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LIBERALISM AND NIHILISM: CONTEMPORARY CONSTRAINED PERFORMANCE THEORIES OF JUSTICE

*Michael P. Zuckert**

At first glance the liberal tradition in political philosophy appears extraordinarily alive. Within living memory this was not always so, for all political philosophy, including the liberal variety, was declared dead in the face of a philosophic and social scientific critique of all "oughts" as merely "values," or ultimately "preferences." In the 1970's, however, we experienced an impressive re-birth of liberal political philosophy, for which John Rawls usually receives and probably deserves credit. I wish to discuss here what might be called the Rawlsian liberal tradition. Although the thinkers I would put in this tradition disagree quite strongly with Rawls about a number of important things, and are usually viewed as differing sharply from him in methodology as well as substance, they nonetheless take their inspiration from him, and agree with him and each other in two important respects: they all develop self-consciously liberal political philosophies, and they all employ a basically similar method of generating political principles.

I will call their method "constrained performance." A constrained performance theory is one in which the standards of justice, or more broadly of political right, emerge as the product of actions taken by persons within specially defined situations, characterized by explicitly specified constraints. Rawls and Robert Nozick are the best known representatives of this tradition, but I shall also discuss Bruce Ackerman's *Social Justice and the Liberal State*.¹ I focus my discussion of these current versions of liberal

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1. J. RAWLS, *A THEORY OF JUSTICE* (1971); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). There are many others who might be included, but most of them are close enough to Rawls not to require separate treatment.

philosophy on their commitment to constrained performance, to show what the performance is, and how it leads to the political principles it is claimed to produce. I conclude that all the constrained performance theories fail and end by asking what this failure means for the viability of the liberal tradition of political philosophy. In my exposition, I have chosen what I hope is the golden middle course, supplying enough of the arguments for the uninitiated to follow, without bogging down those already familiar with the positions of Rawls and the others.

I. JOHN RAWLS'S CONSTRAINED PERFORMANCE: THE FOUNDERING OF THE DEMAND OF JUSTICE

The *performance* in Rawls's theory is a contract-like agreement that human beings, each seeking his or her own benefit, unanimously make over what principles of justice will govern their common life. Whatever principles are agreed to in the choice situation are the correct principles of justice. It is a *constrained* performance because only a very specially defined choice situation will produce the principles of justice. It should be obvious that not every choice position can produce a unanimous agreement. Likewise, principles or agreements that might emerge from many choice situations are often clearly not just.

Rawls calls his choice situation the "original position." He attempts to define the original position in such a way that it is "the appropriate initial status quo."² In the original position men stand behind a "veil of ignorance," which guarantees that when they deliberate over principles of justice they lack all knowledge of themselves in their particularity, so that whatever decision they make will be truly "fair." Thus in the original position

no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . [T]he parties do not [even] know their conceptions of the good or their special psychological propensities.³

Under these constraints, Rawls believes, the participants will agree upon two principles of justice, together called by him "democratic equality":

First: each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are

2. J. RAWLS, *supra* note 1, at 12.

3. *Id.*

both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁴

Since the first principle more or less restates the familiar liberal commitment to political and personal liberty, Rawls's theory clearly resides within the broad confines of the liberal tradition. The second principle also agrees with widely accepted liberal commitments to equality of opportunity, but diverges from those when it holds that no inequalities are justifiable unless they work to make the worst off in society better off than they would be without the inequalities, "better off" understood here entirely without regard to feelings of envy or resentment.

The novelty of Rawls's constrained performance theory becomes visible upon comparing it to classical liberal political philosophy. By denominating his theory "contractarian" he means to place himself within the social contract tradition of "Locke, Rousseau and Kant."⁵ Indeed, classical social contract theory itself might be seen as a kind of constrained performance theory: the parties, through the performance of the contract, bring into existence their political society, and the nature of their agreement determines the character and principles of their political order. For example, Locke discerns the limits of the legislative power from the rational decision his contractors would make about it when they come together to establish government.⁶

It is, however, only partly accurate to consider the classical liberals like Locke as theorists of constrained performance. The performance does not for Locke, as it does for Rawls, purport to settle the most important matters. As the Declaration of Independence states the Lockean position, men "are endowed by their creator with certain inalienable rights" and "governments are instituted among men to secure these rights." That is, the standards of justice, or more broadly of rightful government, are not generated in the constrained performance of the social contract, but precede the performance altogether, and have their source in God or nature. The rights provide the pre-given standards for the performance, guiding it to a more or less determinate conclusion as pre-given ends guiding deliberation over means.⁷ Thus for classical liberal theory the performance plays a segregated and subordinate role, while in Rawls it dominates, settling not only the derivative or means questions, but also the fundamental or ends questions of the principles of

4. *Id.* at 60, 83.

5. *Id.* at 11.

6. J. LOCKE, TWO TREATISES OF GOVERNMENT 373-81.

7. J. RAWLS, *supra* note 1, at 6.

political right as such.⁸

Moreover, while Rawls suggests a "correspondence" between his doctrine of the original position and the Lockean state of nature, they are in fact quite different: Locke's state of nature abstracts away all conventions, leaving nature as the special form of constraint on the performance to follow, while Rawls's original position abstracts away nature as well.⁹ The original position dramatically radicalizes the Lockean state of nature by stripping away all that characterized and motivated men in that state. The original position is most emphatically not a state of *nature*; it is far closer to a state of *antinature* or *nonnature*.

The features of Lockean theory that Rawls omits have been exceedingly controversial. The central issue probably concerns the natural rights, the naturally pregiven standards. Many doubt that Locke provides adequate grounds for believing that rights exist, and for saying that they consist of life, liberty, and property. The Declaration of Independence finesses the issue by its reference to "self-evident" truths, a philosophically troublesome claim indeed.¹⁰ Rawls is not burdened by these or any other positive standards of right prior to the performance. The constrained performance itself, and nothing else, supplies the content of political right.

Likewise, by looking to the state of nature Locke entangled himself in difficult semantic and factual questions. What exactly is a "state of nature," and what evidence is there that men once lived in it? Rawls's doctrine avoids this difficulty as well. His original position can only be thought into. While some critics (like Ackerman) find the Rawlsian original position too abstract even to conceive of, this is not a serious problem. As Rawls says, "[O]ne or more persons can at any time enter this position, or perhaps, better, simulate the deliberations of this hypothetical situation, simply by reasoning in accordance with the appropriate restrictions."¹¹ To be in the original position is merely to respect in one's thinking the constraints which define that position.

Of course, the avoidance of some of the well-known difficulties of Locke's theory by no means justifies Rawls's turn to a constrained performance theory, nor validates the particular version of that theory he developed. Indeed three clusters of issues need to be

8. Similarly, for the "performance" of utilitarianism's "disinterested observer," the standard of pleasure-pain (or utility) is pregiven.

9. Cf. D. SCHAEFER, *JUSTICE OR TYRANNY?* 38-39 (1979).

10. On "self-evidence" in the Declaration, consider the recent discussions in G. WILLS, *INVENTING AMERICA 181-92* (1978); and M. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION 9-96* (1978).

11. J. RAWLS, *supra* note 1, at 138.

raised about Rawls's contractarianism. First, why should we adopt constrained performance theory? Second, why should we adopt the particular constraints Rawls employs? And third, does the performance generate the principles of justice that are supposed to follow from it?

Rawls's turn to constrained performance derives from the conjunction of two more primitive insights or foundational principles respecting justice. The first I shall call the *antiutilitarian principle*; the second, the *demand of justice*. Rawls takes utilitarianism to hold that "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."¹² While Rawls does not dwell on them, he clearly is impressed with all the horror stories that have been raised against utilitarianism. For example, since utilitarianism looks to maximum total (or average) net satisfaction, it seems to raise no barrier to Roman principles of social policy: sacrifice a few to the lions in such a way as to give very many much pleasure. Such a view, Rawls believes, "does not take seriously the distinction between persons" in its apparent willingness to trade off the agony of some against the pleasure of others.¹³ In this it is proceeding contrary both to empirical fact—human individuals are the reality, society a construct—and to moral fact—we have an "intuitive conviction," or a "considered moral judgment" of the "primacy of justice," which finds "an inviolability founded on justice" in each person "that even the welfare of society as a whole cannot override."¹⁴ The greater good of some or even of the whole cannot outweigh sacrifices imposed on others.

To this intuition of "the inviolability of each individual," which we are dubbing the *antiutilitarian principle*, Rawls adds his *demand of justice*. We can understand that demand if we look at Rawls's thought as an effort to think through the problem of what is the basis for what one is due. He begins with an essentially negative insight: what one deserves cannot rest on something undeserved. To rest the deserved on the undeserved is to make desert arbitrary. It follows, he believes, that justice cannot be the rewarding of undeserved inequalities, or more broadly, of undeserved qualities. This general *demand of justice*, although not explicitly formulated by Rawls in this manner, seems to be the implicit criterion for his criticism of the kind of equal opportunity principles of justice that classical liberal theory endorsed. As he says in that critique, "no one

12. *Id.* at 22.

13. *Id.* at 27.

14. *Id.* at 3-4.

deserves his place in the distribution of native endowments," any more than he can claim credit for those "fortunate family and social circumstances" which support the "superior character" which in turn supports "effort."¹⁵ The demand is entirely negative or disqualifying: what one is due cannot rest on any of the natural or social or other proscribed bases of desert.

The conjunction of the two foundational principles produces Rawls's turn toward a constrained performance theory and largely determines the specific character of the constraints and of the performance as well. If the utilitarians fail in not paying sufficient attention to the individual's claims, then the remedy is to give the individual a voice. That was a basic insight of contract theory as developed by Hobbes and Locke, and Rawls reasserts the contractarian approach in order to guarantee that the antiutilitarian principle is satisfied. The individuals, all of whom must agree to the principles of justice, surely will not accept any principle which might sacrifice them to others or to the whole. Rawls allows this sort of self-interested calculation, as utilitarianism does not. But Rawls concedes that there is a sense in which the utilitarians are right that justice requires disinterest. At its most commonsensical level, justice is giving each his due, but men are notorious for overestimating their own due and undervaluing the due of others. Rawls somehow needs to combine the self-assertion of self-interested actors to guarantee one side of justice (the inviolable claims of the individual) with the disinterestedness required to satisfy the other side (the rightful claims of others). The contractual performance, to produce any agreement, much less a just one, must occur under a number of constraints.

The antiutilitarian principle, the requirement of disinterestedness, and the demand of justice all can be satisfied by a process or performance which builds into the circumstances of the performance precisely those constraints implied by the foundational principles.¹⁶ The performance requires unanimous agreement of self-interested actors, deciding on what principles of justice shall guide their common life under the constraints on deliberation imposed by the veil of ignorance. Rawls makes clear the connection between the demand of justice and the constraints when he finds the source and character of the latter in a decision "to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance (and psychological make-up) as counters in the quest for political and economic advantage."

15. *Id.* at 104.

16. *Id.* at 310-15.

Those "accidents" and "contingencies" are "nullified" in the original position because the veil of ignorance guarantees that no contractor can make any decisions taking account of any of these things.

We have thus answered our first and second questions together: the antiutilitarian principle and the demand of justice combine to produce the Rawlsian method of the constrained performance and the chief features of the constraints as well. It should be obvious, however, that neither the antiutilitarian principle nor the demand of justice can be justified by the performance. They ground it, and are not grounded by it. The presence of these more fundamental principles in Rawls's scheme does not qualify the character of this theory as one of constrained performance. Those prior principles are not themselves principles of justice, i.e., of rightful claims, but only disqualificatory of all claims hitherto put forth about justice. Being entirely negative, they generate nothing positive: the performance is to generate whatever positive content is possible.

The third major question about Rawls's constrained performance remains to be considered: does the performance generate, as he claims, the two principles of justice? The veil of ignorance substantially simplifies the performance for Rawls. Since it makes all differences among the contractors irrelevant to what happens in the original position, Rawls need not consider a multiplicity of parties with a multiplicity of goals. The veil makes all men equal in the very strong sense of identical. Therefore, all reasoning can proceed with just one "representative man." Whatever principles he will select, will, by definition, achieve unanimous consent.

He will accept whatever principle best satisfies the problem of rational choice he faces: how can he maximize his "pay-off"? Since Rawls understands rational choice in the manner of contemporary economics and decision theory as the selection of the most effective and efficient means to pre-given ends, his veil of ignorance might seem to make rational choice impossible, since the chooser is denied any knowledge of his ends. Rawls circumvents this difficulty by stipulating that the ends toward which the choice is made are "primary goods," defined as "rights and liberties, opportunities and powers, income and wealth." The primary goods are not to commit Rawls, or his hypothetical decisionmaker, to any substantive conception of the good or end of man as such. "Whatever one's system of ends, primary goods are necessary means."¹⁷ Whether this claim

17. *Id.* at 93.

is true or not has been hotly debated in the literature.¹⁸

In any case, Rawls's representative man chooses rationally when he selects the principle that maximizes his holdings of primary goods. Again the veil makes that decision very difficult, or at least very abstract, for he knows nothing of his personal qualities, interests, position in society, or even what society he will be in. The most rational decision under these circumstances might seem to be to choose principles which will produce the society with the highest average quantity of primary goods. But to choose that way would be to choose utilitarianism, and not Rawls's democratic equality. This is the most common criticism of Rawls's reasoning about the selection of principles in the original position.¹⁹

Rawls maintains, however, that in the original position democratic equality would be selected over utilitarianism. While he casts his discussion in the language of game theory, it seems to me that the strongest argument for his position is this: the representative man, selfish devil that he is, will not select a principle like average utility which contains no bar in principle against his good being sacrificed for the good of the others or of the whole. He will prefer the principle of democratic equality which guarantees that the others benefit only when he is benefited. Under democratic equality, he can't be thrown to the lions to amuse the crowd.

As restated here, Rawls's argument is stronger, I think, than it is often taken to be, but it remains vulnerable to many of the objections that have been made to it. The representative man must face the fact that what he gains in security by choosing democratic equality, he may lose in opportunity.²⁰ How should he weigh opportunity against security? As Rawls's critics have said, the answer must depend on attitude toward risk, toward maxima and minima, and ultimately toward lifestyles. But the veil of ignorance forecloses all such information in order to satisfy the demand of justice. Ironically, the demand of justice calls into being the particular kind of performance attempted in the original position, and guarantees that it must fail.

Even conceding *arguendo* that the representative man could deduce something in the original position, it seems most unlikely that it would be democratic equality. Two other principles seem far

18. See, e.g., D. SCHAEFER, *supra* note 9, at 37-38.

19. Consider, e.g., Lyons, *Nature and Soundness of the Contract and Coherence Arguments*, in *READING RAWLS* 160-67 (N. Daniels ed. 1975); Harsanyi, *Can the Maximum Principle Serve as a Basis for Morality?: A Critique of John Rawls's Theory*, 69 *AM. POL. SCI. REV.* 594 (1975); B. ACKERMAN, *supra* note 1, at 339; G. HEGEL, *PHILOSOPHY OF RIGHT* (trans. 1942).

20. J. STERBA, *THE DEMANDS OF JUSTICE* 36 (1980).

more attractive. A position I will call "Pareto equality" (because of its similarity to the concept of Pareto optimality in welfare economics) would seem clearly preferable to democratic equality. Pareto equality would change only one feature of Rawls's democratic equality: rather than accepting only those inequalities that benefit the least advantaged, it would accept all inequalities that do not disadvantage the least advantaged, i.e., inequalities which make nobody worse off but make some better off. Even a risk averse representative man must see this principle as more attractive than democratic equality, since he cannot lose and he might gain from it.²¹

An even more attractive principle is what I call "welfare liberal equality." This is the model of justice that probably is most prevalent in America today. According to welfare liberal equality, justice requires "fair equality of opportunity" together with a "safety net" of social welfare beneath which individuals would not be allowed to fall. Wouldn't the representative man find this more attractive than Rawls's democratic equality, balancing better his security against his opportunity?²²

Rawls fails to consider seriously these two fairly obvious principles. Most likely, he avoids them because they don't completely break the link between the undeserved advantages and the rewards of life. They thus fail to satisfy the demand of justice, even if they may satisfy the antiutilitarian principle; they may follow better from the rational choice of the original position than his own two principles, but they cohere less well with the foundational principles which motivate the whole performance, and which retain primacy within the theory as a whole. Thus criticisms of Rawls which focus on the derivation of the principles in the original position do not reach to the center of his theory.

But Rawls's own democratic equality also fails to satisfy the demand of justice, albeit in a less obvious way than Pareto or welfare liberal equality. Democratic equality, while not directly rewarding the chance or arbitrary factors which the demand of justice requires be nullified, nonetheless preserves rather than nullifies inequalities based on these undeserved inequalities. It allows inequalities which benefit the least advantaged, that is, those inequalities

21. Rawls seems to concede the force of this objection. J. RAWLS, *supra* note 1, at 83. Cf. P. PETTIT, *JUDGING JUSTICE* 177 (1980); A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 131-60 (1970).

22. A lengthy defense of this point is in J. STERBA, *supra* note 20, at 38-57. He spends much space attempting to find a way to specify the minimum. L. THURLOW, *THE ZERO-SUM SOCIETY* 155-214 (1980) also makes some relevant suggestions. Cf. M. BAYLES, *PRINCIPLES OF LEGISLATION: THE USES OF POLITICAL AUTHORITY* (1978).

which are productive of more goods from which the least advantaged benefit by receiving some share. Rawls ties the differential reward to the differential social contribution, but what is it after all which allows the more favored to make their greater contribution? Surely it is the very natural endowment and effort which Rawls has thrown overboard as morally otiose prizes in the natural and social lottery. To reward the greater contributions is in fact to reward the undeserved bases of those contributions and thus to violate the demand of justice.

James Sterba argued recently that this objection "can be shown to rest upon a misinterpretation of Rawls' theory." He concedes that natural endowment and effort would "continue to be assets in the acquisition of social goods, but they will do so in a way that would be acceptable to persons who discounted their knowledge of their own particular natural and social assets, that is, persons using Rawls' decision procedure." The natural assets are not "nullified" altogether, but only partially so, in that while distribution in part continues to rest on them they can be chosen as the bases for distribution by persons ignorant of their own relationship to those natural assets, and thus chosen disinterestedly.²³

Sterba's response, however, ignores the foundation of the Rawlsian theory. The demand of justice is more fundamental than the derivation in his original position, indeed it is determinative of most of the features of the original position. It is not to be suspended on the basis of something derived in the original position. Moreover, Sterba believes that disinterestedness is the only interest the demand of justice is meant to serve. That surely is false; while disinterestedness is an important goal of the demand it is not the only one. The demand of justice requires more—it requires the nullification of natural endowment and effort as the bases for distribution, not simply because people tend to favor themselves, but because these bases are, in Rawls's estimation, morally arbitrary. Sterba reifies the original position too much; it is, after all, merely a device for generating principles which must satisfy certain criteria.²⁴

Not only do Rawls's own principles of justice fail to satisfy his demand of justice, one cannot help but wonder if there are any principles of justice which could satisfy it. I believe the answer is no, and invite the reader to attempt the experiment on any principle he or she likes.

23. J. STERBA, *supra* note 20, at 98-99.

24. Sterba's own modification of Rawls, along the lines of welfare liberal equality, follows also from the same misapprehension of the deep structure of Rawlsian theory.

The demand of justice, then, is the core difficulty of Rawls's theory. Why does Rawls insist on such a problematical principle? The answer, I suggest, is that he has misunderstood the very logic of desert. If justice is getting what one is due, then the basis of desert must ultimately be undeserved. Desert is a relational concept, expressing a relationship between a deserved and a basis of desert. It simply destroys the character of desert to demand, as Rawls does, that the basis of desert be itself deserved. For example, if we say a man deserves some primary good because of some quality or action "x," we can always ask, as Rawls does, "but does he deserve 'x'?" And so on. We then either have an infinite regress of bases of desert, or we arrive at some basis, some beginning point, which the individual cannot claim to have deserved or to be responsible for, but only to have, to have been given. To demand, as Rawls does, that no just claim rest on an undeserved base simply means that we must cease speaking about justice, for on the basis of that demand there can never be any just claims—not even for equality.

Rawls's analysis of justice dissolves the concept of desert and with it of justice. The great failing of Rawls's argument is that he provides no substantive basis for a claim of right or desert. Rawls looks to the constrained performance to supply this lack, but, as we have seen, it does not do so. The other constrained performance liberals, we shall see, can do no better.

II. ROBERT NOZICK'S CONSTRAINED PERFORMANCE: THE FOUNDERING OF THE ANTI- UTILITARIAN PRINCIPLE

Robert Nozick seems to return to an older kind of liberalism with his doctrine of *laissez faire* libertarianism, but his theory also belongs in the Rawlsian tradition of constrained performance. However, the performance and the constraints imposed upon it are as different from Rawls's as are the substantive principles of justice Nozick derives. Instead of Rawls's antinatural original position, Nozick returns to a doctrine of the state of nature much closer to that of Locke. Instead of the contractlike agreement of Rawls (and Locke), Nozick's performance leads to a state which is prohibited from engaging in redistribution for the sake of justice or from enforcing any pattern of justice at all. Nozick's is an even purer performance theory than Rawls's because it has no standards of distributive justice other than the performance: the just distribution is whatever distribution the constrained performance produces, no matter what that might be, no matter how well or badly off the

members of society are under it. This radicalization of the performance is the most distinctive feature of Nozick's theory.

However much he differs from Rawls on the character of the performance or its outcome, Nozick borrows his foundational principle from Rawls. Ironically, his theory derives far more from Rawls, of whom he is a strenuous critic, than from Locke, whom he claims to follow.²⁵ He grounds his theory on the Rawlsian antiutilitarian principle, renamed by him the *Kantian principle*. Nozick is led to modify the Rawlsian structure because he sees with great clarity that Rawls violates his own antiutilitarian principle. In supporting the redistributive formula of democratic equality Rawls sanctions taking the product or property of some, the more advantaged, in order to benefit others, the less advantaged. Rawls even goes so far, under the sanction of the demand of justice, as to consider the natural endowments and efforts of individuals to be a "common asset" belonging not to the individuals themselves, but to the community as a whole. Nozick turns Rawls's first foundation, the antiutilitarian principle, against his second, the demand of justice, when he says, quoting Rawls against utilitarianism, that this common asset view "does not take seriously the distinction between persons." "[T]reat[ing] people's abilities and talents as resources for others" cannot be justified under the antiutilitarian principle.²⁶ Nozick's critique thus complements the one that I have offered. The principles of justice that Rawls derives from the conjunction of his two foundations can satisfy neither the antiutilitarian principle nor the demand of justice.

Nozick thus perceives that the two foundational principles together lead to inconsistent results. One of them must go and Nozick has no difficulty deciding which one: he jettisons the demand of justice as pernicious in its effects and neither intelligible nor defensible in itself.²⁷ The differences between Nozick's constrained performance and Rawls's are largely traceable to the presence in Rawls and the absence in Nozick of the demand of justice. The first difference is obvious: with the demand for the nullification of particularity removed, Nozick can accommodate a state of nature where men are allowed to act on the basis of their particular qualities, needs, and so forth. The demand of justice led to a contradiction with the antiutilitarian principle in Rawls because it led him to attempt to generate principles of justice from the original position where the veil of ignorance covered over the particularity

25. Cf. R. NOZICK, *supra* note 1, at 10-25, 228. See also *id.* at 183.

26. *Id.* at 228.

27. *Id.* at 213-31.

of persons. He then applied those principles, which might be adequate for the sorts of abstractions who live in the original position, to real men who have particularity. This transference led to Rawls's violation of the antiutilitarian principle. Nozick avoids this trap.

Another difference from Rawls is that Nozick builds his performance around constraints that are more strongly responsive to the antiutilitarian principle. Rawls, it will be recalled, begins with a requirement that all must unanimously agree. This requirement is designed to protect the antiutilitarian principle. Nozick modifies this idea by insisting that the contractors must agree in their particularity because they are particulars, and it is only as such that they can (logically) be violated at all. The major constraint, then, which Nozick imposes on his performance is voluntariness or consent, not once for all in some performance that will produce something—rules or whatever—that will then supersede the constrained performance, but in the continuing necessity for the constrained performance itself.

Nozick most frequently refers to the constraints as rights; in terms of the classic Hohfeldian analysis of rights, Nozick's constraints are immunities rather than claim rights. To have a right, for Nozick, means to have a moral claim to be free from the coercive interference of others. To have a right to life, for example, implies a duty on the part of others to forbear from interfering with the right-holder's life, but it implies no duties whatever to supply that person with the means to life. Any other interpretation of rights, Nozick insists, violates the antiutilitarian principle in that it gives some a claim against others without their consent, a kind of involuntary servitude.²⁸

If immunity from coercion is the fundamental constraint on performance, then, since politics is inherently coercive, it would seem that no performance of a political sort is possible. Nozick thus begins with the problem of anarchism—not for any external or abstract reasons, but because the constraint he imposes to actualize the antiutilitarian principle would seem to make anarchy the only morally legitimate situation. Nozick is unwilling, moreover, to make foolish assumptions about human behavior, as some anarchists have done, to the effect that once anarchy is properly instituted men will cease being dangerous to each other. He sees the need for the state, but justification of it under his constraint is a difficult task.

28. *Id.* at 130.

Nozick maintains that there is a performance that can legitimately generate the state and a mode of operation for the state that can continue its legitimacy. He rejects the Lockean social contract: consent cannot be what legitimates a state, for no act of consent in the past can be more significant than present indisposition to consent. Besides, unanimity of consent cannot realistically be posited for the denizens of actual societies. Nozick's performance is not a social contract but an "invisible hand" process whereby men produce a state through a series of morally permissible or even required steps, without aiming at a state at all, and whether they consent or not.

Besides their moral immunity, men in the state of nature also possess a power Nozick follows Locke in calling the "executive power of the law of nature," which is rightful power to enforce their own and others' immunity. The use of coercion to protect against coercion is legitimate, but costly and time consuming. Nozick conceives of various cooperative and other devices whereby men generate a division of labor with respect to enforcing the immunity constraint, culminating in a situation where an entity comes into existence possessing a monopoly of coercive authority, and offering protection to all within its geographic area, whether subscribers or not. Since the state's legitimate coercive power is constructed only from the individuals' "executive power of the law of nature," it can have no more legitimate authority than the individuals themselves had in the state of nature. It can be more effective than they, but it cannot have powers of a qualitatively different kind. Since the "executive power of the law of nature" is only immunity enforcing, the minimal state is the only legitimate state. If the state tries to establish any pattern of justice it necessarily will violate the immunity constraint, or rights. The performance which establishes distributive justice is the voluntary actions of individuals, free from all legal interference other than immunity enforcement.

Does Nozick's performance successfully generate its alleged results? We may state our answer to this question as follows: if the state is valid at all, on Nozick's principles, then he has not succeeded in establishing the legitimacy of only the minimal or night watchman state, that is, of the state which may never redistribute wealth for the sake of satisfying the requirements of distributive justice. But Nozick also fails to establish the moral validity of any state whatever; his performance cannot get him out of the anarchic state of nature and into political society. The problem lies with Nozick's immunity constraint itself: it is too weak to establish the

theory of distributive justice he advocates, and too strong to establish even the minimal state.

Nozick's famous "entitlement theory of justice" holds that the economic outcomes of actions taken in accord with the immunity constraint are the only possible just outcomes. Any other outcome requires an intervention which violates the constraint. But this position requires extending the immunity constraint from the person and action of the individual to parts of the external world which the individuals claim as their own, as their property. This extension proves impossible for Nozick to make successfully.

He follows two rather different strategies in attempting to prove his entitlement theory. He first toys with a theory of "just acquisition," somewhat along the lines of Locke's labor theory in the *Second Treatise*. Nozick does not find Locke's account compelling, and he fails to produce a satisfactory alternative. He identifies the center of Locke's doctrine as the view that "property rights in an unowned object [originate] through someone's mixing his labor with it." But Nozick himself wonders whether "mixing what I own [my labor] with what I don't own" isn't "a way of losing what I own rather than a way of gaining what I don't."²⁹ As for a theory of acquisition of his own, he says "I shall not attempt that task here."³⁰ He does not attempt it, I believe, because none of his principles has any room for it—neither the performance nor the constraint nor the foundation beneath both can generate the kind of relationship that constitutes private property. Nothing in the constraints would seem to require that the claims to ownership of property be respected in the way that the immunity constraint imposes respect for person and liberty. Nozick attempts to get by with only the immunity constraint, grounded in the antiutilitarian principle, but to justify property he needs something more than these.

Nozick seems to believe that even without a theory of acquisition he can show that all redistributive patterns of justice violate the immunity constraint and his Kantian principle. He asserts that redistribution in fact violates a liberty right above all: "Taxation of earnings from labor is on a par with forced labor. . . . [I]t is like forcing the person to work n hours for another's purpose."³¹ According to Nozick, to take "five hours' wages in taxes," is to "force someone to work five hours." But this argument assumes that each person ought to own the full contractual product of his labor. The kind of contract one can make for one's labor depends, among other

29. *Id.* at 174-75.

30. *Id.* at 153.

31. *Id.* at 169.

things, on the resources one brings into the contractual situation. These resources include wealth, ability, and so on. The legitimacy of claims to the full contractual product of one's labor therefore rests on the legitimacy of the relevant distribution of property and other sources of power. Without a way of declaring that one's property is as much and as rightly one's own, and thus as much guarded by the immunity constraint as one's person and liberty (labor), Nozick's argument fails badly. In other words, the argument on taxation and forced labor begins by assuming its conclusion and is valid only under that assumption.

But Nozick's difficulties go deeper than this. Not only his entitlement theory of justice, but the state itself cannot be derived from his constrained performance theory. Or, to put it another way, the performance cannot satisfy the foundational antiutilitarian (Kantian) principle, and is thus in contradiction with its own ground. The minimal state, he insists, derives its rightful, coercive powers from those that individuals possess in the state of nature, i.e., according to the nature of morality. Nozick emphasizes that there can be no source for these coercive powers other than the preexisting powers of individuals. He asserts with great confidence that the "principle that prohibits physical aggression . . . does not prohibit the use of force in defense against another party who is a threat."³² But it is by no means so evident as Nozick asserts that the immunity constraint allows the use of defensive force. Force against others is prohibited presumably because it violates their autonomy, their status as "ends in themselves." But defensive force, even against a violator of the law of nature, a violator of the immunity of others, is as much prohibited by this principle as offensive force. To punish an offender is to treat him as a means to my ends or the ends of the community in general. It is an effort to act against him in such a way as to make my rights and the rights of others more secure. Its effectiveness in deterring his greater threat against our rights is only a utilitarian argument in its favor. It does not satisfy the more stringent moral criterion that Nozick propounds. The only stance consistent with Nozick's moral principle seems to be "turn the other cheek." Without a rightful "executive power of the law of nature" the minimal state cannot be generated. Anarchism, pitched out with a hay fork, returns through the back door.

The central difficulty for Nozick's performance lies in his immunity constraint. He derives that constraint in turn from his foundational Kantian principle. Nozick asks: "[I]n virtue of precisely what characteristics of persons are there moral constraints on how

32. *Id.* at 34.

they may treat each other or be treated"?³³ He rejects as inadequate the usual list of qualities to which appeal is made to ground individual rights—rationality, free will, moral agency. While they may not individually suffice, Nozick thinks that

[i]n conjunction . . . they add up to something whose significance is clear: a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself and hence not merely the plaything of immediate stimuli, a being that limits its own behavior in accordance with some principles or picture it has of what an appropriate life is for itself and others.³⁴

This adds up to more than the original three traits, and amounts to a larger "ability to regulate and guide its life in accordance with some overall conception it chooses to accept. Such an overall conception, and knowing how we are doing in terms of it, is important to the kind of goals we formulate for ourselves and the kind of beings we are."³⁵

The moral significance of this capacity, (i.e., the claim that to exercise it is a right, to interfere with someone else's exercise of it is a wrong) lies in the fact that this is a "[person's] way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life."³⁶ To be an end in oneself, for Nozick, is to give oneself one's own "meaning of life." The content of what it is to be or be treated as an end is even more open than in Kant. Nozick's conception of the free, rational moral being is pregnant with no moral principles of a positive or substantive sort at all, only the immunity constraint.

To be an end is to give one's own meaning to one's life. To be treated as an end is not to be prevented by others from so doing, i.e., not to be forcefully made part of someone else's "meaning of life." But why should the power to give one's own meaning to one's own life preclude sets of meanings which impinge on the meanings of others? What about the person, say a Marquis de Sade, who gives his life the meaning of using others wholly as means for his life plan? Indeed, who sets his life plan in that way precisely because the others are similar beings capable of setting life plans of their own. How much more satisfying it might be to such a person, how much more his meaning is projected into the world, if he forms a life plan which treats others merely as means. Why should the Marquis de Sade be limited, under Nozick's scheme, to recognizing

33. *Id.* at 48.

34. *Id.* at 49.

35. *Id.*

36. *Id.* at 50.

the rights of others? What might Nozick say to him? Of course, for the Marquis to claim the right to treat others as mere means does not mean they have a duty to accept his attempt, nor that he is immune from similar attempts on their part. The fact that others are, like himself, meaning-imposing beings does not of itself seem sufficient, for his effort to impose his meaning, even at their expense, does not deny that fact, but may depend on it for added relish. The fact that life lived in the manner of Marquis de Sade may be insecure or even nasty, cruel, brutish and short, is a good reason for him to recognize rights or claims of others, at least under some conditions, but it is not necessarily a reason to accept the immunity constraint as formulated by Nozick.

Nozick thus fails to ground the chief constraint of immunity. One could say that the moral situation derivable from his argument is indistinguishable from a war of all against all, a war he cannot explicitly resolve in the Hobbesian or Lockean manner because of his strong immunity constraint. Nozick's constrained performance is caught hopelessly between two liberal traditions, between Locke and Kant. The core of Nozick's effort was to go as far as possible with the antiutilitarian principle alone. His foundering reveals the limits of that enterprise.

III. ACKERMAN'S CONSTRAINED PERFORMANCE: THE FOUNDERING OF ALL PERFORMANCE

Rawls tried to build a constrained performance theory on his twin foundations of the antiutilitarian principle and the demand of justice. His own adumbration of that type of theory revealed the untenability of the demand of justice; Nozick's effort revealed the untenability of the antiutilitarian principle. Bruce Ackerman attempts to salvage the method of constrained performance by scraping both of Rawls's foundational principles. He tries to find a way to establish the performance and the constraints on it that will at once be less abstract and therefore produce more determinate results, and less substantive in the constraints it imposes a priori.³⁷ As he writes, he pursues "the old liberal dream of a philosopher's stone by which a commitment to a particular procedure of dispute resolution . . . can be transformed into a commitment to particular substantive outcomes."³⁸

Ackerman's performance is a dialogue, occurring any time a holder of power is challenged to justify it. "Whenever anybody

37. B. ACKERMAN, *supra* note 1, at 5, 49, 367-69.

38. *Id.* at 12-15.

questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is."³⁹ A successful defense is one which says something sensible without violating a number of constraints Ackerman imposes on what may be said. The most important constraint he calls "Neutrality":

No reason is a good reason if it requires the power holder to assert:

- (a) that his conception of the good is better than that asserted by any of his fellow citizens or
- (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.⁴⁰

Ackerman applies his dialogic method with great boldness and some ingenuity to a wide range of difficult issues, including not only such standard ones as property rights but also areas like genetic engineering and liberal education. He proceeds in stages, first developing an "ideal theory," characterized by a number of unrealistic simplifying assumptions, and then a second-best theory, relaxing the simplifying assumptions. Ideal theory assumes a "liberal commander," entirely dedicated to enforcing justice, and able to do so through possession of a perfect technology of justice. While Ackerman professes great hostility to state of nature theory, he begins in a somewhat similar way. He assumes a group of humans deliberating over how to distribute holdings on a virgin planet, where all holdings can be expressed in terms of a perfectly fungible item called manna. Under such conditions the only principle of initial distribution that can be justified, he concludes, is equality. Since no generation can claim priority over any other, all members of later generations have a right to holdings at least equal to those of members of the first generation. From these general principles he derives principles of population policy and inheritance law. Ackerman's principles for governing economic relations are somewhere between Rawls's and Nozick's. He presses the issue of initial holdings much harder than Nozick does, and insists that each generation has a right to what the first generation had. But he does not require a just distribution of wealth at every instant. Free exchange is one of the liberal freedoms that, with qualifications, Ackerman defends.

We must note, in passing, some troubling difficulties with Ackerman's formulation of an "ideal theory." How, in the real world, do we discover the baseline first generation and its baseline holdings? Aside from that, we need to remember that the goods with

39. *Id.* at 4.

40. *Id.* at 11.

which distributive justice is concerned are not pre-given, but come into existence through human labor. Labor, in turn, requires incentives and the issue of justice cannot realistically be treated in isolation from these facts. Moreover, Ackerman's approach to justice in holdings, while meant to be more humane than Nozick's, seems to lead to the same indifference in the face of need. The citizens of his state can claim the liberal education and the initial share of wealth to which they are entitled, but they have no right of any sort to welfare. Are we prepared to say that someone who even improvidentially squanders his or her initial stake and is without other recourse has no claim on the community for even minimal support?

Ackerman's "second-best theory" attempts to adjust to the absence in the real world of either a perfect will or a perfect ability to achieve justice. In place of the commander, Ackerman develops the institutional mechanisms of liberal democracy. In a world where all liberal rights cannot be secured, Ackerman proposes the principle of equal sacrifice, providing that no citizen may be asked to sacrifice more of his or her ideal rights in the real world than other citizens. The liberal state is obliged to take various forms of affirmative action to prevent or remedy such inequities as exist.

With this brief sketch of Ackerman's theory behind us, we may pose to him the same set of questions we posed to our other two theorists. What kind of reasoning sustains Ackerman's turn to constrained performance theory? What reasoning supports the particular constraints Ackerman employs? And, finally, how adequate is the performance for generating the principles of justice he claims it produces?

There is a certain obscurity in Ackerman's presentation of the grounds for the turn to performance, but the chief ground seems to be the very neutrality principle which becomes the leading constraint for his performance theory. Ackerman seems to believe that neutrality necessarily entails neutral dialogue, i.e., dialogue that respects the neutrality constraint as the means of generating principles of justice.⁴¹ But is it clear that neutrality implies dialogue, or that all dialogue is neutral dialogue? What about Socratic dialogue? Socrates sought knowledge of virtue, the good, and so forth, and never treated all "life plans" as a priori equally valid. Conversely, it is not clear why the neutrality principle especially requires dialogic application. If it can be established that the neutrality principle is true, or ought to be taken as the basis for political reasoning, then why not just say we will establish the principles of justice on the

41. *Id.* at 366-67.

basis of reasoning which respects the neutrality principle? Why all the talk about dialogue?

There are at least three reasons, I think, for Ackerman's insistence on the performance-dialogue character of his theory. The first, I suspect, is mere custom: ever since Rawls this type of performance theory has been fashionable. More importantly, Ackerman is driven to posit a dialogic theory because, he believes, he cannot establish in any other way the neutrality constraint itself. To establish neutrality in some nondialogical manner would be to violate the very terms of neutrality itself in that it would require a "claim of privileged access to the ultimate truth." To avoid this, he tries to show that a dialogue should lead people of diverse "ultimate truths" to agree on the neutrality principle. Ackerman's theory is dialogic then at the level of first principles in that it takes the interlocutors' own first principles as the foundation for establishing neutral dialogue as the method of political philosophy. Even if successful at this level, however, that does not make the political philosophy itself necessarily dialogic.

But Ackerman's most important reason for positing the performance dialogue follows from the character of his foundational principle, which (like Rawls's demand of justice and Nozick's Kantian principle) is entirely negative or disqualificatory. Can an entirely disqualificatory principle produce anything substantive or positive? By itself, it cannot, and so the dialogue is meant, somehow, to turn the corner. As we shall see, it cannot do so.

How adequate is the performance for generating the principles proposed to follow from it? This question is more difficult to answer for Ackerman than for the other two, because the performance is not compacted into a few grand moments, as in the derivation of the two principles in the original position, or the tracing of the genesis of the minimal state. Ackerman's performances are many and varied, but nonetheless some core difficulties pervade the whole.

An indeterminacy of result more vicious even than that which beset Rawls vitiates Ackerman's attempt to develop a performance theory. The central problem lies in an area to which we have already adverted: the neutrality principle, the foundation for the whole scheme, is entirely negative or disqualificatory. It tells what sort of principles cannot support just power relations, but neither it nor any other feature of Ackerman's theory supplies a basis for finding principles which will qualify as legitimate.

Ackerman recognizes that it is not enough for some claim to pass the entirely negative or disqualificatory neutrality constraint. So he offers some additional constraints: something must be said,

and that something must be self-consistent (intelligibility constraint), must possess "distinctive merit" (differentiation constraint), and must satisfy the conceivability constraint as well.

To set them off from the disqualificatory neutrality constraint, we might call the other constraints "qualifying constraints." While they are necessary to his theory, they also stand in a certain tension with the overall thrust of his thought. In particular, the extremely problematical differentiation constraint requires that one have some notion of what makes one kind of reason more meritorious than another, and thus that one have some notion of a meritorious argument altogether. To the extent this argument is taken seriously, of course, the performance aspect of the theory as a whole is undermined, for not the performance as such but the meritorious argument as such would generate the rules of justice. The just claim would be the claim that had the most meritorious argument in its behalf, with meritoriousness established entirely prior to the dialogue performance. Thus the dialogue would be entirely irrelevant, and Ackerman would have a theory of the substantive sort he seeks to avoid.

More importantly, Ackerman never specifies what counts as meritorious or relevant argument or claim; all that he does specify, again, is the disqualificatory neutrality constraint. Does that mean that any claim passing through the filter of neutrality will do? That certainly does not seem to be Ackerman's view; at one point he insists, for example, that a claim to manna cannot be sustained on the basis of the assertion, admittedly nonviolative of neutrality, that the sky is blue.⁴² To satisfy the differentiation constraint, a claim must "conceivably count as a justification for a decision rule"; it must not be "totally irrelevant nonsense." But he supplies no basis in general for distinguishing relevant from irrelevant connections between reasons and rules, and it appears that the neutrality constraint prohibits him from doing so. The relevance of a reason can be judged only in terms of some claim on whose behalf it is being pressed. But no claim is or can be simply neutral. To legitimate claims which rest on the lowest common denominator that all claims have in common is not to be neutral, for to reduce a claim to its lowest common denominator (i.e., to treat it in terms of what it shares with all other claims) is to prefer some claims to others. For example, to treat all claims equally and simply as claims is to favor certain claims of a "democratic" sort over other claims of an "aristocratic" sort.

We may see this very general point at work in Ackerman's treatment of the theme of justice in initial holdings. The just rule of

42. *Id.* at 40.

initial holdings, he claims, is equality; the basis for that conclusion is the fact that all human beings can equally claim to have a conception of the "good" and, according to the neutrality constraint, none of these conceptions may be treated as superior to any other. He describes the connection between having some conception of the good, and claims to equal shares of manna, as follows:

While we may disagree about the meaning of a good life, each of us is prepared to say that our own image of self-fulfillment has *some* value. Otherwise, we should be willing to starve while the others took all the manna for themselves. And once we are prepared to affirm the value of fulfilling our own life plan, we may use this initial affirmation as the foundation of a public dialogue of right. Without attempting to evaluate the merits of our competing life plans, we may present ourselves to one another as persons who have undertaken to put a positive value on their conception of the good. Our claims to manna can be based on nothing more—and nothing less—than a dialogic exchange in which each of us describes himself as a morally autonomous person capable of putting a value on his life plan. Given this self-description, it follows that *something* can be said on behalf of initial material equality.⁴³

He seems to believe something can be said, but he is not quite sure what it is. My best reconstruction is this: all affirm the value of their own conception of the good (however this might differ from saying all have a conception of the good); neutrality requires that they not grant higher value to their conception of the good, but must grant all equal value; therefore, all must get an equal share.

What is missing, unfortunately, is what we need—a clear statement of the nexus between having a conception of the good and having a right to any manna. Why is it any more or less relevant to move from having a life plan to having manna than from the sky's being blue to having manna? Some of what Ackerman says suggests an unstated connection to the effect that material goods (manna) are necessary means to the effectuation of any and all conceptions of the good, because after all people have to stay alive.

Since Ackerman never states the reasoning explicitly or carefully, he never seems to notice that, even if we grant him the connection he assumes, it does not follow that manna should be divided up equally, or divided up at all for that matter. Locke, for example, at one point suggests that a more rational rule is that all manna should remain in a common pool, with each using only as much as he or she immediately requires. Why should any more extensive claims to exclusive possession follow from the mere fact of having a conception of the good? Why should any right to achieve or pursue a conception of the good follow from merely having one? Or why not prefer Rawls's approach? To effectuate any conception of the

43. *Id.* at 57.

good, an increase in one's manna is preferable to some fixed amount, and so it would seem rational to follow Rawls toward a rule that attempts to guarantee all more than they would otherwise have by abrogating the requirement of equal shares. While Ackerman does not explicitly discuss Rawls's alternative rule, he does not follow him for reasons that are probably implicit in his great emphasis on the neutrality constraint: a rule favoring "more" does not equally or neutrally favor all conceptions of the good. It favors conceptions of a more materialistic sort, and disfavors those who are, for example, more ascetic in taste, or who value equality over plenty. To be truly neutral over conceptions of the good forbids building in a bias toward more in the primary distribution rule. Of course, we must make the obvious observation that the equality rule can no more escape favoring some conceptions of the good over others than Rawls's democratic equality can.

Moreover, is it true that all men grant the necessity of possessing manna? If so, why? Surely not because of the mere existence of a conception of the good: there is, for example, no inherent or logical reason why a conception of the good as such must affirm life over death, existence over nonexistence. Ackerman's professed model, Socrates, himself points this up when he declares that his knowledge of his ignorance leads him to wonder whether death is not the greatest good.⁴⁴

Neutrality seems to require that the ends, or "conception of the good," be left entirely indeterminate, while the differentiation constraint requires some determinativeness whereby judgments of more or less adequacy and relevance may be made. Both constraints may not be pressed equally. If neutrality is given more weight, the result of the dialogue is perforce as indeterminate, or more so, than Rawls's deduction in the original position. If the qualifying constraints are pressed, then not only must Ackerman violate the deep rooting of the whole theory in neutrality, but he must give up the performance mode.

For the most part, Ackerman tries to stay true to the insight expressed in the neutrality constraint. Another example shows how difficult he finds it to generate positive, determinate, and satisfactory principles with that constraint. He applies his method of constrained performance to, among other things, questions of "birth rights." Are there duties to have children (no), a right to abortion (yes), a right to infanticide (no), a right to engage in genetic engineering (no)?

44. PLATO, *The Apology of Socrates*, in *FOUR TEXTS ON SOCRATES* 11-36 (T. West trans. 1983).

His defense of abortion leans heavily on the performance side of his theory. Citizens are those who can raise for themselves dialogic questions with others. They and only they receive the protection the dialogic performance provides. Thus Ackerman rejects claims to rights on behalf of animals, trees, canyons, outer space, and fetuses.⁴⁵

The simple truth is that a fetus is *not* a citizen of a liberal state. While it may possess a humanoid body, we have seen that citizenship is not a biological category. A liberal community does not ask what a creature looks like before admitting it to citizenship. Instead, it asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal polity. The fetus fails the dialogic test—more plainly than do grown-up dolphins.⁴⁶

The fetus itself has no dialogic rights on its own account, and any attempts to intervene to protect fetuses on any other grounds, for example, religion, run afoul of neutrality. Abortion is therefore just, or rather, given the structure of Ackerman's theory, interference with abortion is unjust.

Now, what of infanticide? As Ackerman says, an "infant is no more a citizen than a nine-month fetus."⁴⁷ Yet he hesitates to draw the conclusion that seems to follow; instead he tries to find a "liberal argument for denying citizens the right to kill their newborn children." He finds two such arguments. The first concerns rights of infertile parents who might wish to adopt a child. That argument has two great difficulties, however. First, it is relevant only under certain "second-best conditions," which are, by Ackerman's own hypothesis, irrelevant to the stage of the argument he is presenting at this point. Or, to put it otherwise, even if the second-best argument holds, he would seem to have to admit that in the ideal conditions he hypothesizes, infanticide is perfectly acceptable, at least so far as the adoptive parents argument goes.

The second failing of that argument is even more serious. Since infertile parents may have it as part of their life plan to rear children, the liberal state may not forbid them various means whereby they might attempt to fulfill their plans. For example, there must be a legal possibility for adoption, artificial insemination, test-tube babies, and so on; the state must not interfere with their right to procure a baby via some sort of transaction, just as the state may not deprive citizens of most other rights to transactions they desire. But as Ackerman insists in his treatment of transaction, one's right to engage in a transaction imposes no obligations on any

45. B. ACKERMAN, *supra* note 1, at 18.

46. *Id.* at 127.

47. *Id.* at 129.

other to engage in that transaction.⁴⁸ Furthermore, no citizen has a right to have his or her desire fulfilled.⁴⁹ And every citizen has a right to dispose of, even to destroy, things which he possesses. "Neutral conversation legitimates acts of self-sacrifice no less than efforts at self-affirmation."⁵⁰ Putting all this together, what basis could adoptive parents of the liberal state have for forbidding parents from pursuing a life of "self-sacrifice"—or would it be "self-affirmation"—in the destruction of their infants?

Ackerman has a second argument against infanticide. He developed earlier the legitimacy of a law against "wanton cruelty." "In the present case, the 'natural' parents have it within their power simply to pass the child on to another, yet they prefer to kill it instead. What other reason can they give for their action but their desire to impose pain upon mute creation?" Now since they are obliged to "give reasons" only to proper dialogic partners, and since the infant is not such, their ability to answer the question would seem quite beside the point, as may be seen by trying the same argument out in relation to the ascetic who has the right to destroy his manna, no matter how many others are lined up eager to obtain it.

In any case, there may be several answers the parents could give. They might have come to believe that life is horrible and want to save their child from much suffering. Or, they may just get their kicks this way—as part of their "conception of the good." Who can then say they are wrong, under the principles of neutrality? Yet Ackerman believes the liberal state may prohibit infanticide:

[T]reating everything as if it were manna for citizen exploitation may be taken as an unsatisfactory expression of the liberal community's principled agnosticism about the "proper" relationship between the state and the larger universe. Thus, the citizenry might choose to preserve the Grand Canyon or some other natural monument in its pristine condition as a mark of its collective uncertainty about the extent to which it may exploit the world for its own purposes; in the same spirit, it may restrain acts of wanton cruelty where the *only* reason a citizen has for abusing an animal is to see it suffer.⁵¹

The "principled agnosticism" of which Ackerman speaks follows from the fact that "none among us can set himself up as a privileged spokesman for mute creation. . . . No political faction may declare that it has finally unlocked the ultimate mysteries of the universe."⁵²

The whole notion of "principled agnosticism," when imposed

48. *Id.* at 168-200.

49. *Id.* at 45-53.

50. *Id.* at 61.

51. *Id.* at 128.

52. *Id.* at 102.

on individuals, violates neutrality just as much as the imposition of any other religious or metaphysical belief. To be free to have one's own conception of the good means, Ackerman insists, to be free to be an atheist, a believing Catholic, a spiritualist, or whatever. Surely the way in which the liberal state expresses its principled agnosticism is by not imposing any views on or taking any actions motivated by such views against its citizens. That is, they must be left free to be atheistic, religious, materialist, or ascetic as they choose.

Is it not obvious that this whole construction of a prohibition against infanticide, against destroying the Grand Canyon, in favor of "principled agnosticism" is just a patch, intended to shut out conclusions which follow from Ackerman's basic principle but which he hesitates for reasons of decency to endorse? The problem here seems to follow most especially from Ackerman's failure to specify what a person is, and what moral protection a person is entitled to, and to what moral duty he or she is subject. Surely he fails to do so because of what has followed from every previous attempt to probe this issue: to discern what it is to be a person and on what basis persons deserve moral consideration is to point toward some substantive moral conclusions which overstep the bounds of the neutrality principle. Neutrality alone leaves him with an unacceptable position, which amounts to nothing other than that we may do whatever we like. Ackerman's performance is on the one hand as indeterminate in its results as Rawls's and on the other hand as prone to collapse into the war of all against all as Nozick's.

Ackerman's theory is merely an updated version of a rather naive theory which had great vogue in some circles not so many years ago, and remains the standard undergraduate thought on the subject of democracy. This theory finds moral relativism supportive of democracy because if "all values are relative," or if all moral judgments are merely subjective preferences, and thus equal as preferences, then the preferences of the majority should rule. Many adherents of this view became convinced that challenges to the doctrine of moral relativism necessarily were also challenges to democracy.⁵³ These ardent democrats failed to notice, however, the simple logical error they were committing. If all "oughts" are equally merely subjective preferences, it by no means follows that the preferences of the majority ought to prevail. That conclusion is not somehow of a higher order and immune from the corrosive effects of its own major premise; it is itself merely one subjective pref-

53. For a lengthy discussion of the emergence and content of their theory within American political thought, see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1980).

erence, with no more authority than any other. While Ackerman's position is not identical to this one it nonetheless has exactly the same difficulties. From simple relativism, one can only arrive at simple relativism. Dressing up your conclusions as the results of so-called dialogues doesn't change this at all. As with Rawls and Nozick, then, what prevents Ackerman from developing a satisfactory account of justice is the very foundational principle which gives rise to his entire theory, in his case, the neutrality principle.

Why did he adopt that principle in the first place? He argues that a wide variety of routes, beginning at very different points, all lead to neutral dialogue. I will not even bother the reader with a reference to these many different paths, for he concedes, although somewhat indecisively, that they may just as well not lead to neutral dialogue. It is difficult to know how seriously one ought to take any of these arguments, since they depend heavily on caricatures of the opposition and wild jumps in logic to reach their conclusions.

Ackerman seems to invest one of his arguments, the most far-reaching and only potentially adequate one, with a certain priority. He calls it the argument from "liberal skepticism." Liberal skepticism is the conviction that "[t]here is no moral meaning hidden in the bowels of the universe." This, says Ackerman, is the "hard truth."⁵⁴

Yet [Ackerman says] there is no need to be overwhelmed by the void. We may create our own meanings, you and I; however transient or superficial, these are the only meanings we will ever know. And the first meaningful reality we must create—one presupposed by all other acts of meaningful communication—is the idea that you and I are persons capable of giving meanings to the world.

Yet this is just the achievement of a neutral conversation. . . . By speaking to one another in a Neutral way, we both succeed in giving our struggle a meaningful form.⁵⁵

All this resembles nothing so much as Nozick's discussion of the grounding for his Kantian principle. Ackerman's neutral dialogue can no more grow from these roots, however, than did Nozick's foundational principle. One would be tempted to remonstrate with Ackerman that neither dialogue nor neutrality follows logically, psychologically, or morally from this "hard truth," if he did not himself preempt the point by observing, echoing Nietzsche, that "[i]f God is dead, everything is permitted."⁵⁶ Beneath the performance, beneath the constraints, lies nihilism. Ackerman, while philosophically not as adept or interesting as the other two, brings out with greater clarity than they do the fundamental character and

54. B. ACKERMAN, *supra* note 1, at 368. *Cf. id.* at 11, 365.

55. *Id.* at 368.

56. *Id.* at 369.

significance of constrained performance liberalism. It is both an expression of and an attempt to overcome the unresolved problems of nihilism as proclaimed by Nietzsche. They prove once again, if it needed to be proved once again, *nihil ex nihilo*.

Perhaps Ackerman brings the nihilism more into the open than the others, but it is equally there in, for example, Rawls's demand of justice, which dissolves moral claims of all sorts and overcomes the essentially moral commitment of his antiutilitarian principle. Nihilism appears also in Nozick's conclusion that the only possible implication of the Kantian principle is the immunity constraint and not a positive or substantive conception of any sort of what it is to be a free, rational, self-determining being. As we have seen, Nozick cannot even preserve the immunity constraint from the dissolving force of his conception of freedom.

All three theories begin with a strong desire to preserve "the moral point of view" that there are standards of moral and political right, that each individual is a moral entity with moral duties to his fellows, and moral claims against them. But they ground or combine this aspect of their theory with a conception of freedom so indeterminate as never to be able to bear any particular content in itself. The content is thus to be supplied in the performance, but the performance cannot rise above the nihilistic notion of freedom that permeates it.

Unable to supply any content via the performance, except perhaps "do whatever you like," performance theory proves unable to keep hold of the moral point of view with which it begins. The question most forcefully posed by the failure of performance theory is this: is it possible to develop a moral position on the basis of the liberal principle, that is, on the basis of freedom? Performance theory is instructive because it raises that very radical question. Performance theory is disheartening because its failure suggests that the answer is "no."

But performance theory is not necessarily the last word of a dying liberal tradition. Must liberalism grasp freedom in the nihilistic manner of the performance liberals? Nothing they say seems to establish any such necessity, but the challenge of overcoming nihilism, of which their effort is a token, remains liberalism's most pressing task.⁵⁷

57. Relevant to this question of liberalism's ability to overcome nihilism are the works of Hegel on the one hand and Leo Strauss on the other.