

TOWARD A LIBERTARIAN THEORY OF GUILT AND PUNISHMENT FOR THE CRIME OF STATISM

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THIS PAPER IS AN attempt to combine the insights of Van Creveld (1999) concerning statism with libertarian theory in order to forge a theory of justified punishment for the crime of engaging in statist, governmental or other gangster activity.

GOVERNMENT VS. STATE

Van Creveld begins his analysis by distinguishing between governments and states. In his view (1999, p. 1): "The state ... is an *abstract* entity which can be neither seen, nor heard, nor touched. This entity is not identical with either the rulers or the ruled; neither President Clinton, nor citizen Smith, nor even an assembly of all the citizens acting in common can claim that they *are* the state. On the other hand, it includes them both and claims to stand over them both."

The hallmark of the state, for Van Creveld is its impersonality. There is no one individual who can be clearly be described, distinctly, as a member of the state. On the other hand, it is possible to claim that *everyone* living within a certain location is a member of the state. He goes so far (1999, p. 1) as to liken this institution to a "corporation in the sense that it possesses a legal *persona* of its own, which means that it has rights and duties and may engage in various activities *as if* it were a real flesh and blood, living individual."

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But if the state is a corporation, it is distinguished from all other such, typically in two ways: it claims the right to initiate violence within in a given geographical area (e.g., taxation), and demands a territorial monopoly in this regard (e.g., it will not tolerate the operation of any other state within “its area”). Van Creveld (1999, p. 1) puts the matter in this way: “... the state differs from other corporations ... first, (in) the fact that it authorizes them all but is itself authorized (recognized) solely by others of its kind; secondly, that certain functions (known collectively as the attributes of sovereignty) are reserved for it alone; and, thirdly, that it exercises those functions over a certain territory inside which its jurisdiction is both exclusive and all embracing.”

In sharp contrast, a government is an entity which, although it typically serves the same function as a state, is comprised of specific identifiable persons. Here, there is a clear line of demarcation, in any geographical area, between the rulers, who are part of the government, and the ruled, who are not.

According to Van Creveld (1991, p. 415): “... government and state are emphatically not the same. The former is a person or group which makes peace, wages war, enacts laws, exercises justice, raises revenue, determines the currency, and looks after internal security on behalf of society as a whole, all the while attempting to provide a focus for people’s loyalty and, perhaps, a modicum of welfare as well. The latter is merely one of the forms which, historically speaking, the organization of government has assumed ...”

Van Creveld (1991, p. 2) further divides the government into various types, including tribes with rulers (chiefdoms), city-states, and empires.¹ To preview our findings, we shall maintain that while fomenting states and governments are equally criminal acts under the legal code of libertarianism, the distinction between them is still a highly useful one, in that the former presents far more analytic difficulties than the latter.

WHAT IS LIBERTARIANISM?

Libertarianism is the philosophy that maintains it is illicit to threaten or initiate violence against a person or his legitimately

¹He (1999, p. 2) actually includes a fourth category “tribes without rulers” but we ignore this possibility on the ground that it cannot be reconciled with our own view that all governments necessarily initiate (legally legitimate) violence against their citizens, and demand a monopoly role in this regard.

owned property.² Defensive force may be used to ward off an attacker, but invasions of person or property are strictly prohibited by the non aggression axiom.

Given that both the state, and government, can be defined as a monopoly of legitimated violence within a given geographical area, it may then be fairly said that any such entity, which admits of rulers and ruled, whether private gang, government or state, necessarily violates the libertarian axiom of non aggression.

Can it reasonably be objected that ruling entities, whether states or governments, are really embodiments of voluntary agreements between consenting adults, since they are based on constitutions?³ Unfortunately for the supporters of *dirigisme*, such a contention cannot be maintained. Philosophers such as Spooner (1966), Rothbard (1965, 1970, 1973, 1982) and Hoppe (1989, 1993) have put paid to all such claims.⁴

If it is illicit to invade the person or property of another, what should be the appropriate response from the forces of law and order?⁵ It is a combination of making the victim “whole” again, and punishing the aggressor.⁶ What this amounts to, in effect, is “two teeth for a tooth” plus costs of capturing and scaring.⁷ Consider the following scenario: A steals a car from B. A is now captured. What is the just punishment that will restore B, as much as possible, to his previous non-victimization state? First, the automobile must be returned from the carjacker to its rightful owner. That is the first “tooth.” Then, what A did to B must be, instead, done to A, in B’s behalf, by the forces of law and order. Since A relieved B of a car, and took it for himself, the same must now be done to A; that is, A’s own car (*not* the one he just stole from B which has already been returned

²See on this Rothbard (1982), Hoppe (1989, 1993), Locke (1960).

³This is the position of the Public Choice School. See on this Buchanan and Tullock (1962). For criticism, see Rothbard (1997), DiLorenzo and Block (2001), Block and DiLorenzo (2000, 2001).

⁴Spooner (1966) goes on to reject the claim that the government is really a voluntary organization, one agreed to on the part of its citizenry, on the ground that people do vote, pay taxes, serve in the army, etc.

⁵These must of necessity be private, since public sector police violate the libertarian code of law in the first place, and can thus scarcely be relied upon to uphold it.

⁶On libertarian punishment theory, see Barnett and Hagel (1977), Block (2004), King (1980), Kinsella (1992, 1996a, 1996b, 1997, 1998–1999), Rothbard (1982).

⁷See on this Block (forthcoming); Rothbard (1982, pp. 85–96, 1973, p. 97).

to B as the first tooth) must be given to B.⁸ This is the “second tooth.”⁹ But more is needed if the scales of justice are to be once again righted. When A engaged in his act of car jacking, B was ordered, at the point of a gun, to exit from the automobile, and turn it over to A. B, reasonably enough, feared for his very life, not knowing whether or not compliance with A’s orders would be sufficient to save himself. If all we do, now, is blithely turn two cars over to B from A, we will still be a long way from bringing matters to a just conclusion. Since A scared B, we must scare A, twice as much, if anything. Accordingly, to the “two teeth” penalty already imposed upon A, we additionally scare him. How can this be done? One reasonable option is to force him to play Russian roulette with himself, with the number of bullets and chambers to be determined by the severity of the crime perpetrated upon B by A. When we add to this a reasonable amount for the costs of capturing A,¹⁰ our story in this regard is complete.

APPLYING LIBERTARIAN PUNISHMENT THEORY TO POLITICAL RULERS

In those branches of athletics that have as their goal the movement of a spherical object such as golf, handball, racquetball, baseball, softball, soccer, the road to success is to “keep your eye on the ball.” He who fails to do so, for even the slightest moment, cannot do as well as otherwise he might. A necessary condition for orchestral playing is to either memorize the notes—and their time value—or to keep

⁸If A does not have his own vehicle of equivalent value, then its value can be taken out of A’s hide: that is, instead of putting A in a jail at B’s (and all other taxpayers’) expense, where he can spend his days in front of a color tv, in cozy air conditioned circumstances, A will in effect be enslaved until he earns enough money to pay his debt to B. Our experience of this “curious institution” (Hummel, 1996; Thornton, 1994; Fogel and Engerman, 1974) shows that private concerns are able to “sweat” more value out of their charges than the costs of feeding and guarding them. So would it be, nowadays, under fully private (slave) prisons.

⁹Note that we are not talking about 1.9 “teeth” or 2.1 “teeth” or any other amount of “teeth.” Justice amounts to exactly twice what the bible recommended since we first return the stolen car, and then add on a second car as punishment.

¹⁰If A presents himself at the police station with a voluntary confession, this aspect of his punishment will be minimized.

your eyes *glued* to the musical score. Even a momentary lapse in this regard is almost a guarantee of less productivity than otherwise, if not outright failure. There are, to be sure, distractions; these account for failure to a great degree. But the high road to success is to strive to the utmost to focus on what you are doing.

It is the same with our present concerns. Only here, instead of a ball or musical notes, the aphorism of keeping your eye on the ball applies to the non-aggression axiom—and its applicability to these responsible for creating and running states and governments.

The aim of the present paper is to apply the libertarian non-aggression axiom and punishment theory to the activities of the state. It is of the utmost importance that we act consistently with the basic building bloc of this philosophy, since the distractions will be numerous and powerful; allowing them to deter us from an accurate analysis will almost guarantee erroneous conclusions. The “distractions” are so numerous and deeply embedded in our societal mores that even I, the author of this paper, feel a certain reluctance to overcome them. For one thing, politicians are the *leaders* of our present society. To contemplate incarcerating them, particularly en masse, is more than sufficient to make the most hardly intellect blanch.¹¹ But facts are facts, and we cannot take our eye off of the “ball” if we are to shed any sort of social scientific light on the problems to which we are addressing ourselves: given that governments are illicit invasive criminal institutions, and that people who aggress are justifiably punished, we must contemplate retribution, on a massive scale, against all those responsible.

JUST HOW MASSIVE?

But just how all encompassing must be our vision? Suppose we were to contemplate a Nuremberg type trial for Cuba and North Korea. Would all inhabitants of these unhappy countries, without exception, be candidates for a jail sentence (or worse)? This, indeed, would be precisely the conclusion reached by what I would consider a rather unsympathetic interpretation of Van Creveld, along with the

¹¹It is also undoubtedly illegal to contemplate any such activity. Accordingly, I hereby restrict the coverage of this discussion to the two political entities most people would agree are presently rogue states, or illegitimate governments, those of North Korea and Cuba, as of the time of the present writing (2000). Political entities operating in the past which fall into this category, include the USSR, any of the countries of Eastern Europe until the fall of communism in that part of the world, Nazi Germany, Fascist Italy, Chile under Salvatore Allende and Uganda under Idi Amin.

premises of libertarian punishment theory as we have adumbrated them. Specifically, this author (1999, p. 1) has stated: "... neither President Clinton, nor citizen Smith, nor even an assembly of all the citizens acting in common can claim that they *are* the state. On the other hand, it includes them both and claims to stand over them both."¹² The point is, if both Smith and Clinton *are* the state, and the latter is guilty of criminal behavior on this ground, then so must this apply to the former. But it would be a strange Nuremberg trial that found guilty the entire populace of Cuba; this would mean that there were no victims in that unhappy Island country, only victimizers, a manifest impossibility, since the latter implies the existence of the former. From this we deduce that there must be at least *one* victim in Cuba. Further, it is only a particularly unsympathetic reading of Van Creveld to assume, on the basis of his analysis, that both Idi Amin and any one of his many victims would be not only guilty of political crimes, but equally guilty.

If it is not and cannot be the case that "we are all guilty" of statism, then it logically follows that some are culpable, and some are not. Let us consider a few candidates for the criterion separating the blameworthy from the innocent.

First, you are guilty of being part and parcel of government if you are employed by it, and not if not. This sounds like a good initial stab at making the distinction, but it is not. For one thing, virtually *everyone* in Cuba, North Korea, the USSR, East Germany either works or has worked for the state. Thus, this criterion would tend to collapse into the one which claims "we are all guilty," which has already been rejected. For another, surely there are people who are not formally employees of government, and yet who are guilty of statism to a great degree. Krupp and Messerschmit spring readily to mind in the Nazi era; Armand Hammer was an American businessman who cooperated with and effectively promoted Stalinism. Thus this criterion is both under and over inclusive.

Now consider a country where it is almost entirely a matter of choice, not physical necessity, to take a government job, for example, the U.S.¹³

¹²Again, let it be repeated, we are not in this paper contemplating punishing any such person as William Clinton for the crime of being the president of the United States. Rather, if we are to make us of this example, we are implicitly discussing the president or dictator of a country such as Cuba or North Korea.

¹³Let it be repeated once again that we are *not* considering the U.S., or any of the other western democracies as examples of countries that, if it is concluded that a person is part of the state apparatus, then he is guilty of violating the libertarian code of non-aggression, and is thus a subject fit for punishment.

Use of the employment contract would condemn to criminality virtually every post office worker, teacher, professor,¹⁴ social worker, street sweeper, garbage man, welfare recipient, toll booth collector, road repairman, etc.¹⁵ Again, we come perilously close to lapsing back into the “we are all guilty” scenario. Worse, no cognizance is taken of the distinction between a Marxist or leftist professor who supports totalitarianism, and those who oppose it.

Of course, it can be argued that even the libertarian professor or politician¹⁶ who accepts a salary from government is still guilty of what, by his lights, can only be considered stolen (e.g., taxed) property. And this cannot be denied. However, there are several replies open to the libertarian professor employed by a state school. First, there is the claim that he is only getting some of his own money back from the government, and not that of other people. Second, it is not exactly theft to take from a thief;¹⁷ rather, such an act is best characterized as relieving a criminal of his ill gotten gains. So, even if a post office worker takes a salary from the government, this does not mean he is guilty of a libertarian legal code violation; far better that he, a non thief, now has this money than that the government,¹⁸ which stole it in the first place, gets to keep it. Ragnar Danneskjold, a fictional hero in *Rand* (1957), made a career out of liberating (not stealing!) government property and returning it to its rightful owners. This was a two stage act: first, taking money from the state, and second, giving it back to those from whom the state had stolen it from in the first place. If this complex act consisting of two separate parts was a righteous one, then each and every part of it, too, had to be licit; there cannot be a totally legitimate act one part of which is

¹⁴In the interests of full disclosure, I must note that I was previously employed by the University of Central Arkansas, a public institution of higher learning.

¹⁵This is somewhat of an exaggeration since some of these jobs have been privatized.

¹⁶Ron Paul is perhaps best known person in this latter category. Throughout his long career in the House of Representatives, he has served as a lone beacon for freedom.

¹⁷Actually, it is logically impossible to steal from a thief; one can only steal from the rightful owner, which, manifestly, the robber is not. An analogous situation occurs with regard to money. It is only possible to counterfeit legitimate money, not money which is already counterfeited, such as Cuban or North Korean money. On this see Block (1991, pp. 109–120), Creveld (1999, pp. 224–229).

¹⁸Remember, we are still talking North Korean or Cuban government.

improper. But this means that not only returning stolen money to rightful owners should be lawful, but also taking it away from those with no valid title to it.¹⁹

Of course, the libertarian college professor who does not wish to open himself up to the charge of hypocrisy is subject to the “attack” on the part of tax payers who may approach him and demand that he return to them those parts of their salary which cannot be accounted for on the grounds of him merely getting back his own (or his parents’) tax revenues. What response does he have at his disposal? He has several. First, not all of these revenues (the difference, suitably capitalized, between what was stolen from him and what he has recovered) are up for grabs to the irate taxpayer who approaches him with charges of hypocrisy; it is only this amount subtracted from a reasonable “salvage” fee. According to the law of the sea merchant,²⁰ salvage fees amounted to one third of the value of a lost or abandoned boat. Applying this rule of thumb to our present situation, at most only two thirds of the libertarian professor’s salary is vulnerable to this charge. Second, just as Ragnar chose his own victims of the state to whom to make restitution, so is this option open to our libertarian professor employed by a government institution. He need not satisfy any and all comers. Instead, he can direct these funds to worthy groups and organizations who have been victimized by taxation. Third, the would be *claimant’s* hands must also be clean in this regard. *His* financial records must show that he is not a ruling class or net tax consumer in the light of Calhoun’s (1953, pp. 16–18) analysis. Otherwise, he will be vulnerable to a counter claim from the very person he is “attacking.”

LIBERTARIAN CLASS ANALYSIS

No, not all inhabitants of a geographical area are guilty of fomenting state institutions, nor are, even, all those who work for the government. The latter may constitute a presumption of political criminality, but this can be defeated, as we have seen. A better candidate for guilt and punishment emanates from libertarian class analysis.

This contention may be rejected out of hand by men of good will and good sense, because the Marxists have long polluted the concept with their own version of it. That is, in the more well known Marxian

¹⁹E.g., the government of North Korea, or the fictional country of the U.S. in Rand (1957).

²⁰See http://www.safesea.com/boating_info/salvage/salvage_main.html; <http://rms-republic.com/sal00.html>

class analysis, employers are guilty of exploitation, and employees are their victims.²¹ But just because one version of class analysis is intellectually bankrupt does not mean that all others are. In the libertarian account, the distinction is, as might be imagined, between those who either directly or indirectly engage in violent attacks on innocent people, and those who do not.²²

The state is of course the most well organized group of exploiters of the innocent, but there are also non governmental criminals, gangsters, etc., who must be included in the ruling class. Every car-jacker, every two bit thief, every perpetrator of fraud, every perpetrator of rape, assault and battery or murder, is, along with organizers and top managers of both government and state, a member of the ruling class from the libertarian perspective. As well, there are the aiders and abettors of the political system: members of the business, arts, athletic communities who help politicians and bureaucrats in their mistreatment of the rest of society.

Perhaps the analogy that best illustrates this concept is that between officers and enlisted men in the army. The former are the rulers, the latter, the ruled. A colonel or a general typically receive far better treatment than a private or a corporal.²³ Who is a member of the ruling class: a welfare mother who accepts a check that would not be available to her in the free society, or the head of the fed, an institution also incompatible with *laissez faire* capitalism?²⁴ It is clearly not the former, but rather the latter. Yes, welfare is a clear theft from the rich taxpayer to the poor tax consumer (Calhoun, 1953, pp. 16–18) in this case, and is unjustified. But the single mom is more sinned against than a sinner. Put it this way: if somehow the “welfare queen” and all her ilk disappeared from the scene, the mixed economy, or socialism, would function pretty much as it has always done. On the other hand, were the politicians and top bureaucrats to decamp, and not be replicated, we would be well on our way toward the free society.

²¹For a refutation of this doctrine, see Böhm-Bawerk (1959 [1884]), particularly Part I, Chapter XII, “Exploitation Theory of Socialism-Communism.”

²²On libertarian ruling class theory see Rothbard (1982, pp. 176–177).

²³See Creveld (1999, p. 161) on the different treatment accorded officers and enlisted men captured in war.

²⁴It should not be forgotten that in this and other examples, we are discussing the Cuban or North Korean equivalents; e.g., the head of the central bank of those countries.

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