

SELF-OWNERSHIP, ABORTION, AND THE RIGHTS OF CHILDREN: TOWARD A MORE CONSERVATIVE LIBERTARIANISM

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For many libertarians, the thesis of self-ownership is the foundation of their political philosophy.¹ Natural rights to life, liberty, and property—the protection of which is, according to the libertarian, government’s sole legitimate function—derive from self-ownership, in particular one’s ownership of his body and its parts, of his capacities and labor, and, by extension, of whatever he can acquire by his non-coercive exercise of them. One famous implication of this is that redistributive taxation of earnings from labor, of the sort advocated by socialist and liberal egalitarians for the purposes of equalizing the outcomes of free market competition and enforcing some allegedly more “fair” pattern of income distribution, is unjustifiable and, indeed, positively unjust. Another well-known implication of this view is that government cannot legitimately interfere with an

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¹This is certainly true of the version of libertarianism that has received the most attention from political philosophers, Robert Nozick’s *Anarchy, State, and Utopia* (New York: Basic Books, 1974). For a discussion of the role played by self-ownership in both Nozick’s philosophy and in libertarian political philosophy generally, see Edward Feser, *On Nozick* (Belmont, Calif.: Wadsworth, 2003), chap. 3.

individual's use of his body, abilities, etc., where that use does not involve the infringement of the rights of others, even when that individual's use is otherwise immoral. Even if, for example, one decides to use narcotics or to drink oneself into a stupor night after night, the state has no right to stop him from doing so.

It must be emphasized that the implication here is, strictly speaking and contrary to a common misconception about what libertarianism holds, *not* that whatever “doesn't hurt anyone else” is morally acceptable. Rather, a behavior, however morally unacceptable, that doesn't involve a rights violation also doesn't justify government interference. The drug addict or alcoholic might be worthy of moral criticism, but that by itself does not entail that he may properly be imprisoned, fined, or in any other way punished by the state. His use of his property—i.e., himself—may well be *abuse* of it, for which he ought to be held in contempt. More charitably, he should perhaps be strongly encouraged and even helped, non-coercively, to cease such abuse. Still, just as your neighbor's failure to keep his car in running order or to water his backyard lawn doesn't justify you in paternalistically forcing him to change his ways—they're *his* car and lawn, after all, and it's *his* responsibility to take care of them—so, too, neither you, the state, nor anyone else has the right to interfere *forcibly* with an individual's abuse of himself. By the same token, just as your neighbor has no right to coerce *you* into paying for a new car or lawn after he has foolishly neglected them, neither does the addict or alcoholic have the right to force you, either directly or indirectly through the taxation used to support rehabilitation programs, to pay for the consequences of his folly—though, of course, it may be admirable, and perhaps in some cases even morally required, for you *voluntarily* to provide such help. Self-ownership goes hand in hand with personal responsibility.

That, at any rate, is the standard picture of what libertarianism entails with respect to the enforcement of moral principles. Moral principles involving rights—e.g., principles forbidding killing, stealing, etc.—are properly enforceable by the state. Those which do not involve rights, but rather involve the inculcation of virtues and the avoidance of vices, such as principles forbidding drug abuse or sex outside of marriage, are properly enforceable instead through the everyday practices of moral praise and blame.²

²For an influential statement of the opposing view that government *may* legitimately enforce the latter sort of principles, see Robert P. George, *Making*

One advantage claimed for this view is that, though it by no means entails any kind of skepticism or relativism about morality, it does at least allow us to avoid having to *settle* disputes about moral issues about which there is great disagreement in modern society, and thus can facilitate social harmony. People who disagree about, say, whether homosexuality should be regarded as immoral or as a legitimate lifestyle need not come to blows. Traditionalists are free to live in accordance with their views and to promote them within their own institutions—private associations, schools, places of business, churches, etc.—and “liberationists” can do the same within *their* institutions. This is one reason that libertarians hold that schools ought to be privatized and anti-discrimination laws abolished: such laws, and public education, inevitably involve the imposition of some people’s moral views on others.

The libertarian does not *absolutely* rule out such things, however. Any community, of whatever size, is free to impose any restrictions on its members that it likes, provided that *all* members of the community *consent* to the restrictions. It is fully consistent with libertarianism that, for example, a group of Puritans decide together to settle a territory and institute a religious commonwealth, or that a group of communists set up a socialist republic. What is ruled out is Puritans or communists imposing such a system on *everyone else*, on a community not *all* of whose members consent to it.³

While libertarianism has often been allied politically with conservatism, it is sometimes claimed that these philosophies inevitably conflict with one another—that the libertarian’s insistence on non-interference is incompatible with the conservative’s concern to defend the traditional moral order. In fact, though, there is no *essential* tension between them, even over questions of sexual morality, “family values,” and the like. A libertarian state need at worst be indifferent to conservative moral scruples, not hostile to them; and a conservative state may see fit to leave the sustenance of the moral order to the actions of private individuals, rather than to the machinery of government.

Men Moral: Civil Liberties and Public Morality (Oxford: Clarendon Press, 1993).

³See Nozick, *Anarchy, State, and Utopia*, chap. 10. However, as we’ll see shortly, some significant qualifications to this characterization of the libertarian position may be in order when the full ramifications of self-ownership are understood.

It might appear, though, that on the issues of abortion and the rights of children, conflict between libertarians and conservatives *is* inevitable; and these issues have, admittedly, always been tricky ones for libertarianism. To take the latter first, as human beings, children are to be counted as self-owners. Yet, they are typically under the control of their parents, forced to do many things they do not want to do, and forced not to do certain things they do want to do, including things that do not involve rights violations. Is this control incompatible with libertarianism? Ought the libertarian to advocate, in decidedly unconservative fashion, a program of “children’s liberation”? But while libertarians no doubt hold different views on this matter, in practice at least, the mainstream (and surely the sane) libertarian view is something like this: Children are self-owners, but as they are not fully developed, and lack the knowledge, experience, ability, etc., properly to understand what is in their own best interests, they are, in effect, “held in trust” by their parents, who act as *stewards* of the children’s property (i.e., themselves) until such time as their children reach maturity. Parents, thus, have the right to bring up their children in line with their own moral principles, and to force their children to live in accordance with those principles, at least until the children reach adulthood, at which time they become *full* self-owners, no longer under the authority of their parents and responsible for themselves.

Abortion might seem a greater source of tension between conservatives and libertarians. After all, it is sometimes said that libertarianism involves being “pro-choice about everything,” but that is not necessarily so. True, if it is denied that a fetus is fully human or a person, then the state would seem to have no grounds for interfering with the decision to abort. However, if a fetus *is* a human being or a person, then it is plausible to regard it also as a self-owner, in which case there may arguably be at least some instances in which the state is *required* to stop an abortion (since an abortion would, on this view, be a violation of the self-owning fetus’s right to life). Accordingly, while some libertarians are “pro-choice,” others are “pro-life”—the difference stemming from a disagreement over the moral status of the fetus.

At the very *least*, then, libertarianism as such is *neutral* with respect to conservative attitudes, even on the issues of abortion and children’s rights. That the political alliance between libertarians and conservatives has persisted as long as it has is, thus, hardly the miracle that many political analysts and activists have alleged it to be.

However, I suggest that the relationship between libertarianism and moral conservatism goes beyond bare compatibility. A proper

understanding of the fundamental libertarian principle of self-ownership might actually entail not just *tolerance* of conservative attitudes with regard to abortion and children, but enthusiastic *endorsement* of those attitudes, and perhaps even the writing of them into law. Self-ownership, rightly understood, not only does not entail the freewheeling libertinism so often presented as a caricature of libertarianism, it entails instead a polity, though recognizably libertarian, of an unmistakably, even radically, morally conservative character. Accordingly, many of the moral issues that libertarians assume can be safely bracketed off as, however intrinsically important, nevertheless irrelevant to public policy simply *cannot* be thus avoided. On these issues, libertarians *must* take a stand, indeed a conservative stand. To be consistent libertarians, they must become conservatives.

SELF-OWNERSHIP

The thesis of self-ownership is the claim that each individual has absolute ownership of himself—of his body and its parts, his talents, abilities, capacities, and labor. It is usually taken by libertarians to be as obvious and intuitive a moral first principle as one could ask for, but there are also a number of arguments given in its defense. One such argument holds that unless one acknowledges self-ownership, one has no way of explaining the injustice of certain practices that clearly are unjust, such as slavery and (to take a popular and vivid, though grisly, example) forced eyeball redistribution. It isn't just the bad treatment a slave suffers that makes his slavery unjust, for it is unjust even if the slave is treated well; nor is taking one of someone's eyeballs by force justified even if it is done to help someone who is blind, and even if it can be done painlessly. The reasons why these things are unjust can only be because the slave already *owns himself*, and, thus, cannot be justly owned by another, and because people *own* their eyeballs, and, thus, cannot be forced to give them up for any reason.

Other arguments for self-ownership appeal to the need for an individual to have the autonomy guaranteed by the rights entailed by self-ownership if he is to be capable of living a life of virtue, since development of moral character requires the capacity for *moral choice*, and, thus, the free exercise of one's capacities; or to the necessity for such rights as a precondition of the fulfillment of one's nature as a pursuer of projects capable of rationally formulating and carrying out a plan of life; or to the incoherence of denying self-ownership, given that

the very use of one's rational faculties and body parts in formulating such a denial presupposes ownership of those things; and so forth.⁴

Whatever deeper justification one might seek to give the principle, however, it clearly has a very high degree of *prima facie* plausibility—at least as much as any foundational principle put forward by opponents of libertarianism. Indeed, it arguably has a *higher* degree of *prima facie* plausibility: the average person is more likely to find self-ownership believable than he is, say, a principle of equality of the sort appealed to in defense of an egalitarian redistribution of wealth (a principle which, incidentally, its defenders almost *never* try to justify).⁵ Even some critics of libertarianism go so far as to admit the intuitive plausibility of self-ownership, grant that it cannot be refuted, and justify their rejection of libertarianism on the (alleged) grounds that the principle at least hasn't been *proved*.⁶

In any event, proving it isn't my task here.⁷ My aim is to draw out the conservative implications of the principle. One might think there to be a *prima facie* conservative *objection* to the principle, namely, that it is inconsistent with conservative attitudes concerning morality and religion. After all, if I own myself, doesn't it follow that I can, *morally*

⁴See Feser, *On Nozick*, for detailed references and discussion of some of these arguments.

⁵And I do mean a principle of *equality*, not a principle endorsing help to the poor or otherwise less fortunate, which is a very different sort of principle, however much egalitarians often, and perhaps intentionally, confuse them. The average person, I submit, clearly finds compelling the claim that the poor ought to be helped; he does not, at the end of the day, find compelling the notion that everyone ought to have strictly *equal* shares of wealth, even if he occasionally might feel resentment against those better off than himself. If one doubts this, one ought to keep in mind that whereas right-wing politicians appealing to the right to keep the fruits of one's labor (to self-ownership, in effect), and left-wing politicians appealing to the plight of the needy, have had success in democratic societies, politicians appealing to *equality per se* have not. Strictly egalitarian policies, where they have existed at all, were *imposed* on unwilling populations.

⁶Marxist G.A. Cohen is the chief representative of this attitude. See his *Self-Ownership, Freedom, and Equality* (New York: Cambridge University Press, 1995). For criticisms of Cohen, particularly of his attempt to show that the injustice of slavery and eyeball redistribution can be explained apart from self-ownership, see Feser, *On Nozick*; and Edward Feser, "Taxation, Forced Labor, and Theft," *Independent Review* 5, no. 2 (Fall 2000).

⁷See Feser, *On Nozick*, chap. 3, for a defense of the principle.

and not just legally speaking, do anything I want with myself, since it's my own property I'm using—including engaging in certain sexual and other behaviors frowned upon by conservative moralists? And doesn't the claim of self-ownership conflict with the religious notion that we belong to God? The answer to both questions is a firm No.

The reason why the first claim doesn't follow has already been hinted at. Your ownership of your car or lawn does *not* entail that any decision you make in using those things is as good as any other; your full ownership of them is consistent with your being subject to criticism for using them wastefully or foolishly. Similarly, your full ownership of yourself is perfectly consistent with some "uses" you make of yourself being foolish, wasteful, irrational, etc. If we take, as I recommend, an Aristotelian approach to ethics, according to which human beings have by nature certain capacities the fulfillment of which constitutes the good for them as rational beings, foolish and irrational uses of oneself will, accordingly, be *immoral* uses subject to criticism as severe as the conservative moralist would wish to make.

Regarding the second point, self-ownership is no more inconsistent with God's ownership of us than our ownership of private property is inconsistent with God's ownership of the entire universe. Though the religious believer takes God to own everything, this nevertheless is compatible with the belief that He also allows us to take portions of the external world for our own exclusive use. Relative to Him, we are but stewards of what we possess and He owns; but relative to each *other*, we are owners of what we possess. (Indeed, there are *two* Commandments—"Thou shalt not steal" and "Thou shalt not covet thy neighbors' goods"—giving divine sanction to claims of private ownership.) But surely the same thing is true, and indeed more obviously true, of *ourselves*: relative to God, we are but stewards of His property, but relative to each other, we are self-owners. (And of course, this entails that, though we may not be answerable to each other with respect to every use we make of our selves, we *are* answerable to *God* for every use.⁸)

The deeper harmony of self-ownership and moral conservatism can only fully be seen, however, by attending to a distinction between

⁸This may have implications, however, which some contemporary libertarians might find uncomfortable. For example, it would plausibly rule out suicide as inconsistent with God's ultimate ownership of one's self. But even John Locke, whose work is the source of modern self-ownership-based political thought, held suicide to be morally illegitimate for precisely this reason.

what we might call *formal* vs. *substantive* self-ownership. Suppose Bob is sitting on a park bench, peacefully watching squirrels scamper about, and Fred sneaks up behind him and strangles him to death. Clearly, Fred has violated Bob's rights of self-ownership, invading as he has Bob's personal space without his consent and directly inflicting damage on his self-owned windpipe. But suppose that Fred goes nowhere near Bob, and instead, from a block away, activates a device which sucks away all the air in Bob's vicinity, leaving Bob in a vacuum in which he passes out and quickly dies. Has Fred violated Bob's rights of self-ownership in *this* case?

Fred might plead innocent on the grounds that he never laid hands on Bob. Further, he might insist quite sincerely that he had no particular desire to kill Bob, but wanted instead only to take all the air—Bob's death was simply a (regrettable, he might generously allow) side-effect. And Fred might also claim that Bob's self-ownership rights have, in any case, not been violated: Fred has not deprived Bob of anything Bob owned by virtue of being a self-owner. He never took, inflicted damage upon, or even so much as *touched* Bob's neck or windpipe, nor his lungs, arms, legs, or any other part of his body. It just so happens that those things don't keep working when there's no air around, but that's not *Fred's* fault.

Surely we can be forgiven for regarding Fred's defense as less than compelling, however casuistically ingenious. It is true that he has not deprived Bob of any *formal* rights of self-ownership; he's left Bob and his self-owned body parts, abilities, etc., unmolested, for all the good this does poor Bob. Clearly, though, he's deprived Bob of any *substantive* rights of self-ownership. He has put Bob in a situation that makes him utterly *unable to exercise* his self-owned powers, abilities, and so forth, rendering them as useless as if Bob had not owned them at all. In a famous story about Wittgenstein, Norman Malcolm says:

On one walk he "gave" to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth *mine*.⁹

The reason this story is amusing is that the "ownership" that Wittgenstein facetiously offered Malcolm was, at best, purely formal—

⁹Norman Malcolm, *Ludwig Wittgenstein: A Memoir* (Oxford: Oxford University Press, 1958), pp. 31–32.

barely distinguishable from the absence of ownership. *Meaningful* ownership of something—whether a tree or oneself—cannot be purely formal; it must involve at least the possibility of substantial use of what is owned.

Libertarian philosopher Eric Mack has suggested that respect for others' self-ownership rights entails abiding by restrictions on the use of one's own property and self-owned powers enshrined in what he calls the *Self-Ownership Proviso* (SOP).¹⁰ One's self-owned powers, abilities, capacities, and so forth, are, Mack argues, inherently *world-interactive*—it is of their essence that they are directed upon the environment external to one's body. One's hand, for example (my example, not Mack's), is, by its nature, something used for grasping and manipulating, where what is grasped and manipulated must of necessity be something external to it.

Even non-invasive use of one's property and powers can violate another's self-ownership if it effectively nullifies or disables the other's ability to bring his self-owned powers to bear on the world, that is, if it renders another's ownership purely formal, not substantive. Choking Bob invasively violates his self-ownership, but removing all the air from his vicinity also violates it, however non-invasively. Cutting off your hand invasively violates your self-ownership, but your self-ownership is also violated, non-invasively, if instead, to use an example of Mack's, I activate a device that causes to disappear everything you ever try to reach for with your hand.¹¹

Or consider an example that Mack refers to as "Adam's Island": Suppose the shipwrecked Adam washes up on a previously uninhabited island, which he proceeds to make his own by mixing his labor with it in the manner of Locke's theory of property. Suppose further that Zelda later becomes shipwrecked, and will drown unless Adam allows her onto his island.¹² May Adam justifiably refuse to allow her ashore, seeing as it is, indeed, *his* island? Mack argues that he may not, since this use of his property would, however non-invasively, violate Zelda's self-ownership in that it would effectively disable her

¹⁰Eric Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," *Social Philosophy and Policy* 12, no. 1 (Winter 1995). I should note that Mack would probably not endorse the use to which I will be putting his proviso.

¹¹Mack, "The Self-Ownership Proviso," p. 187.

¹²Mack, "The Self-Ownership Proviso," p. 187.

capacity to use her self-owned abilities. Genuine respect for others' self-ownership thus entails that one abide by the SOP—that one refrain from using one's own powers and property in a way that nullifies the self-owned powers of others.¹³

Taking self-ownership seriously thus entails endorsing the SOP. But this, as we are now in a position to see, means that respecting self-ownership requires taking a decidedly conservative position concerning abortion and the rights of children.

ABORTION

Judith Jarvis Thomson presented a famous argument in defense of abortion which many libertarians have found congenial.¹⁴ The argument goes roughly like this. Suppose you awaken one morning to find that you have been attached surgically to a famous violinist, whose circulatory system is now, like yours, making use of your kidneys. A group of his admirers, fearing that he would die of a rare kidney disease he has, and knowing you to be the only person in the vicinity with his blood type, kidnapped you for the purpose of keeping him alive. Though they regret putting you through this, they say, they nevertheless insist that you not unplug yourself from the violinist, since he will die if you do so. In any case, as they will only need you to remain attached to him for nine months (after which he can, for whatever reason, be cured), the discomfort and inconvenience you are being put through will be only temporary. Now, morally speaking, must you subject yourself to this? Thomson says that you need not. You have a right to your body, and neither the violinist nor his admirers ever got your consent to do to you what they've done. Thus, they can have no complaint if you unplug him. True, it would be charitable and morally admirable of you to refrain from unplugging him, but it would not be unjust if you don't refrain. He has *no right* to the use of your body. He does have a right to life, but that just means

¹³For a detailed defense of the SOP against a variety of objections, see Edward Feser, "There is No Such Thing as an Unjust Initial Acquisition," *Social Philosophy and Policy* (forthcoming); also in *Natural Rights Liberalism from Locke to Nozick: Essays in Honor of Robert Nozick*, ed. Fred D. Miller, Jr., Ellen Frankel Paul, and Jeffrey Paul (forthcoming).

¹⁴Judith Jarvis Thomson, "A Defense of Abortion," in *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge, Mass.: Harvard University Press, 1986).

he has a right *not to be killed* by you or anyone else; it does *not* mean he has the right *to be kept alive* by you at your expense. By unplugging him, you would, strictly speaking, not be killing him anyway—it is at least possible that, by some medical miracle, he will survive. Instead, you would at most be letting him die, and though this would be regrettable, it would not constitute an injustice on your part.

According to Thomson, this situation parallels the typical case of aborting an unwanted fetus. In having the abortion, the mother is not, or need not be, positively killing the fetus, but only letting it die. In any case, she does not consent to the use of her body to keep the fetus alive any more than you would have been consenting to have the violinist attached to you. Thus, the abortion involves no injustice—and this is true, Thomson says, *even if* (as she grants for the sake of argument) the fetus is a person with a right to life, just as unplugging yourself from the violinist is not unjust, despite the fact that *he* is a person with a right to life.

There are a number of problems with this argument. For starters, it is not clear how it would justify any abortion that *does* involve the direct killing of the fetus, and not just its detachment, after which the mother merely “lets it die”; the vast majority of abortions are surely of the former type. Further, it isn’t clear how it would justify any abortion other than in the case of pregnancy resulting from rape, with which the kidnapping by the violinist’s admirers is analogous. Surely a pregnancy resulting from *consensual* intercourse—which, as everyone knows, has a chance of resulting in pregnancy even when contraception is used—is *not* analogous to Thomson’s example.¹⁵

¹⁵Thomson appears to try to get around this by appealing to another example, in which we are to imagine people coming into existence when “people seeds,” which float through the air, enter into homes and grow into human beings after embedding themselves in carpet. Assuming that a woman took reasonable precautions—keeping the doors closed, putting up screens, etc.—and nevertheless found that some people seeds had gotten through, surely we should say that she’d be justified in destroying those that land on her carpet. Then, Thomson claims, it follows that we should also allow that a woman who seeks an abortion after taking reasonable contraceptive precautions to avoid pregnancy ought to be able to have one if pregnancy nevertheless results. Surely, though, the disanalogy here is obvious: sperm is hardly as difficult to avoid as Thomson’s people seeds are, and unlike the latter, one has positively to *do* something to get it, something one is fully capable of refraining from. It is not as if we are, as with the people seeds, constantly bombarded with it.

The most important problem for our purposes, however, is that it seems that an abortion, though it might in principle respect the fetus's *formal* rights of self-ownership (as long as it did not involve direct killing, etc.), nevertheless clearly *would* violate its *substantive* rights—it would, that is, violate the SOP. Just as Fred's removal of all the oxygen around Bob nullifies Bob's self-owned powers, and indeed nullifies them to such an extent that his death results, so too does removing the fetus nullify its powers *in exactly the same way*. Like Fred, the fetus is put in a situation in which his use of those powers becomes impossible; thus, it is dealt an injustice just as surely as Fred is.

Notice that this is true not only in the case of pregnancy resulting from consensual intercourse, but *even in cases resulting from rape*. In those cases no less than the others, the fetus's powers are nullified; how the fetus came into existence is irrelevant. Nor does the fact that the pregnancy came about involuntarily make a moral difference with respect to the rape victim's obligations: in Mack's "Adam's Island" example, Adam obviously could not justify letting Zelda drown by saying "I never *consented* to Zelda's coming ashore, and it's not my fault she happened to get shipwrecked near *my* island!" This remains true even if Zelda's coming ashore seriously inconveniences Adam. We can sympathize with him in his bad luck, but we cannot absolve him of his duty to abide by the SOP. If Zelda's shipwreck resulted from the actions of a negligent ship's captain, Adam might have a just complaint against (and could presumably demand compensation from) that captain, but that would not in the least affect his duty to help Zelda. But a woman pregnant as a result of rape is in a situation analogous to Adam's: it *isn't* her fault that the fetus is in her womb, but then, neither is it the *fetus's* fault. It is the rapist who must, as far as is possible, be made to compensate for putting the woman (and the fetus) in the position he's put them in. In the meantime, the fetus cannot justifiably have his self-owned powers nullified.¹⁶

This might seem a harsh conclusion to draw, for without question, the distress of a woman pregnant as a result of rape must for most of us be unimaginable, and calls forth in any decent person the deepest sympathy. But the harshness of a situation does not *by itself* prove that one may morally extricate herself from it; sometimes, moral duties can

¹⁶Accordingly, it would seem also to follow that you *must* remain attached to the violinist in Thomson's example—though those who did this to you must also be forced to do everything possible to free you from this circumstance as soon as possible, and to compensate you for your inconvenience.

be onerous.¹⁷ In any case, harsh or not, the conclusion does appear to follow from the SOP if we grant that the fetus is a person.

Should we grant this? I certainly think so, but defending this view at length would take us beyond the scope of this paper. Suffice it for now to make the following observations. Most libertarians would allow that the infirm and mentally retarded do indeed count as persons at least as far as the suitability of attributing self-ownership to them is concerned. They would not allow mandatory euthanasia for such individuals, rejecting it as inconsistent with a serious respect for individual liberty. They would also reject, as a violation of self-ownership, the practice of infanticide. If they reject these things, however, they cannot plausibly and consistently deny that at least very highly developed fetuses ought also to count as persons, as self-owners. If a mentally retarded person or an infant is a self-owner, despite the lack of high-level cognitive functioning, then an eight-month-old fetus cannot plausibly be denied self-ownership status; self-ownership cannot plausibly depend on whether one is two inches this side of the womb. Nor is the dependence of the fetus on the mother relevant: the violinist in Thomson's example remains a person and self-owner even though he has now become dependent on you.

One might argue that a fetus in an *early* stage of development does not count as a person or self-owner, but this is hard to maintain with any confidence, given the lack of a clear dividing line in fetal development between non-person/person status, and given that (as most libertarians would grant) those in comas and vegetative states, who are as little capable of mentation as a primitive fetus is, do not lose their right to life for that. Appealing, as is often done, to what a fetus, embryo, or zygote “looks like” is unhelpful, and even philosophically frivolous: one might claim that a table “doesn't look like” a collection of atoms swirling about, but that's what a table is. And in fact, a table *does* look like that: that is *exactly* what a collection of atoms swirling about looks like when it is in the form of a table. Similarly, to the charge that a fetus, at whatever stage of development, “doesn't look like” a person or a human being, one ought to reply, “*Of course* it does; that's *exactly* what a human being or a person looks like at one month (or one week, or whatever) of development.”

¹⁷It does prove, however, that the one who has put a woman in this situation is worthy of *severe* punishment. Forcing rapists to (hard) labor to support a fund for the provision of rape victims and their children would seem the absolute *minimum* penalty called for.

The often-made claim that a fetus is only “potentially” a human being is simply false. It clearly *is* a human being—it isn’t a dog or an octopus—just not a fully developed human being. The typical substitute claim that it is, at any rate, only potentially a *person*, and that merely potential persons don’t have rights, is question-begging. After all, the claim of the foe of abortion is not that the fetus is a “potential person,” but rather the very different claim that it *is* a person who hasn’t yet fulfilled his potentials. Nor is it plausible to argue that, even if it is a person, the fetus may be killed as long as it is only in its primitive state, not yet having fulfilled its potentials. Suppose that I have a device that will transform an adult human being into gooey protoplasm for an hour, after which he will spring back into his normal form. Further suppose that I use it on an amnesiac and mentally ill homeless man who has no family or friends, and who, like an unwanted fetus, would not be missed and would have no plans I’d be disrupting. Would it be morally permissible to destroy the protoplasm before it realizes its potential and changes back into the homeless man? Surely not. But then, how can it be permissible to destroy a fetus at *any* stage of its development?

If one accepts the SOP, then it is difficult to see how one can fail to condemn abortion, even in the case of rape, and *certainly* in the case of pregnancy resulting from consensual intercourse. A woman—and the man she sleeps with—are in the latter case like Adam, should he decide to fire cannonballs at passing ships and then complain that people keep washing up on his island whom he now has to allow ashore.

THE RIGHTS OF CHILDREN

The matter of a fetus fulfilling its potentials has ramifications far beyond abortion, however. Children, unlike the progeny of non-human animals, are entirely helpless at birth. It follows that, on libertarian principles, anyone who brings a child into the world has a duty to do what is necessary to provide for that child, since not to do so would be a clear violation of that child’s self-ownership—a putting of that child in a position in which its capacities are completely nullified. Child neglect and endangerment, even when it is non-invasive, is an obvious violation of the SOP.¹⁸

¹⁸What about a child resulting from rape? It seems clear that the rapist must bear primary responsibility for his upbringing, though, under the circumstances, the victim would have an obvious trump over all claims the rapist might wish

But bare provision of what a child needs to survive is not all the SOP calls for. A child is not only helpless in the sense that he cannot feed, clothe, and shelter himself; he is also helpless insofar as he has no instinctive knowledge of how his natural capacities can or should best be developed. If a child is to flourish, he needs not only to be fed, clothed, and sheltered, but also to be *taught*, and that requires not only teaching him to be self-sufficient where physical needs are concerned, but providing *moral* instruction as well. Nor is a child's failure to gain such instruction something easily remedied in adulthood, for a poorly reared child carries the burdens of his parents' irresponsibility for the rest of his life, as bad character traits and the like become ingrained, and difficult or even impossible to undo. Bringing a child into the world and then failing to provide proper instruction thus constitutes a clear violation of the SOP, for it effectively constitutes a nullification or disablement of the child's innate capacities.

It follows from the thesis of self-ownership, then, that a child has a *right* properly to be reared by his parents, and that their failure to provide for such an upbringing constitutes an *injustice*. And it is *precisely* the parents who must, if they are at all capable of doing so, be the ones to fulfill the duties corresponding to this right. It is *they* who implicitly took this duty upon themselves in having the child. Further, given the biological and psychological facts that human beings tend to care most for those to whom they are related by blood, have more in common with them and greater knowledge of their particular needs and circumstances, etc., it is in the nature of a child's self-owned capacities that, other things being equal, they tend to flourish best when developed in the context of his natural biological family.

Who is responsible for fulfilling the duties corresponding to this right, though, should the child's parents pass away? It seems clear, given the considerations just adduced (plus the fact that, in deciding to have children, you know you are also potentially bringing into existence *future* generations for whose well-being you might reasonably bear some responsibility), that it is the next nearest of the child's kin on whom the responsibility devolves. This means that the SOP requires just the sort of attitude about responsibility toward one's kin that common sense has always held—and hewing at least fairly closely to common sense is always the mark of a sound moral philosophy.

to make, should she decide either to raise the child herself or give him up for adoption. In short, the rapist has all the obligations any normal father would, but, given his crime, none of the rights.

It also, in effect, requires a kind of *subsidiarity*, to use a term prominent in Roman Catholic moral theology, on which, other things being equal, the needs of individuals and communities ought always to be met by individuals and institutions closest to those whose needs are to be fulfilled. It should be obvious, then, that advocating SOP-generated rights of children by no means entails that it is the *state* that has the duty to fulfill the positive duties implied by those rights; quite the opposite is the case.

It also follows from the SOP, however, that anyone who influences a child in a way that makes him less able to fulfill his capacities, including by corrupting his moral character, commits an injustice—he commits a violation of the child’s rights, a *positive harm* rather than merely a (negative) failure to fulfill a positive obligation. And that means that government has, in principle, a role to play in protecting those rights. Though some libertarians may be made uneasy even by this much, such talk of government playing a role in protecting children’s rights may seem to others fairly uncontroversial, as long as it is taken to entail only the legal prohibition of child molestation and physical abuse. However, the implications go beyond merely ruling out of that sort of thing.

To see how, consider the analogy of pollution. Libertarians would (rightly) hold that, as long as my unwise use of my land affects only me, government has no business interfering with it. But if it starts to affect other people—if, in the language of economics, I start imposing negative externalities on others by, say, dumping toxic waste into a river that passes through their property, or pumping dangerous gases into the air—then government can justifiably step in to keep me from thus violating the rights of others. And it can, within limits, even do so when it isn’t clear that it’s *my* use *per se* that is the cause of some specific damage. In circumstances in which clearly defined property rights in a resource are difficult to establish, “tragedy of the commons”-type problems inevitably arise, with the various individuals who use that resource having no incentive to preserve it. A good example is the air. No one owns it, so as long as individuals using it (i.e., all of us) suffer no immediate ill consequences or pay no price for polluting it (e.g., a fine to an owner, or a cost incurred by oneself as owner), they have no incentive not to do so. But many individuals acting in this way eventually hurt everyone, as the air becomes polluted by the aggregate effect of acts that would be innocuous taken individually. In principle, then, the state can step in and, in a way that respects individual property rights as far as is possible, and in a manner which

mimics as closely as possible the market mechanisms that would exist if the establishment of private property rights in air were workable, regulate the level of air pollution that individuals can individually produce.

There is an analogy here with what we might call the *moral* pollution that may exist in the “atmosphere” in which a child is raised. Any “negative externalities” that tend to undermine the moral character of a child, by making it significantly more difficult for him to develop the moral virtues that the proper exercise of his self-owned capacities require, are, given the SOP, on a par with the negative externalities caused by pollution. Any behavior an adult engages in that morally “pollutes” only himself must be tolerated by government, but where it threatens to disable a child’s as-yet not-fully-formed moral capacities, there is a case for prohibiting it.¹⁹

What are the practical implications of this? That will depend on what the moral facts are concerning precisely which behaviors are morally polluting, a topic which promises to be a matter of great controversy. But such controversy cannot, if what I have argued thus far is correct, be sidestepped on libertarian grounds; one cannot simply appeal to self-ownership and claim that government can entirely ignore such matters and leave them to private individuals to decide. The general libertarian concerns about an overweening state lose none of their force because of this; one ought still to insist on government that is as small as possible, as local as possible, and, accordingly, is as answerable as is possible to the citizens whose consent to it legitimizes it. Hence, as with any function considered by libertarians to be within the proper bounds of government, the model to follow, other things being equal, is the local “town hall,” *not* the federal bureaucracy.²⁰

¹⁹The reason government would not be justified on SOP-based grounds in prohibiting it where the adult “pollutes” only himself is that, to the extent he deepens the nullification of his own moral capacities, they are still *his* capacities, not another’s, so he violates no one else’s rights. Nor can government prohibit activities that involve the polluting of other adults’ capacities if those other adults have consented to being so polluted (as you might consent to having toxic waste dumped on your land), for, unlike a child, an adult has attained full development of his capacities (even if this amounts to maldevelopment) and knows (or can be presumed to know) what he is doing.

²⁰My argument is not necessarily significantly affected if one endorses an anarcho-capitalist form of libertarianism rather than a minimal state form. For natural rights—including the rights entailed by the SOP—are as much in

Suppose for purposes of illustration, though, that the members of a local governmental body believe that fornication, pornography, homosexuality, etc. are immoral, and that their promotion in public activities inevitably witnessed by the young will be as potentially corrupting to their moral character as would, say, a march by the KKK or Nazi party in a town where racial tensions are already high. Then it would have grounds, *given the SOP*, for banning any such public activity—which would include explicit “sex ed” materials in the local schools, a “pornography fair” at the local university, “gay pride” parades down Main Street, lewd billboard advertisements and displays of pornographic materials on magazine racks, and so forth. These all quite obviously contribute to an atmosphere tending to undermine a child’s ability to develop character traits consistent with sexual virtue, given the extreme difficulty young people have in keeping sexual feelings under control—*especially* when constantly bombarded by messages insisting in effect that they *not* be kept under control. Along the same lines, the local government could prohibit the adoption of children by persons whose choice of sexual “lifestyle” it had reason to consider immoral, so as to prevent the moral corruption of those children. It could also prevent the formation of institutions, such as “same-sex marriage,” that it has reason to think would have a dramatic negative impact on the general public understanding of and commitment to basic moral norms, for such a result would profoundly, if indirectly, affect the ability of children to form a sound moral sensibility. Private vices generally recognized to be vices, and kept private, cannot justifiably be outlawed, but the public legitimization of such vices can and must be.²¹

Although many libertarians will find such a suggestion shocking, I claim that they have no *libertarian grounds* for objecting to it, at

need of protection according to the former as according to the latter, even if they are to be protected by private protection agencies rather than government.

²¹It would follow that the more difficult it is at the local level to prevent certain immoral public behavior, the stronger is the case for government action at higher levels. Public lewdness can surely be handled by local officials, but preventing the institutionalization of “same-sex marriage” can plausibly be done effectively only at the federal level. Similarly, making it difficult for children to access pornography on the Internet might, given technological complexities, be impossible for parents and local officials to achieve. Thus, there is a case for strong federal action, such as, to take one proposal that has been put forward, “ghetto-izing” pornographic websites into a single .xxx (vs. .com, .net, etc.) domain, access to which could be more easily controlled.

least not if their libertarianism is based on the thesis of self-ownership. They may challenge the arguments attempting to show fornication, pornography, homosexuality, or whatever, to be immoral, but their *libertarianism per se* settles nothing. If these things are not truly immoral, then the libertarian ought to oppose government action. However, if they *are*, in fact, immoral, then there is a case—a *libertarian* case based on self-ownership, and in particular on the SOP—for government to take on the sorts of measures described. So the libertarian cannot avoid having to deal with such moral questions, nor can he accuse conservatives who promote such measures of violating self-ownership *simply* by virtue of promoting them. The conservative can plausibly respond: “*Violate* self-ownership?! I’m *promoting* self-ownership, and in particular the proper development of the self-owned capacities of children, as required by the SOP! Indeed, that makes *me* the *real* libertarian!”²²

One might reply that a truly libertarian community would be one in which “public” spaces and the like are *privately* owned in the first place, or at least in which *all* the members of a community who use them, if they can be said “collectively” to own them, do so only because, at some time, they *voluntarily agreed* to move into the community in which they exist, to contribute to their maintenance, and to abide by certain regulations as to their use, etc. In this circumstance, all the members collectively—either when the community was founded, or later via a unanimous vote, or even a majority vote, if abiding by the will of the majority is one of the conditions to which one must agree in order to move into the community—could decide if they wish to ban the sorts of purportedly immoral behavior described. So what need is there for the SOP-based argument for such action? Can’t the standard libertarian view already accommodate the scruples of the moralist—and without offending those who lack those scruples (who could, if they wish, set up communities in which *no* such moralistic restrictions hold)? Doesn’t the SOP drop out of consideration here as otiose?

²²No doubt there are certain libertine libertarians who will scoff at this suggestion as merely another attempt disingenuously to justify anti-libertarian policy “for the sake of the children,” *à la* Hillary Clinton. But to scoff is not the same as to give an argument, and not all appeals to the good of children need be disingenuous or misguided. My argument is that libertarian grounds themselves, rightly understood, yield the results in question. It is therefore incumbent on those who disagree to provide a serious counterargument, rather than lazily to deploy the well-worn *argumentum ad Clintonum*.

It does not, and the reason why is precisely because there may be communities in which at least a great many individuals would *not* allow for government enforcement of such scruples. If the SOP-based arguments I've sketched are sound, then it would follow that *even if* some, or even most, individuals in a community object to such restrictions and thus would not voluntarily agree to put them in force, the moralist could justify imposing them *anyway*—just as he could, on any libertarian's view, impose laws banning the forcible redistribution of wealth for egalitarian purposes, even if socialistically-inclined members of the community wanted such redistribution. He could say: "I'm a libertarian, because I believe in self-ownership. But because I believe in self-ownership, I must abide by the SOP. As such, I must ensure that the natural self-owned capacities of the children in the community whose rights of self-ownership I'm supposed to protect, including their moral capacities, are not effectively nullified by the negative moral externalities of the public behavior of immoral people. And since I have solid grounds in my view—who else's view am I supposed to go by?—for considering behavior B (fornication, homosexuality, drug use, or whatever) to be immoral, I have *perfectly good libertarian* grounds for banning public engagement in or promotion of B. And though some people may not agree that B is bad, that is no more relevant than that some people also don't agree that socialism, fascism, etc. are bad!"

My aim here is *not* to defend any particular proposed legislation banning this or that purportedly immoral public behavior.²³ It is, again, rather to suggest that the SOP implies that the libertarian cannot rule out the possibility of such legislation *a priori*. This means, given the divisions that exist in modern society over moral questions, that the question of what the implementing of the libertarian position requires, or at least allows for, becomes much more complicated than libertarians usually suppose—indeed, *enormously* so. It shows to be naïve the glib assumption that peremptorily repealing all laws banning behavior of any sort between consenting adults is all that libertarianism requires, and that anyone skeptical of the wisdom of doing so simply *must* be an enemy of liberty and self-ownership—an assumption that no libertarian informed by a Burkean (and Hayekian) sense of the

²³However, given the Aristotelian-Thomistic approach to ethics I endorse, and which I and many other libertarians take to be the most plausible foundation for libertarianism, the moral code which would most appropriately serve to inform such legislation would be a decidedly conservative one.

complexity and fragility of social institutions would ever choose to make anyway.

There already are, in any case, other grounds for rejecting such an assumption, whatever one thinks of the SOP-based argument I've been developing. Even one who objects to a certain law on abstract libertarian grounds may have good reason not to endorse its immediate repeal, given concrete circumstances. For instance, some libertarians (though by no means all) take liberalized immigration policies to follow from their libertarianism, but nevertheless would not favor implementing such liberalization while the welfare programs that serve as a magnet to some immigrants are still in existence. Here is a case where a policy that might be good from the point of view of libertarianism, other things being equal, would *not* be good from that perspective when other things are *not* equal—indeed, it could lead to a situation *worse* than the original one from a libertarian point of view.

Another possible example concerns drug legalization. A libertarian who, on self-ownership grounds, took laws banning drug use to be unjustifiable, but who nevertheless considered drug use immoral, would have grounds for resisting outright legalization under current circumstances. He could argue: “If, as was the case a century ago, current drug laws did not exist, but there was nevertheless a very strong social stigma against using drugs, then I would be against passing such laws. But under current circumstances, where drug use is highly glamorized in the popular culture, a repeal of the drug laws would inevitably ‘send the message’ that drug use is not immoral after all, and any remaining social stigma against using them would be considerably weakened, leading to increased drug use among the young. The bad, concrete social effects of legalization would outweigh the good of adhering more strictly to abstract principle. So until the moral climate vis-à-vis drugs considerably improves, these laws should not be repealed. At most, their more blatantly unjust aspects (the asset seizure often associated with their enforcement, absurdly harsh penalties imposed on minor offenses, etc.) should, in a quiet and unobtrusive way, be abandoned.”

Similarly, had anti-discrimination laws existed in Weimar Germany, a wise libertarian, perceiving the looming threat of Nazism, would think twice about repealing those laws simply on the basis of abstract principle. The “message” this would (however unintentionally) send under those circumstances would obviously be one tending to legitimize persecution of the Jews.

Libertarian philosopher Michael Levin made a similar point with respect to the question of repealing anti-sodomy laws and the like, in terms drawn from Paul Grice's well-known analysis of what he calls "conversational implicature." If you make a statement *P*, knowing that it will be given a certain interpretation *I* by your audience, and knowing also that your audience knows you know this, then in uttering *P* you will have sent the message that *I*. Similarly, if legislators repeal anti-sodomy laws and the like, knowing that this will, under current cultural conditions, be interpreted by most members of their society as a rejection of the traditional view that homosexuality is immoral, and knowing also that these members of society know that they know this, then in repealing such laws they will in effect be sending the message that homosexuality is not immoral after all. This cannot fail to increase approval of homosexuality in such a society. Thus, anyone, including any libertarian, who thinks homosexuality is immoral has grounds for opposing the repeal of such laws.²⁴

None of this affects the essentials of the libertarian position on what consenting adults do behind closed doors, though admittedly the question of children's SOP-generated rights does complicate matters here. If parents are known regularly to engage in egregiously immoral behavior in the presence of their children, there would *in principle* be an SOP-based case for government intervention, though this would be strongly counterbalanced, not only by general pragmatic libertarian concerns about giving government power over the private domain, but also on the *principled* grounds that as parents are, generally speaking, *far* better able to judge what is in their child's best interests, including what is and what isn't likely to harm the child, than even the most local and accountable public official, it is *they* who, as a matter of justice guaranteed by their self-ownership rights and the SOP-based rights of their children, ought presumptively to have the right to make the relevant decisions. Application of the SOP here must be guided by the same common sense and tact that application of any view requires, including any libertarian view (since, after all, even libertarians who might otherwise be hostile to the argument of this paper would presumably grant that government can legitimately intervene in the family context in *some* circumstances, e.g., where children are killed, beaten, or sexually molested). Still, in general, and clearly where children are not involved, neither the thesis of self-ownership itself nor the SOP

²⁴See Michael Levin, "Why Homosexuality is Abnormal," *Monist* 67, no. 2 (1984).

would seem to permit government interference with activities, however immoral, that are kept “out of sight” as it were and within the walls of individuals’ private property (though such immoral behavior would no doubt be far less common in a society in which, on SOP-based grounds, the moral corruption of children was actively discouraged). The argument of this paper thus remains a recognizably libertarian one.

CONCLUSION

If the cogency of my argument is accepted, then libertarianism not only is *not* inconsistent with conservatism, but, in fact, when its implications are worked out, *leads naturally* to a kind of moral conservatism, not only in private morality, but to some extent even in public policy.²⁵ The “fusion” of liberty and tradition famously championed by Frank Meyer, and which has formed the philosophical basis of modern American conservatism, is, thus, well-grounded.²⁶ Libertarians ought to welcome this. For however powerful and compelling it is as a *political* philosophy (as a theory, that is, about the proper scope of state power), libertarianism tends to be rather thin, even shallow—and indeed, in some cases positively grotesque—when (mis)interpreted as a general *moral* and *social* philosophy (a theory, that is, about what is required for individuals or communities of human beings to flourish). Libertarians can learn much from conservative moral and social thinking—and *need* to, given the consequences of their own view.

²⁵This is even more clear when one keeps in mind the conservative or traditionalist implications, already alluded to above, of Hayek’s Burke-inspired defense of a libertarian political order, and of the Aristotelianism that motivates many other libertarian political philosophers. It is, I suggest, therefore no accident that libertarians and conservatives tend so often to find themselves allied politically, for there is a natural harmony between their positions. Nor, for parallel reasons, is it an accident that their enemies—those hostile to traditional morality and the individual freedom represented by the market—tend to be allied together on the left. For further discussion of some of these issues, see Edward Feser, “Hayek on Tradition,” *Journal of Libertarian Studies* 17, no. 1 (2003).

²⁶See Frank S. Meyer, *In Defense of Freedom* (Indianapolis, Ind.: Liberty Fund, 1996).

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