests predictably stifle human flourishing unless the state takes no action except to uphold the negative natural rights of all citizens. This argument follows in the lineage of classical liberal scholars perhaps best epitomized by John Locke ([1690] 1991), Wilhelm von Humboldt ([1791] 1969), and John Stuart Mill ([1859] 1989).

It is instructive to initiate this analysis of human flourishing with Aristotle's concept of *eudaimonia*, which describes a state of individual well-being induced by living rationally or intelligently and characterized by self-actualization and maturation. Use of the term *eudaimonia* in no sense implies an endorsement of Aristotle's ethics, which does not embrace the notions of natural rights and individual liberty central to this article.

Although *eudaimonia* is usually translated as "happiness," this is misleading if not qualified. Here, happiness should be understood not simply as the gratification of desire, but rather as the satisfaction of right desire—the desires and wants that will lead to successful human living (Rasmussen and Den Uyl 1991, 36). Of course, man is not only a rational being but also an animal with the biological capacity and need for sensory experiences. Emotions play a significant role in achieving *eudaimonia*. Nevertheless, human flourishing requires that the emotions be controlled by man's capacity to reason. For a successful life, man must live so that he achieves goals that are rational for him not only from an individual perspective but also as a human being (Machan 1975, 75). In so doing he controls his animal passions.

In a society of diverse individuals, the outcomes of human flourishing will reflect that diversity. Human flourishing is unlikely to lead to a consensus about the good, despite much modern consequentialist reasoning to the contrary. Value pluralism, which so concerns conservatives and communitarians, will be dealt with later, and I shall argue that it constitutes a problem only within the context of the nonminimal state.

Human flourishing or *eudaimonia* must be attained through a person's own efforts. It cannot be achieved as the result of forces beyond his control. If a human is to flourish, the cardinal virtue is rationality, which can develop only when an individual has full responsibility for his own choices. Individuals cannot flourish or grow when others make choices for them or when they are not held responsible for the choices

they make, because the human faculties of perception, judgment, mental activity, and even moral preference are exercised only in making a choice:

He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? It really is of importance, not only what men do, but also what manner of men they are that do it. (Mill [1859] 1989, 59)

Of course, the laws of nature do not guarantee that every human being will flourish. Some will not seize the opportunity provided by liberty to fulfill their lives to the limit of their respective capacities. Many will evade the burdens and constraints of choice and make their way in life through imitation or servitude rather than creativity. Others will be overwhelmed by their passions, discarding rationality in favor of purely sensory pleasures. The laws of nature offer only opportunities, not a guarantee of utopia. They also protect individuals from the choices by others that threaten their lives, liberties, or property. The freedom to flourish is not a license to behave in ways injurious (in this sense) to others. Fundamentally, the law of property, of contract, and of tort, effectively enforced, would control the injurious impulses incidental to human flourishing.

In the Lockean tradition of negative natural rights, the natural right to private property arguably is its most controversial component. This controversy extends to the relationship between property rights and human flourishing (Rawls 1971). This relationship, therefore, requires particular attention. Individuals are material beings, not, as Rawls supposes, disembodied ghosts. Being self-directed or autonomous is not some psychic state but pertains to actions in the real world and often involves material resources. By using and manipulating material resources, autonomous individuals, in large part, develop and exercise their creativity under conditions of liberty.

For individuals to flourish, they need to maintain control of what they have produced (Buchanan 1993; Rasmussen and Den Uyl 1991, 116) and to retain or dispense their accumulated resources according to their own judgment. In this respect, the imprescriptible right to property takes its full place with the inalienable rights to life and liberty as the strongest foundation for human flourishing.

## The Nonproblem of Value Pluralism

John Gray (1989, 1993) has argued for what he calls *plural realism in ethics* along the following lines: because there are definite limits on the varieties of human flourishing and there are many forms of social life, often involving divergent and uncombinable goods, in which human beings may flourish, no one form is the one right way of life for man. Plural realism thus differs sharply from Aristotelian ethics, which claims that the one best form of life for the human species can be rationally discovered. Plural realists, in contrast, argue that human well-being can be realized in many, diverse, and incompatible forms of social life. With this assessment I have no quarrel; indeed it is the essence of the political philosophies of both Locke and Mill (Waltzer 1994).

Gray (1993), however, deploys plural realism as a weapon to attack classical liberal ethics, most certainly the brand of ethics I have advanced in this article. He claims that pluralism fells classical liberal meliorism, which ranks societies by the degree to which they approximate a classical liberal order; that it overwhelms the notion that all human beings are endowed with rights, because highly stratified societies may give rise to some form of human flourishing; that it destroys Kant's notion that only persons have intrinsic value, because elements of a "rich cultural environment" may enter into autonomous choice constitutively rather than instrumentally.

In passing this judgment, Gray lays claim to intellectual support from Isaiah Berlin, in his view the most compelling liberal political philosopher of the twentieth century (Gray 1996). At the heart of Berlin's thought, he claims, is value pluralism, an idea of enormous subversive force. If there is no single master-value and some values are not necessarily compatible or harmonious, no single moral theory can guide our conduct when we face moral dilemmas that force us to forsake one good for another. No metric enables us to make trade-offs. In such circumstances, classical liberal institutions have no universal authority.

Whether Gray is accurate in his reflections on Berlin—and there is a lot of evidence that Berlin is a fox who knows many things rather than a hedgehog who knows one big thing (Kukathos 1996)—he wields these reflections to attack classical liberal political orders, arguing that they have no general superiority. In Gray's view, value pluralism dictates pluralism in political regimes and undermines the claim that only classical liberal regimes are fully legitimate. Gray finds a wide range of past and present societies that are far distant in nature from classical liberal orders to be compatible with his concept of civil society.

In my view, the argument from value pluralism strengthens rather than weakens the case for a political society grounded either on the law of nature or, equivalently, on Jasey's maxims set out in *Before Resorting to Politics* (1996). For only in such a society, where the negative rights of individuals are strictly enforced, will value pluralism withstand public-choice pressures to conform either to the values of transient majorities or to the dictates of an autocrat. In his critique of classical liberal political orders, Gray

falls into a categorical error of assuming that the whole of society is politicized, that the supposed monism of classical liberal values will be imposed on all aspects of an individual's life.

This assumption is not the case. By definition, a classical liberal order constrains politics to its minimal form, leaving individuals free to form their own associations and groups and to pursue their own goals subject only to the laws of property, contract, and tort, uninhibited by political pressures. Ultimately it leaves individuals free even to abandon the order itself should they so choose. Classical liberals will not force individuals to be free (Rowley and Peacock 1975). Citizens who flourish within the framework of classical liberalism, however, will not easily choose to deny themselves the advantages they enjoy.

### A Flawed Concept of Civil Society

Gray (1993) claims that classical liberalism, as a doctrine taken to have universal prescriptive authority, is dead; its philosophical foundations are in a state of collapse. All that remains is “the historic inheritance of civil society that has now spread *to most parts of the world*” (314). Civil society, as defined by Gray, superficially conforms with the basic tenets of a classical liberal order, although on a closer examination this conformity is discovered to be a mirage.

By civil society, Gray (1993) means a number of things. First, it is a society tolerant of the diversity of views, religious and political, that it contains and in which the state does not seek to impose any comprehensive doctrine. In this sense, Calvin's Geneva was not a civil society, nor were any of the societies characterized by twentieth-century totalitarianism.

Second, it is a society in which both government and individual citizens (Gray significantly refers to them as its subjects) are restrained in their conduct by a rule of law. A state in which the will of the ruler is the law cannot contain a civil society. In consequence, civil society presupposes an omnipotent but limited government.

Third, civil society is characterized by the institution of private property. Societies in which property is vested in tribes or most assets are owned or controlled by governments cannot be civil societies. Private property is defended as an enabling device whereby individuals with radically different goals can pursue such goals without recourse to a collective decision-procedure that must be highly conflictual. Private property, in Gray's view, is compatible with a wide range of political institutions.

These institutions need not conform to classical liberal predilections. Nor need they contain the culture of individualism. Nor need they embrace the institution of market capitalism, which in Gray's opinion is not the only market institution compatible with private property. In Russia and Japan, for example, municipal, village, and cooperative forms of property ownership are likely to prove greatly superior to the capitalist form (Gray 1993, 316).

The criteria set out by Gray as the defining characteristics of civil society are capable of defining a narrow or a broad tent, depending on how the words are interpreted. By his selection of societies he categorizes as civil societies, Gray unequivocally chooses the broad-tent definition. The societies of North America and Western Europe clearly qualify, although Gray is not uncritical of the growth of government in these countries, especially during the second half of the twentieth century. One senses that something is seriously awry, however, when Gray (1993) adds to this list of civil societies a range of past and present political orders radically different from the great democracies: Czarist Russia, Meiji Japan, Bismarckian Prussia, Duvalier's Haiti, Singapore, Hong Kong, South Korea, and Taiwan. None of these has demonstrated great tolerance for diversity of opinions and lifestyles; none has provided great security for private property rights, recent indexes of economic freedom (Gwartney, Lawson, and Block 1996) notwithstanding; and none has protected the lives and liberties of citizens by restricting government through any recognizable rule of law enforced by an independent judiciary.

It would be easy to take advantage of Gray's poor judgment to ridicule the concept of civil society advanced in his recent writings. It is more instructive, however, to review a stronger contestant for his lists in order to demonstrate the flawed nature of his broad concept. Certainly many of the citizens of the United States claim preeminence for their political order as the leading example of civil society in the modern world. The concept of the new world order advanced by Presidents Bush and Clinton essentially involves a commitment to reshaping all nations in the American image. Evaluated by the criteria of classical liberalism, however, the United States is not now a civil society, although it probably was at its founding in 1787 except for the evil institution of slavery.

In the late twentieth century, the United States has the highest murder rate of all advanced nations; clearly it is not protecting the lives of its citizens. It also has the highest incarceration rate of all advanced nations, as a consequence of extremely interventionist legislation and administrative regulations that further erode the liberties of its nonincarcerated citizens. Its taxes and regulations significantly encroach on the private property rights of its citizens, and its takings of private property for public use in no sense honor the wording of the Fifth Amendment to the Constitution. There is no imprescriptible right to property in the United States.

These characteristics are no accident of fate. They are entirely predictable consequences of the expansion of government beyond the limits of the minimal state, of the abandonment of either natural rights or Jassay's maxims "before resorting to politics." In many ways Tocqueville anticipated the likely regression of American democracy away from liberty and civil society and toward equality and noncivil society in volume 2 of *Democracy in America*.

Tocqueville warned that "the type of oppression which threatens democracies is different from anything that has ever been in the world before" ([1840] 1969, 691).

He envisaged “an innumerable multitude of men, alike and equal, consistently circling around in pursuit of the petty and banal pleasures with which they glut their souls” (692). In such a society, a man “exists in and for himself, and though he may still have a family, one can at least say that he has not got a fatherland” (692). In a prophetic passage, Tocqueville sets out the implications for the political order of this state of affairs:

Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident, and gentle. It would resemble parental authority if, fatherlike, it tried to prepare its charges for a man’s life, but on the contrary, it only tries to keep them in perpetual childhood. . . . It provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, makes rules for their testaments, and divides their inheritances. Why should it not entirely relieve them from the trouble of thinking and all the cares of living? (692)

The process of subjugation of such a population is subtle rather than brutal as in totalitarian orders:

It does not break men’s will, but softens, bends, and guides it; it seldom enjoins, but often inhibits action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd. (692)

Much of what Tocqueville feared in 1840 for democracy in America has come to pass with consequences for civil society that manifest themselves in high crime rates, high rates of incarceration, a cult of property theft by middle-income groups through the process of government, and a decline in thrift, manliness, civility, toleration, duty, self-sacrifice, service, fidelity, self-control, fortitude, honesty, honor, trust, mutual respect, diligence, discretion, and self-improvement (Anderson 1992).

For the most part, these qualities of civil society may seem more psychological and sociological than economic. My central hypothesis is that they depend not on the perfectibility of man but on sound political economy as enunciated by the great classical liberal scholars whose ideas form the basis of this article. These lost values will return, if at all, only through a return to the minimal state obligated to preserve and protect the lives, liberties, and properties of the citizens who create and effectively control it. Only in such a society will human beings flourish and assume for themselves duties and obligations they have currently abandoned in an ever-escalating demand for unjustified rights and privileges.

## The Restoration of Civil Society

In his *History of the Decline and Fall of the Roman Empire* ([1787] 1974), Edward Gibbon describes the gradual emergence and consolidation of classical civil society throughout the Roman Empire over some six hundred years during the period of the Great Republic (SPQR). He chronicles the disastrous consequences of monarchy and the collapse of SPQR following the assassination of Julius Caesar, the subsequent civil war between Octavianus Caesar and Marc Antony, the final victory of the former at the battle of Actium (34 B.C.), and the crowning of Octavianus as the Emperor Augustus Caesar. He relates the slow but inexorable decline and fall of this once great empire during the following several centuries as it was ravaged from within by internecine battles for the Imperial Crown, always involving the Praetorian Guard and the Roman Legions, and from without by the barbarian hordes waiting at the boundaries for any perceived weakening of imperial resolve.

Following the final collapse, “the greatest, perhaps, and most awful scene in the history of mankind” (Gibbon [1787] 1974, 6:2441), the institutions of civil society disappeared completely for the greater part of a millennium. Later Great Britain freed itself from the Stuart dynasty in 1688 and accelerated the slow process of evolution of the institutions of civil society, which eventually were to extend far beyond its own frontiers to encompass much, although by no means all, of its own extensive empire. The twentieth century has witnessed the decline and fall of the British Empire and, with it, the erosion of classical liberal civil society, ravaged alike by two world wars and the follies of unlimited democracy. If this process of erosion is not checked, a new Dark Age beckons from which, given the destructive power of modern weaponry, mankind is unlikely to reemerge.

Now that government has grown so large, both in absolute size and in the range of its functions, in all Western nations, the public-choice constraints obstructing any rapid return to the minimal state are formidable. The advance of the welfare state has created a culture of dependency that manifests itself at the polls even as it corrodes human flourishing among the individuals addicted to its offerings. The politicization of society that accompanies the growth of government has essentially destroyed the rule of law and, in doing so, has weakened the protection accorded the lives, liberties, and property of individual citizens. This weakening of protection, in turn, has curtailed human flourishing even among the more independent individuals in society, lowering the degree of vigilance on which the law of nature depends for its continued existence.

In such circumstances, public-choice predictions for the restoration of the minimal state are less than propitious. Without the minimal state, the prospects for the restoration of civil society are as bleak as they were in the dying years of the Roman Empire.

It is instructive in this regard to switch attention from the fundamental characteristics of classical civil society as outlined in this article to the complex of interlocking institutions and individual dispositions on which civil society may be expected to flourish

in a twenty-first-century environment. Insights are available concerning these interrelationships from the experience of Great Britain during the late eighteenth and early nineteenth centuries. The freedom of British citizens at that time stemmed, as Michael Oakeshott (1991) has noted, not from separate rights, laws, or institutions but from many mutually reinforcing liberties:

It springs neither from the separation of church and state, nor from the rule of law, nor from private property, nor from parliamentary government, nor from the writ of *habeas corpus*, nor from the independence of the judiciary, nor from any one of the thousand other devices and arrangements and characteristics of our society, but from what each signifies and represents, namely, the absence from our society of overwhelming concentrations of power. (Oakeshott 1992, 387)

In this perspective, individuals considered themselves free in classical-liberal Britain because no one was allowed unlimited power—no leader, faction, party, government, church, corporation, trade or professional association, or trade union. Instead, power was diffused through what Oakeshott refers to as a *civil association* in which each individual acknowledges the authority in which he lives. Respect for the authority of law did not imply that every individual supported every law. The law itself was a slowly changing spontaneous order (Hayek 1973) that garnered respect not just for what it was but also for what it promised to become, always within the framework of the rule of law. In a civil association, the government “is an instrument of the people, charged with keeping in good order the institutions which allow people to pursue their self-chosen ideals” (Green 1993, 9).

The twentieth century has witnessed major retreats by all such civil associations as illiberal nation states have abandoned the minimal state and have reconstituted their citizens into what Oakeshott (1991) refers to as *enterprise associations*. Nation-states constituted as enterprise associations are composed of individuals related by their pursuit of a common interest or objective. There is but one sovereign purpose. The task of leaders “is to manage the pursuit of this goal and to direct individuals as appropriate” (Green 1993, 8). Communism and national socialism were ultimate forms of the enterprise association. However, late-twentieth-century social democracy has evolved as a less extreme form of this perversion of the civil association, unfortunately much better entrenched than either of its totalitarian close relations.

Hayek (1973) has demonstrated that the classical-liberal experiment with democracy failed because the institutions chosen to preserve liberty proved inadequate. In particular, faith placed in the separation of powers—legislative, executive, and judicial—was not justified even in the most sophisticated experiment, the United States Constitution.

The U.S. Supreme Court, although equal in status to the Congress and the president, had been designated as the crucial check against politicization of the law. It

played this role effectively until, in 1937, a majority of its justices rendered themselves unlawful in the case of *West Coast Hotel Co. v. Parrish*, caving in to pressures from the White House to subvert the Constitution in favor of unconstitutional New Deal legislation. Thereafter, periodic coalitions between Congress and presidents effectively destroyed the separation of powers and the rule of law.

In large part, classical liberal scholars underestimated the capacity of the state to subvert society by shifting it from the civil to the enterprise association because they failed to anticipate the shift from the law of *Nomos* to the law of *Thesis*, from the common law to law making by the state (Hayek 1973). The idea that the law was immune from interference by government, that it was discovered and not made, was fundamental to natural law, or the law of God, indeed was the fundamental contribution of Judeo-Christian religion to the seventeenth- and eighteenth-century concept of civil society. That view was swept away by the extension of the franchise in the nineteenth and early twentieth centuries and the philistinization of the majority vote in most advanced democracies.

What was swept away had taken many generations to evolve. It cannot be reestablished by constitutional decree but only by another slow process of evolution. From a public-choice perspective, such an evolutionary process faces formidable obstacles in the form of special interests that control the enterprise association. In a civil association, the law must not be the instrument of special interests nor the tool of government. It must constitute a body of moral and prudential rules binding on everyone (Green 1993, 122). How can law making be restored as the making of impartial rules of just conduct in an environment subverted by the forces of public choice? How can it be established in environments that have never experienced the rule of law?

One route to such reform is the weakening of central government through a process of devolving power (including the power to tax) to the states or provinces in a federalist system or to the local level in nonfederalist systems. In and of itself, such devolution does not guarantee a shift away from Leviathan in favor of the minimal state. In some instances, where the population is highly dependent on the state, devolution may shift the balance even further in favor of Leviathan.

Nevertheless, locally ruled communities would then be free to experiment (at their own cost) with differing forms of government. To the extent that such experimentation steers clear of contamination by the spending and taxing interventions of central government, communities that are more successful in encouraging human flourishing signal the existence of a better way to those that are less successful. Given the powerful forces ranged against such reforms by the central government, if civil associations are once again to replace enterprise associations, devolved competition may be the only feasible mechanism.

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