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LIBERTARIANISM AND LEGITIMACY: A REPLY TO HUEBERT

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IT IS OBVIOUS FROM his review of my book that J.H. Huebert[1] holds me in genuine high esteem. This saddens him all the more for, in his view, I have squandered my talents on so unworthy a topic as *Restoring the Lost Constitution: The Presumption of Liberty*, which he characterizes as "an unfortunate waste of talent for a powerful mind such as Randy Barnett's" (p. 108). While there is much that I disagree with in Huebert's review, in this Reply I will focus on one crucial respect in which he misunderstands my thesis. This concerns the concept of constitutional legitimacy I develop and defend in my book.

Part of the fault for this misunderstanding may be mine. Although I fully expected some libertarians to make this mistake, because my book was aimed at a more general audience, I nevertheless did not address it explicitly. For this reason, I am sincerely grateful to Mr. Huebert for putting this misconception into print and thereby providing me with the perfect forum in which to rectify it: the journal in which some of my earliest work on libertarian theory, written when I was still a law student, was published (Barnett 1977, 1978).

The approach to constitutional legitimacy I present in *Restoring* was aimed at correcting what I believe to be a serious deficiency in libertarian political theory. Among radical libertarians within the modern libertarian intellectual movement, there is a single conception of political legitimacy: consent. This conception has two parts: (a) a legal system that is consented to is legitimate; and (b) a legal system that is not consented to is illegitimate. Because government legal systems lack the consent of the governed, they are necessarily illegitimate. In addition to lacking consent, government legal systems are

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[1]Huebert's review appeared in the spring 2005 issue of this journal and all page numbers without author refer to his review.

also illegitimate because they claim a coercive monopoly of power and therefore violate natural rights.

So far so good, but here is the problem. Or rather, a symptom indicating an underlying problem: by this theory of legitimacy, all government legal systems are *equally* illegitimate. Why? Because all government legal systems lack consent; and all modern governments claim a coercive monopoly of power. Because real consent is an all-or-nothing-at-all thing that all government legal systems lack equally, and all governments equally claim a coercive monopoly of power, modern libertarian theory offers no criteria by which to distinguish better from worse governmental legal systems.

But no libertarian really believes that there is no relevant difference on *libertarian grounds* between the regime of Nazi Germany, the Soviet State, the United States, or (name the country in which you most want to live). Yet their exclusively consent conception of legitimacy, properly understood, offers absolutely no way to conceptually distinguish among these government legal systems. I say "properly understood" because classical liberals tried to escape this conundrum, as some do today, by speaking of degrees of consent of the governed through democratic processes. However, I agree with Lysander Spooner (Spooner 1870), that this form of consent is entirely fictional for reasons I discuss at the beginning of my book in a chapter that draws the much-appreciated praise of Mr. Huebert (Barnett 2004, pp. 11–31).

In response to this challenge, it is not enough for a libertarian to say, as some surely would, that some governments are better than others because they commit more or fewer rights violations. However true this assessment, it misses a crucial issue to which libertarians have paid inadequate attention: the duty to obey the law. This is a complex subject that I address in my book and elsewhere (Barnett 2003), and I simply cannot recreate that analysis here. The conclusion I reach is that there can be a *prima facie* duty to obey the law if it is made and enforced by procedures that provide sufficient assurance that the laws it imposes on nonconsenting persons are just. In other words, the issue of obedience turns not on whether a particular law is just, but on whether it deserves the benefit of the doubt that it is just. Laws made and enforced the right way are due this deference, unlike laws that are not. So the existence of a *prima facie* duty to obey the law depends upon the reliability of the procedures in place to assure the justice of laws.

This "gap" between the justice of a law and the *prima facie* duty to obey a law that is *likely* to be just because of the way it is made and enforced makes possible a much-needed refinement of basic libertarian theory. In the account of constitutional legitimacy I defend in my

book, I continue to insist that consent, if it really exists, can impart legitimacy on a legal system.[2] Such unanimous consent to governance is pervasive in nongovernmental legal systems, such as those governing universities, churches, businesses, condominium associations, etc. Nor do I truck with any weakening of the concept of consent to accommodate obvious differences among government regimes. Instead, I propose that there is a second route to legitimacy besides consent: the degree to which a legal system protects the fundamental natural rights of those upon whom it is nonconsensually imposed. The more effectively a regime protects the rights of those whom it governs, the more legitimate it is.

This move requires that a new distinction be introduced into libertarian theory between "justice" and "legitimacy." Although I believe that this distinction is implicit in the actual beliefs of libertarians, confusion and error results from its lack of explicit recognition. And regrettably some libertarians try so hard to hew to existing theory based exclusively on consent that they come to believe that all governmental legal systems are equally objectionable.

So here is the distinction: at its core, "justice" is defined by the fundamental natural rights of persons. Justice consists of the respect for and protection of these rights; injustice consists of their infringement or violation. "Legitimacy," by contrast, concerns whether the commands of a particular legal system are binding in conscience on the individual. There are two routes to legitimacy. The first is consent, which must be real, not fictitious. In the absence of consent, the second is the probability or likelihood that a particular legal system is or is not acting justly, in the sense of respecting and protecting these natural rights. In the absence of consent, a legal system can still be legitimate if the likelihood that it is acting justly is great enough to justify granting its decisions a benefit of the doubt. A nonconsensual legal system is illegitimate if this likelihood is not high enough.

This means that, while justice is a matter of "substantive" rights, legitimacy is a matter of either consent or following the right procedures. In particular, procedures that protect substantive rights to a greater or lesser degree. By procedural protections, I include not only the rules governing the application of law to particular persons, but also the process by which coercively imposed laws are made and interpreted. On this account, the greater the degree of protection

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[2]*Prima facie*, that is. The effectiveness of this consent to legitimate a legal system is mitigated, however, when it purports to alienate the inalienable fundamental natural rights that I identify and defend in my book, *The Structure of Liberty: Justice and the Rule of Law* (1998).

afforded to rights by the legal procedures actually in effect, the greater will be the chances that the actions of a particular government are just and, therefore, the greater its legitimacy.

Justice remains an all-or-nothing-at-all judgment. Actions, including law enforcement, either violate background natural rights or they do not. Those that do are just; those that do not are unjust. So too is consent, which either exists or it does not. By contrast, legitimacy is a matter of degree. The more reliably that its procedures protect the rights of those who have not consented to a particular legal system, the more legitimate it is. The less reliable, the less legitimate. While most of this is explained in my book, I did not there explain the implications of this new libertarian conception of legitimacy for libertarian theory.[3] Now I will.

First of all, and most obviously, this procedural conception of legitimacy provides a rights-based criterion by which the relative or comparative legitimacy of different legal regimes can be evaluated. Some government regimes can be assessed as superior to others on libertarian grounds. I consider this as a major advance for libertarian political theory.

Second, a procedural conception of legitimacy does not provide an argument for justifying government legal systems *qua* monopolies. By this I mean, it in no way mitigates the injustice of a coercive monopoly of power,[4] though it recognizes that some unjust coercive monopolies are better than others in their protection of individual rights and hence more legitimate. In other words, a government legal system could in principle be (relatively) legitimate because it effectively respects and protects the rights of nonconsenting persons and, at the same time, unjust because it claims a coercive monopoly of power.

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[3]This theory of legitimacy may not be entirely new, and for the sake of the intellectual history of libertarianism, it is worth discussing how it originated in these very pages. It can be traced to an important article by George Smith (1979a) in which he defends a conception of what he calls "procedural justice." For the record, I published a critical response to Smith, also in these pages (Barnett 1979), but was subsequently persuaded by his response (Smith 1979b). This debate had a profound long-term effect on my thinking, and I publically confessed error some years ago (Barnett 1985, p. 71 n. 48). My only complaint was that, had George made the argument in his original paper as clearly as he did in his reply, I would not have been entrapped into taking issue with him as I did. In his defense, George later told me that he had simply not anticipated my line of criticism when initially formulating his thesis and was induced to do so by my response.

[4]I first used the phrase, "coercive monopoly of power" in Barnett 1985.

In principle, a nonconsensual legal system could be perfectly just in its rulings in the sense that these rulings never violate the rights of the persons on whom they are coercively imposed. But even a legal system that was perfectly just in the enforcement of its rulings, and therefore entirely legitimate, would nevertheless still be unjust to the extent that it claimed a coercive monopoly on the provision of justice. This claim would violate the natural right of freedom to contract, in particular the right of persons to contract with rival legal systems (Barnett 1978, pp. 238–83). In addition, all government systems are also unjust insofar as they confiscate their revenue by force. This action violates the natural right of freedom from contract by taking the property of persons who have violated no one's rights.[5]

So when Mr. Huebert observes that I "do not address how a government may legitimately have a *monopoly* on the use of force and the provision of defense" (p. 105), he reveals his misunderstanding of both my project and my argument. It should now be clear that I do not address this question because I continue to deny that "government may legitimately have such a monopoly," although I would now substitute the word "justly" in place of "legitimately" in this particular context.

Of course, real government legal systems act unjustly in many other ways beside claiming an unjust monopoly and unjustly confiscating their income. Nor, as a practical matter, are their unjust claims to a coercive monopoly of power completely divorced from other and different violations of rights they perpetrate while exercising their monopoly. Still, keeping these issues distinct is useful. Doing so allows one to distinguish among different governmental legal systems on principled libertarian grounds. As I said earlier, all libertarians in their ordinary lives draw these moral distinctions. The problem has been with their political theory that has been unable to explain their intuition.

This defect in libertarian theory has had the unfortunate consequence of inducing some committed libertarians to hold fast to their theory and counterintuitively equate relatively more liberal government legal systems with the most oppressive regimes on the face of the earth. We need not search far for an example of this for, unless I misread him, Mr. Huebert seems to suggest that a democratic constitutional government in Iraq would be as illegitimate as the murderous regime it replaced solely because it resulted from an invasion by the United States "empire."

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[5]The unsuccessful attempt to excuse both of these injustices was the fatal flaw of Nozick's moral defense of the minimal state. See Barnett (1977) and also Rothbard (1977) and Childs (1977).

> If a legitimate government needs only certain "procedural assurances," then there is nothing illegitimate about any government the U.S. empire installs anywhere in the world—just give them the right constitution (perhaps the Cato pocket edition), and *voila*. (p. 109)

Here Huebert is missing the distinction between the legitimacy of a given existing legal system and the injustice of its forcible imposition. Indeed, he also misses the possibility that a legitimate government (insofar as it protects the rights of nonconsenting persons) could be imposed on former tyrannies by the victors of a just war as, for example, against the German Third Reich or the Empire of Japan.[6] Would he deny that *if* the U.S. Constitution, properly interpreted, did reliably enforce individual rights when followed (a contestable claim), then the existence of such a legal system anywhere in the world would be a good thing on libertarian grounds, however it came about? If so, then what concept would he recommend to express its superiority?

The relationship between foreign policy and libertarian rights theory is a complex one that merits closer examination than it has received in libertarian intellectual circles. But it is a mistake to collapse the distinction between the legitimacy of an existing government legal system and the justice or injustice of its origins as Huebert appears to do. After all, if libertarians are correct in their claims that all governmental legal systems claim an unjust coercive monopoly of power, then collapsing this distinction once again renders libertarians incapable of distinguishing among better and worse, more or less legitimate, government legal systems, for the origins of all governments are rooted in injustice.

Not only is this a serious moral error; to the extent that this argument is publicly made (which it generally is not) it holds libertarianism up to disrepute. Libertarians hold enough unpopular opinions; it is a shame to add to them an opinion that is both unpopular and wrong on libertarian grounds.

CONCLUSION

There is one other, more minor, misunderstanding of my project that I would like to clarify. Mr. Huebert writes: "Mr. Barnett naïvely sees judges as somehow more trustworthy than other government officials" (p. 107). I can assure him that I hold no such view. Indeed, the

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[6]While some libertarians would resist these examples on grounds with which I am familiar, I invite them either to supply their own example of a just war or deny its possibility.

very first sentence of my book reads: "Had judges done their job, this book would not need to be written" (Barnett 2004, p. 1). Then why bother to write a book about how the Constitution ought to be interpreted by judges and others?

Whether a particular intellectual project is worth one's time is, of course, a judgment call. Huebert criticizes my choice as impractical as it will never be adopted by a judiciary that is itself a part of the government apparatus and whose members are selected by the more explicitly political branches (p. 107). In his words, my book "advises inappropriate means for achieving desirable ends" (p. 109). In an important respect, I agree.

Part III of my earlier book, *The Structure of Liberty*, makes this exact case against constitutional constraints on government. There I contend that this strategy ultimately runs afoul of the Problem of Power—which consists of the twin problems of enforcement error and enforcement abuse. In that book, I contend that the problem of enforcement abuse is best addressed by the adoption of a "polycentric legal order," the very sort of legal system also favored by Mr. Huebert. So he and I agree about the "first best" solution to the problem of pursuing justice in a free society.

My new book, however, is about the world of "second best" in which Mr. Huebert and I both live. So the pertinent question is: would the United States be a better place on libertarian grounds if the Constitution were applied in its entirety than, as now, with crucial parts omitted precisely because they are barriers to government power? I think it would, and I suspect Mr. Huebert would agree. Apart from the faulty view of legitimacy that he shares with most libertarians, his complaint is that this will never happen.

But if we are making predictions about the future, I would ask which is more likely: the great benefits to be gained by abolishing government legal systems in favor of the polycentric legal order that we both seek? Or an incremental movement in the direction of better protecting individual liberty by an improved understanding of the Constitution? I think reasonable libertarians could conclude that the latter, while offering smaller benefits, is both possible and more likely to be achieved. After all, we do see in the real world some government legal systems better protecting rights than others. The object here is to move the legal system of the United States in the right direction. At minimum a two-track strategy is advisable, and one can view my two quite different books in this strategic light.

So the only remaining question is how this incremental movement can be made more likely to occur. I think it can be made more likely by educating the public about the "lost Constitution." The public, for better or worse, venerates the Constitution. Therefore, it

would be very useful if the public had a better understanding of what it really says and means. I truly do think that a more widespread public understanding of the actual Constitution can lead to its revival, which, however imperfectly, would in turn better protect individual rights and thereby render the government legal system more legitimate than it is at present.

A better respect for individual rights, even within a monopolistic legal system, should also yield visible benefits, thereby making the extension of individual rights into spheres now dominated by government monopolies seem more attractive. If this is correct, then incremental improvements in the protection of rights can create a dynamic that makes a polycentric legal order somewhat easier eventually to achieve. Of course, in the short run, reducing the frequency of rights violations by the legal system of the United States is itself a worthy end for any libertarian to pursue, were it possible to accomplish. With this too I am quite sure that Mr. Huebert would agree.

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