

IMMANENT LIBERALISM: THE POLITICS OF MUTUAL CONSENT

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I will not cease from Mental Fight,
Nor shall my Sword sleep in my hand:
Till we have built Jerusalem,
In England's green & pleasant Land.
—William Blake¹

Part One of Marx's "On the Jewish Question" is a communitarian manifesto, one of the finest and subtlest ever penned.² But has it anything valuable to offer defenders of liberalism?³

I think it does; for in "On the Jewish Question" Marx points to a potential danger into which communitarians are liable to fall, and I shall argue that his discussion sheds light on an analogous peril for liberals. Specifically, Marx distinguishes between a genuine and a spurious form of communitarianism, and warns that a failure to recognize this distinction may lead communitarians to embrace liberal values in communitarian guise. Using Marx's analysis as a model, I hope to show that the same distinction may be found within the liberal tradition, posing a corresponding danger (communitarian values in liberal guise) into which contemporary liberalism has in large part already fallen.

I. VICARIOUS VERSUS IMMANENT COMMUNITARIANISM

Marx argues that the modern democratic state systematically spreads a communitarian illusion over an underlying liberal reality. Citizens of such states exercise the communitarian values of solidarity and fellowship

¹ William Blake, "Milton: A Poem in Two Books," in Mary Lynn Johnson and John E. Grant, eds., *Blake's Poetry and Designs* (New York: W. W. Norton, 1979), Preface, lines 13–16, p. 238.

² As opposed to Part Two, a cynically anti-Semitic diatribe unworthy of its author.

³ I shall be using the terms "communitarian" and "liberal" fairly broadly, and some definitions are perhaps called for. I would define as communitarian those outlooks that place primary emphasis and value on the society of status, and as liberal those outlooks that place primary emphasis and value on the society of contract. (The terminology of status and contract will be elucidated further in Section II below.) I do not intend these as stipulative definitions, but rather as attempts to capture what strike me as the respective unifying ideals of the two broad intellectual traditions commonly identified as communitarianism and liberalism.

with other human beings—but only at the political level, through their ties to the state apparatus (in the form, e.g., of equal rights to the franchise). Such communal ties have no significance in people's actual, everyday lives, which remain competitive, individualistic, and atomized:

The perfected political state is by its nature the species-life of man in opposition to his material life. All the presuppositions of this egoistic life continue to exist in civil society outside the sphere of the state, but as proper to civil society. When the political state has achieved its true completion, man leads a double life, a heavenly one and an earthly one, not only in thought and consciousness but in reality, in life. He has a life both in the political community, where he is valued as a communal being, and in civil society, where he is active as a private individual, treats other men as means, degrades himself to a means, and becomes the plaything of alien powers. . . . Man in the reality that is nearest to him, civil society, is a profane being. Here where he counts for himself and others as a real individual, he is an illusory phenomenon. In the state, on the other hand, where man counts as a species-being, he is an imaginary participant in an imaginary sovereignty, he is robbed of his real life and filled with an unreal universality.⁴

Under such a regime we are bound to one another only *indirectly*, through the machinery of the state. We enjoy fraternal union with our fellows *fictively*, by means of a kind of political play-acting that obscures the actual conditions of social life rather than reflecting those conditions. Like Ludwig Feuerbach's theists, we have projected our nature as social beings onto an external force rather than reclaiming it in our day-to-day existence.⁵ We experience community—but only *vicariously*, through a political intermediary.

Such vicarious community is the result, Marx thinks, of the collapse of feudalism. The feudal system was a communitarian one, in the sense that people's political relationships to one another pervaded their lives and shaped the character of everyday experience; under such a system, no one could think of himself as a solitary individual with purely private interests. These political relationships, however, were not structured to promote the common advantage; instead, they served to reinforce and extend the power of the ruling elites. The rise of democracy might seem a welcome improvement, then. Unfortunately, by wedding political rela-

⁴ Karl Marx, "On the Jewish Question," in David McLellan, ed., *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977), pp. 45–46.

⁵ Ludwig Feuerbach, *The Essence of Christianity* (1841). Marx's "On the Jewish Question" is evidently intended *inter alia* as an application to the idea of the state of Feuerbach's critique of the idea of God.

tionships to the common good, the democratic state thereby divests private life of the communitarian dimension it originally possessed:

The old civil society had a directly political character. The elements of civil life, like, for example, property or the family or the type and manner of work, were, in the form of seigniorial right, estates, and corporations, raised to the level of elements of state life. They defined in this form the relationship of the single individual to the state as a whole, that is, his political relationship. . . . The political revolution overthrew this feudal power and turned state affairs into affairs of the people. . . . Particular professions and ranks sank to a merely individual importance. They were no longer the relationship of individuals to the state as a whole. Public affairs as such became the general affair of each individual and politics was a general occupation.

But the perfection of the idealism of the state was at the same time the perfection of the materialism of civil society. . . . Political emancipation entailed the emancipation of civil society from politics, from even the appearance of a general content. Feudal society was dissolved into . . . egoistic man. This man, the member of civil society, is the basis, the presupposition, of the political state. . . . Man was therefore not freed from religion; he received freedom of religion. He was not freed from property; he received freedom of property. He was not freed from the egoism of trade; he received freedom to trade.⁶

In short, then, social relations under a democratic state are characterized at the level of political institutions by communitarian solidarity and equality, but at the level of actual life by liberal individualism and commercial interests. The citizens of the modern state have received "political" emancipation, emancipation on paper, in place of genuine "human" emancipation.

This is because communal fellowship at the political level is communal fellowship in name only:

The state as state annuls private property . . . as soon as man declares in a political manner that private property is abolished, as soon as he abolishes the requirement of a property qualification for . . . participation at elections. . . . And yet the political annulment of private property has not only not abolished private property, it actually presupposes it. The state does away with difference in birth, class, education, and profession in its own manner when it declares birth, class, education, and profession to be unpolitical differences, when it summons every member of the people to an equal participation in

⁶ Marx, "On the Jewish Question," pp. 55-56.

popular sovereignty without taking the differences into consideration, when it treats all elements of the people's real life from the point of view of the state. Nevertheless the state still allows private property, education, and profession to have an effect in their own manner, that is as private property, as education, as profession, and make their particular natures felt.⁷

The democratic state does not *abolish* the impediments to communal life; instead, it *ignores* them (and thus allows these impediments to flourish). By so ignoring them, the democratic state is able to present a picture of human beings in their political capacity with all these impediments removed, creating the seductive illusion that a communitarian paradise has at last been achieved—while, in fact, society, having (as it were) kicked its communitarian elements upstairs, is more individualistic than ever.⁸

As an alternative to this fictive, vicarious communitarianism, Marx upholds the ideal of an *immanent* communitarianism—that is, one in which the communitarian ideals he cherishes are realized directly in people's everyday lives, rather than indirectly, and in an imaginary way, through the intermediary of the state:

Political emancipation is the reduction of man, on the one hand to a member of civil society, an egoistic and independent individual, on the other hand to a citizen, a moral person.

The actual individual man must take the abstract citizen back into himself and, as an individual man in his empirical life, in his individual work and individual relationships become a species-being; man must recognize his own forces as social forces, organize them, and thus no longer separate social forces from himself in the form of political forces. Only when this has been achieved will human emancipation be completed.⁹

Under Immanent Communitarianism, the social ties that constitute our essence are direct and real, and permeate our day-to-day existence and activity. Vicarious Communitarianism, on the other hand, by demanding that these ties be expressed at and through the political level, divests everyday life of communitarian significance, and thus turns out at bottom to be no more than a disguise for the liberalism it purports to oppose.

⁷ *Ibid.*, p. 45.

⁸ As an example of this, Marx refers to the architects of the French Revolution, who beneath their communitarian rhetoric were ultimately committed to a liberal conception of civil society.

⁹ Marx, "On the Jewish Question," p. 57.

II. STATUS AND CONTRACT

Why should liberals care about any of this? After all, Marx's communitarian vision of liberal society as necessarily crass, legalistic, and selfish, a morass of atomism and anomie, is one that liberals reject. And I think they are correct in rejecting it (though to adjudicate this dispute between liberalism and communitarianism lies beyond my present purpose). So what relevance do Marx's warnings against Vicarious Communitarianism have for liberals?

The answer, I think, is that liberalism too can be either immanent or vicarious, according to whether its fundamental ideals are realized immanently in actual life or vicariously through the intermediary of the state; and it too can serve, in its vicarious form, as a mask for its opposite.

Different versions of liberalism represent different ways of implementing the fundamental idea of the *society of contract*. The terminology of *status* and *contract* was first introduced by the nineteenth-century English jurist Henry Maine:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. . . . The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.¹⁰

¹⁰ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, 10th ed. (London: John Morrow, 1906), pp. 172-74.

Contract relationships are relationships based on mutual agreement, and their attendant obligations derive their binding force from consent; status relationships are relationships into which one is simply born, and their attendant obligations derive their binding force from the nature of the social roles one finds oneself in.¹¹ A political community is described as a society of contract or a society of status according to whether the destinies of its individual members are determined primarily by their contract relationships or primarily by their status relationships.¹²

The paradigm case of a status relationship is the family; I have obligations to my parents in virtue of being their son, although I never voluntarily undertook such obligations. Under a regime of status, the political structure of society is modeled as far as possible on that of the family; this represents the position of contemporary communitarians:

[W]e all approach our own circumstances as bearers of a particular social identity. I am someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. . . . For the story of my life is always embedded in the story of those communities from which I derive my identity. I am born with a past; and to try to cut myself off from that past, in the individualist mode, is to deform my present relationships.¹³

Under a regime of contract, on the other hand, society is viewed—to employ John Rawls's famous formulation—as a system of cooperation for mutual advantage among free and equal persons. It is in this sense that liberalism, as its etymology suggests, is an ideology of freedom:

For by naturall birth, all men are equally and alike borne to like propriety, liberty and freedome. . . . Every man by nature being a King,

¹¹ In Plato's *Crito*, Socrates grounds political obligations on both status and contract relationships.

¹² The status/contract distinction bears some resemblance to Robert Nozick's distinction between patterned and entitlement conceptions of justice (Nozick, *Anarchy, State, and Utopia* [New York: Basic Books, 1974], pp. 150–74). The match is not perfect, however. The entitlement conception, as Nozick constructs it, is inconsistent with redistributive taxation; but a commitment to redistributive taxation is not necessarily at odds with the ideal of contract, if such redistribution is conceived as a necessary means of ensuring the genuinely *consensual* nature of socioeconomic interactions (e.g., by eliminating excessive differences in bargaining power).

¹³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame: University of Notre Dame Press, 1984), pp. 220–21.

Priest and Prophet in his owne naturall circuite and compasse, whereof no second may partake, but by deputation, commission, and free consent from him, whose naturall right and freedome it is.¹⁴

A classic confrontation between these two views of society is Robert Filmer's *Patriarcha* versus John Locke's *Two Treatises of Government*; another is Edmund Burke's *Reflections on the Revolution in France* versus Thomas Paine's *Rights of Man*.

Strictly speaking, liberals do not generally have any objection to status relationships as such; they need not regard significant moral ties as originating from voluntarily chosen relationships alone. In this sense, liberals have nothing against communitarian values.¹⁵ What liberals insist on is that people's lives not be *coercively controlled* by such relationships. This distinction is one that communitarian critics of liberal individualism often miss.

[Let me state] the intrinsic natures of Toryism and Liberalism. . . . Dating back to an earlier period than their names, the two political parties at first stood respectively for two opposed forms of social organization, broadly distinguishable as . . . the régime of status [and] the régime of contract. . . . If, instead of using the word "cooperation" in a limited sense, we use it in its widest sense, as signifying the combined activities of citizens under whatever system of regulation; then these two are definable as the system of compulsory cooperation and the system of voluntary cooperation. The typical structure of the one we see in an army formed of conscripts, in which the units of their several grades have to fulfil commands under pain of death, and receive food and clothing and pay, arbitrarily apportioned; while the typical structure of the other we see in a body of producers or distributors, who severally agree to specified payments in return for specified services, and may at will, after due notice, leave the organization if they do not like it.¹⁶

¹⁴ Richard Overton, *An Arrow against All Tyrants and Tyranny, Shot from the Prison of Newgate into the Prerogative Bowels of the Arbitrary House of Lords, and All Other Usurpers and Tyrants Whatsoever*, excerpted in G. E. Aylmer, ed., *The Levellers in the English Revolution* (Ithaca, NY: Cornell University Press, 1975), p. 69.

¹⁵ For an argument that the liberal right to withhold consent to status relationships is actually a *prerequisite* for the right sort of communitarian values, see John Tomasi, "Individual Rights and Community Virtues," *Ethics*, vol. 101 (April 1991), pp. 521-36.

¹⁶ Herbert Spencer, "The New Toryism," in Spencer, *The Man versus the State: With Six Essays on Government, Society, and Freedom* (Indianapolis: Liberty Fund, 1981), pp. 5-6; cf. Spencer, "From Freedom to Bondage," in *ibid.*, p. 498. For a fuller discussion, see Herbert Spencer, *The Principles of Sociology*, vol. 2 (New York: D. Appleton, 1884), pp. 244-48, 568-78, 603-21, 637-40, 648-61.

The rise of commercial society out of the ashes of feudalism is thus generally regarded as a triumph of contract over status.¹⁷ But the proper evaluation of this transition is another matter. Liberals generally applaud it:

In the Society of Contract man is born free, and comes into his inheritance with maturity. By this concept all rights belong to the individual. Society consists of individuals in voluntary association. The rights of any person are limited only by the equal rights of another person.

In the Society of Status nobody has any rights. The individual is not recognized; a man is defined by his relation to the group, and is presumed to exist only by permission. The system of status is privilege and subjection. . . . [T]he Society of Status resists change. . . . In [feudal] society, the son was held to the father's calling, regardless of ability. . . . The Society of Status is obliged to restrict production to the energy level it can accommodate. It does so by collectivism. . . . Medieval farming gave a miserably low yield. . . . As the level of energy in Europe rose again . . . the overflow once more sought the outlet of trade.

This is usually described as the emergence of the middle class. The term is grossly inaccurate. . . . What is now called the middle class was not and is not a class; it is a different form of society, a classless society, the free society, the Society of Contract. The merchants and independent craftsmen had none of the characteristics of class. . . . The traders necessarily formed a Society of Contract, and lived by contract law.¹⁸

For communitarians like Marx, on the other hand, the substitution of contract for status is socially disruptive, destructive, and ultimately demoralizing:

The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his 'natural superiors', and has left remaining no other nexus between man and man than naked self-interest, than callous 'cash payment'. . . . All fixed, fast-frozen relations, with their train of ancient and venerable prejudices

¹⁷ In fact, matters are somewhat more complicated. Although laws seem to have become somewhat more contract-oriented in their *content*, the rise of the nation-state may have resulted in a legal system less contract-oriented in its *structure*. See Bruce L. Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990); and Tom W. Bell, "Polycentric Law," *Humane Studies Review*, vol. 7, no. 1 (Winter 1991-92), pp. 1-10.

¹⁸ Isabel Paterson, *The God of the Machine* (New Brunswick, NJ: Transaction Publishers, 1993), pp. 42-50.

and opinions, are swept away, all new-formed ones become antiquated before they can ossify.¹⁹

One should not infer that Marx's attitude toward feudalism is on balance positive; while feudalism represents a society of status, it is a hierarchical, patriarchal one — not the egalitarian society of status that Marx himself advocates. Marx makes it clear that the collapse of feudalism represents only the substitution of one form of oppression for another. While Marx is careful not to romanticize feudalism, however, he does see in feudal social relations something important and valuable that is missing from modern liberal society.

Liberals customarily pride themselves on the fact that liberal regimes assign as much of human life as possible to the voluntary forces of *society*, rather than to the coercive powers of *government*.²⁰ Indeed, this is just what we should expect from an ideology that privileges contract over status. But Marx turns the liberal distinction between government and society on its head. While, as a long-run anarchist, he shares in the abstract the liberal preference for spontaneous social order over governmentally imposed order, Marx's complaint is that this preference produces catastrophic results once it is combined with a consignment of status to the governmental realm and contract to the social realm — for the inevitable consequence is then a privileging of contract ideals and a marginalization of status ideals:

Thus none of the so-called [liberal] rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species-life itself . . . appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is natural necessity, need and private interest, the conservation of their property and egoistic person. . . . [C]itizenship, the political community, is degraded by the political emancipators to a mere means for the preservation of these so-called rights of man. . . . [T]he sphere in which man behaves as a communal being is degraded below the sphere in which man behaves as a partial being. . . .

It is true that [liberalism's] revolutionary practice is in flagrant contradiction with its theory. . . . [In practice] the right of man to freedom ceases to be a right as soon as it enters into conflict with political

¹⁹ Karl Marx and Friedrich Engels, *Communist Manifesto*, in McLellan, ed., *Karl Marx: Selected Writings*, pp. 223–24.

²⁰ For the *locus classicus*, see Thomas Paine, *Common Sense*, in Philip S. Foner, ed., *The Life and Major Writings of Thomas Paine* (Secaucus, NJ: Citadel Press, 1974), p. 4; and Paine, *The Rights of Man*, in *ibid.*, pp. 356–58.

life, whereas, according to the theory, political life is only the guarantee of the rights of man, the rights of individual man, and so must be given up as soon as it contradicts its end, these rights of man. But the practice is only the exception and the theory is the rule. Even though one were to treat the revolutionary practice as the correct version of the relationship, the riddle still remains to be solved of why, in the minds of the political emancipators, the relationship is turned upside-down and the end appears as the means and the means as the end.²¹

Marx's solution is to reassert the claims of status over contract—not, of course, by giving government priority over society, but rather by reshaping society along status rather than contract lines. In short, he favors an Immanent Communitarianism, with status values realized directly at the level of society, and he warns communitarians against a Vicarious Communitarianism that, by attempting to realize status values only indirectly through the intermediary of the state, in effect turns the entire social realm over to the liberal ideal of contract.

III. VICARIOUS VERSUS IMMANENT LIBERALISM

We can now see the corresponding dilemma for liberalism: Shall liberalism be immanent, realizing contract values directly at the level of society, or vicarious, realizing such values only indirectly and fictively through the intermediary of the state—thus running the analogous risk of turning the entire social realm over to the communitarian ideal of status?²²

Posing this question casts the liberal social-contract tradition in a problematic light. At first glance, the social contract seems an obvious embodiment of the liberal ideal of the society of contract. The society of contract requires that human association be based on mutual consent; social-contract theory gives this requirement flesh by grounding political authority on the consent of the governed.

But on closer examination there is room for worry. Social-contract theory runs the risk of displacing consent from its immanent role at the level of society to a vicarious role at the level of the state. This opens the door to the Rousseau-Kant-Hegel paradigm of contractualism, which aims not at freedom *from* constraint, but rather at freedom *through* constraints expressive of the constrainees' true will. Thinkers in this paradigm see the function of consent as the *legitimation* of our chains, rather than their

²¹ Marx, "On the Jewish Question," pp. 54–55.

²² Herbert Spencer also sensed the problem: "Most of those who pass as Liberals, are Tories of a new type" ("The New Toryism," p. 5).

removal.²³ The danger to liberalism is that, in focusing on the role of consent to the political framework, liberals may lose sight of consent, or its absence, *within* that framework—bartering, in Benjamin Constant's terms, the liberty of the moderns for the liberty of the ancients.²⁴ This is fine from a communitarian perspective, of course, but surely undesirable from a liberal one.

Social-contract theory need not have such implications, of course. For Overton, Milton, and Locke, for example, the function of the social contract is to guard and preserve consensual relations in everyday social life, not to replace them. Contract values remain immanent, not vicarious. When consent to political authority takes center stage, however—as it does with Hobbes and Rousseau—and the state rather than society becomes the morally significant locus of contract relations, the result all too often is a *de facto* society of status resting on a *de jure* foundation of contract:

If political rights are in question, if it is a case of choosing a legislator from their midst, oh, then, according to him, the people are full of a native wisdom; they are endowed with an admirable intuition; *their will is always right; the general will cannot be wrong.* The suffrage cannot be too universal. . . . Is there a man or a class that will dare to claim the right to act as a substitute for the people and to decide and to act for them? No, no, the people want to be *free*, and they shall be. They want to direct their own affairs, and they shall direct them.

But once the legislator is elected and freed from his campaign promises, oh, then his language changes! The nation returns to passivity, to inertia, to nothingness, and the legislator takes on the character of omnipotence. His the invention, his the direction, his the impulsion, his the organization. Mankind has nothing to do but to let things be done to it; the hour of despotism has arrived.²⁵

²³ See Jean-Jacques Rousseau, *The Social Contract, or Principles of Political Right*, in *The Social Contract and Discourses*, trans. G. D. H. Cole et al. (London: J. M. Dent and Sons, 1973), pp. 181, 191, 195–96 (emphasis added):

Man is born free; and everywhere he is in chains. . . . How did this change come about? I do not know. *What can make it legitimate? That question I think I can answer. . . .* The problem is to find a form of association . . . in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. . . . This is the fundamental problem of which the social contract provides the solution. . . . [W]hoever refuses to obey the general will shall be compelled to do so. . . . This means nothing less than that he will be *forced to be free*. . . . [W]hat man acquires in the civil state [is] moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while *obedience to a law which we prescribe to ourselves is liberty*.

²⁴ Benjamin Constant, "The Liberty of the Ancients Compared to That of the Moderns," in Biancamaria Fontana, ed., *Benjamin Constant: Political Writings* (New York: Cambridge University Press, 1988).

²⁵ Frédéric Bastiat, *The Law*, in *Selected Essays on Political Economy*, trans. Seymour Cain (Irvington-on-Hudson: Foundation for Economic Education, 1975), pp. 86–87.

I do not wish to downplay the importance of consent to political authority. But any liberalism that treats such vicariously consensual relations as the primary determinant of a society's embodiment of liberal values preserves the setting only to lose the jewel. More faithful than such Vicarious Liberalism to the ideals of the society of contract is the Immanent Liberalism that focuses on establishing mutual consent not only at the level of government, but above all at the level of society.²⁶

IV. FORMS OF VICARIOUS CONSENT

Contemporary liberalism, both in theory and in practice, places what should now strike us as a problematic emphasis on vicarious consent. One of the chief examples of this emphasis is the role assigned to the democratic electoral process as the chief vehicle of consent. Given the infrequency of elections, the minimal impact that any one voter is likely to have on electoral outcomes, the minimal input voters have in the selection of the options available on the ballot in the first place, and the inability of voters to determine what decisions their representatives will actually make, the connection between the voter's will and the actual result seems tenuous at best. When one adds to this the severe negative externalities that majority rule creates for minorities, it seems inadvisable for liberals to assign much weight to the legitimizing role of the franchise.²⁷

Both capitalists and socialists are coming to recognize the limitations of democratic suffrage as a realization of the ideal of mutual consent. On the capitalist side:

When a consumer buys a product on the market, he can compare alternative brands. . . . When you elect a politician, you buy nothing but promises. . . . You can compare 1968 Fords, Chryslers, and Volkswagens, but nobody will ever be able to compare the Nixon administration of 1968 with the Humphrey and Wallace administrations of the same year. . . . Not only does a consumer have better information

²⁶ This Immanent Liberalism may also be identified as *libertarianism*, so long as this term is understood in its broadest sense, encompassing both capitalist and socialist varieties. (Since the nineteenth century, liberals advocating a radical redistribution of power from the coercive state to voluntary associations of free individuals have frequently called their position libertarianism, regardless of whether their political sympathies were capitalist or socialist — or something in between. Today, for the most part, libertarian capitalists begrudge socialists, and libertarian socialists likewise begrudge capitalists, the title "libertarian"; yet there seems to me sufficient commonality of ideological concern and intellectual heritage between the two camps to justify using the term in a broad but univocal sense to cover them both.)

²⁷ Perhaps ironically, with regard to this issue it is Immanent Liberalism that endorses an end-state conception of justice. Vicarious Liberals often regard a political scheme as consensual if the process whereby it was chosen allowed input by the voters, whereas Immanent Liberals insist that the end state, regardless of how it was arrived at, must embody the ideal of mutual consent immanently.

than a voter, it is of more use to him. If I investigate alternative brands of cars . . . decide which is best for me, and buy it, I get it. If I investigate alternative politicians and vote accordingly, I get what the majority votes for. . . . Imagine buying cars the way we buy governments. Ten thousand people would get together and agree to vote, each for the car he preferred. Whichever car won, each of the ten thousand would have to buy it. It would not pay any of us to make any serious effort to find out which car was best; whatever I decide, my car is being picked for me by the other members of the group. . . . That is how I must buy products on the political marketplace. I not only cannot compare the alternative products, it would not be worth my while to do so even if I could.²⁸

On the socialist side:

To attain self-management, we want institutions that allow people to initiate their own activities and to participate in all related decisions. . . . [T]he fundamental difficulty [with central planning] is that, even if the planners were all-wise and altruistic, there would still be no self-management. . . . Although it would be possible to elect the central planning board to accord with the fullest of known democratic principles, to conclude that this would resolve the problem is to miss the point. Self-management does not mean electing some person or agency to make our decisions for us. . . . Instead central planning embodies as a core characteristic an *authoritarian command relationship*, which, if it persists, can only eventually erode any self-management characteristics. . . . [T]here is a type of socialist planning other than the centrist variety. . . . It is a procedure in which units coordinate their activities by essentially governing themselves . . . with a dynamic that reinforces empathy between democratic councils.²⁹

A periodic say in choosing one's governors, whatever its merits, is no substitute for a day-to-day say in running one's own life and one's interactions with others.

Liberalism's attachment to democracy is understandable. As we have seen, the core ideal of liberalism is the vision of society as a system of cooperation for mutual advantage among free and equal persons. The obvious political implementation of this ideal is self-government: the people running their own affairs. In other words, *demo-kratia*.

²⁸ David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2d ed. (La Salle: Open Court, 1989), pp. 131-32.

²⁹ Michael Albert and Robin Hahnel, *Unorthodox Marxism: An Essay on Capitalism, Socialism, and Revolution* (Boston: South End Press, 1978), pp. 255-73; cf. David L. Prychitko, "Marxism and Decentralized Socialism," *Critical Review*, vol. 2 (Fall 1988), pp. 127-48.

But *collective* self-government — i.e., majoritarian democracy — leads to the tyranny of the majority over the minority; and this conflicts with the liberal commitment to mutual consent. Immanent Liberalism's solution to this problem is to make self-government *individual* rather than *collective*; as far as possible, each individual is to govern himself or herself. Tyranny of the majority is checked by removing issues of central concern to people's personal lives from the sphere of political authority. All liberals adopt this Immanent Liberal approach to one degree or another; but in many cases this dimension is overshadowed by a different solution, a Vicarious Liberal one, that makes self-government vicarious rather than direct.

The "virtual" consent involved in electoral politics is supplemented by another form of vicarious consent: *tacit* consent. Residing within the territory of a state and accepting the benefits it offers is frequently offered as a sign that one consents to the state and its policies.³⁰ Even were this true, it would still make consent *indirect* in a way that no Immanent Liberal could find satisfying. In fact, however, such tacit consent is largely fictive: in a world whose entire territory is divided among a relatively small number of nation-states, none of them exactly a liberal paradise, and where relocation is costly in any case,³¹ remaining in one's home state is an unreliable sign of satisfaction with that state's policies.³² (Does the fact that I do not move away when my neighbor dumps garbage on my lawn constitute evidence that I consent to dumping?) And must not any benefits the citizen enjoys be weighed against the benefits of which the citizen is deprived by the state's policies? (Eating the meals one is given in prison is no sign of consent to imprisonment.) Moreover, to the extent that tacit consent does exist, such consent may be largely "man-

³⁰ The classic source of this argument is Plato's *Crito*. The view is also often ascribed to Locke; but the attribution is somewhat misleading. Locke insists (*Two Treatises of Government* [1690], ed. Peter Laslett [New York: Mentor, 1960], *Second Treatise*, ch. 8, sections 119–22) that nothing short of *express* consent can make anyone subject *in his or her own right* to the authority of the political community; as I read Locke, the only role he grants to *tacit* consent is as follows: The Lockean right to private property ensures that a property owner may set the terms on which others may use that property. In setting foot on another's property, then, one tacitly consents (not to abide by the property owner's will *simpliciter*, but) *either* to abide by the owner's will, *or* to leave the property. When the property owner has himself *expressly* subjected himself and his property to the authority of a political community, the visitor's tacit obligation to abide by the owner's will or depart is thereby extended to a like obligation to abide by the community's will or depart. (Property acquired by gift or sale is accompanied by something like a restrictive covenant to the same effect.) For Locke, submission through tacit consent is thus only a temporary, conditional, and derivative adjunct of submission through express consent.

³¹ To the ordinary costs of relocation we may add the often prohibitive costs imposed by legal fiat, e.g., denial of exit (as in the former Soviet bloc countries) and denial of entry (as with immigration restrictions in the United States and other Western democracies).

³² "By institutionalizing their monopolistic controls over all geographic areas on this planet, governments have transformed the known world into a vast prison system from which there is virtually no escape" (Carl Watner, *The Voluntaryist*, vol. 66 [February 1994], p. 6).

ufactured" through state control of public education and state-plus-corporate control of the mass media.

A still more vicarious and imaginary realization of contract values is the appeal to *hypothetical* consent—as, e.g., in Rawls's device of the "original position." Here the fictive character of the consent is frankly acknowledged; governmental coercion of citizens is justified by appeal not to the citizen's actual consent, but rather to the consent they *would* give in idealized circumstances—such hypothetical consent in turn having for its object, not the governmental coercion itself, but rather the abstract *principles* that are said to license the coercion.³³ It might seem as though the tie between citizens and what they are supposed to be consenting to could be no more attenuated; but in more recent modifications of his original theory Rawls has suggested that the hypothetical consent which does so much justificatory work is not after all that of the citizens themselves, but rather that of their (unchosen) *representatives*.³⁴ At this point the citizens have been denied even a *hypothetical* role in shaping their destinies! Surely we have here reached the pinnacle of Vicarious Liberalism.

It might be protested on Rawls's behalf that the device of the original position is meant to embody, not an *emergent* justification in terms of mutual consent, but rather a *teleological* justification in terms of mutual advantage.³⁵ The fact that citizens (or their representatives) would consent to Rawls's two principles of justice under idealized fair bargaining conditions would then serve merely as *evidence* that those principles do in fact track mutual advantage. But if in fact Rawls is merely after a teleological justification in terms of mutual advantage, then his rhetoric is seriously misleading. The whole attraction of his theory lies in its attempt to capture the "basic intuitive idea" of society, not just as a scheme for mutual advantage, but as a system of *cooperation* for mutual advantage among *free and equal* persons.

The public-goods argument is another example of the reliance on vicarious, fictive consent to justify governmental coercion. When some service is labeled a "public good," it is accordingly assumed that everyone wants it, and that their failure to contribute to its production is simply the result of a perverse Prisoner's Dilemma incentive structure that delivers results contrary to the participants' actual preferences. Seldom is any attempt made to show that those who are coerced into contributing really do pre-

³³ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

³⁴ John Rawls, "Justice as Fairness: Political Not Metaphysical," in *Philosophy and Public Affairs*, vol. 14, no. 3 (1985), pp. 223–51.

³⁵ A political system is *emergently* justified if it is justified because of the way in which it came about; by contrast, it is *teleologically* justified if it is justified because of its beneficial consequences. Emergent justifications are backward-looking; teleological justifications, forward-looking. For a more detailed discussion of these two types of justification, see David Schmidtz, "Justifying the State," *Ethics*, vol. 101 (October 1990), pp. 89–102.

fer the outcome, or that coercive provision represents anything more than the transformation of internal costs of provision into negative externalities.³⁶ Thus, the pacifist is assumed to consent to the “public good” of national defense, the Christian Scientist is assumed to consent to the “public good” of national health care, the person of unorthodox opinions is assumed to consent to the “public good” of a state-run education system that teaches orthodoxy, and the anarchist is assumed to consent to the “public good” of government itself.³⁷

What all these forms of vicarious consent – indirect, implicit, imputed, or simply invented – have in common is that they are automatically taken to override the real-life *dissent* of actual people. This procedure is in accordance with Rousseau’s formulation: “The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them.”³⁸ The citizen’s situation is eerily analogous to that of the rape victim whose protests are dismissed on the grounds that “she really wanted it”:

[I]t has become commonplace among feminists to regard rape as the linchpin of a male protection racket in sexist societies. . . . When we are raped, we hear that we brought it on ourselves. . . . For we could have stayed home or gone out only with a guardian. . . . Belatedly, we find that a male guardian can often protect us from no one but himself, and we are at his mercy there. The protectorate tends not to recognize rape by guardians or by males to whom we have once been accessible. . . . No matter what the men do to them, it is not really rape, because *the rules give the women’s status itself the value of consent*. . . .

Another kind of rule gives female appearance, rather than status, the value of consent. Consider the rule that women who dress or move “provocatively” are “asking for it” [either in] the “sexy” way, where our clothes and manner accent femininity [or in] the “castrat-

³⁶ When the production of some good valued by A imposes uncompensated costs on B, we speak of a *negative externality*; on both ethical and efficiency grounds, economists generally favor *internalizing* such externalities, that is, requiring those who value the good (in this case, A) to bear the costs of its production. The coercive provision of “public goods” does precisely the opposite: it externalizes internalities – since members of the minority (B), who do not value the good, are forced to subsidize its production in order to benefit members of the majority (A), who do value it. Since members of the minority do not value the good, the costs are uncompensated; these costs include not only the forced contribution to the good’s production, but in many cases the existence of the “good” itself. (Perhaps this could be justified on redistributionist grounds; but the public-goods argument is not generally put forward as a redistribution stratagem [imposing costs on B in order to benefit A], but rather as a scheme for *mutual* advantage.)

³⁷ Nor is any attempt generally made to show that *compulsory* contributions are necessary for the good’s provision, despite the fact that there is not a single example of a so-called public good that has not been supplied solely by voluntary means at one time or another in history.

³⁸ Rousseau, *The Social Contract* (*supra* note 23), p. 277.

ing bitch" way, where our clothes and manner manifest, rather, a refusal to make a feminine or "sexy" display of femaleness, and we consequently need to be "taught our place." . . . These rules confer the value, or part of the value, of consent upon a woman's status, appearance, behavior, or situation. . . .

The most blatant rule, summing up the spirit of the institution of rape, is that when a woman says no she means yes. What must she say to mean no? . . . If both no and yes mean yes, neither means anything. The net result is that women are politically disabled from withholding consent to male sexual access. . . . It is sufficient [for consent] that the woman either is or is not wearing clothes that highlight her femaleness, that she is alone either with or without other men or women, that she says either yes or no, and so on. . . . [T]he rules of rape discredit her refusals.³⁹

Just as the rules of a male-dominated society automatically impute sexual consent to women no matter what they say or do, thus making rape invisible, so analogously the rules of a Vicariously Liberal society automatically impute political consent to citizens no matter what they say or do, thus making oppression invisible:

Perhaps it will be said that this consent is not a specific, but a general one, and that the citizen is understood to have assented to everything his representative may do when he voted for him. But suppose he did not vote for him, and on the contrary did all in his power to get elected someone holding opposite views—what then? The reply will probably be that, by taking part in such an election, he tacitly agreed to abide by the decision of the majority. And how if he did not vote at all? Why, then he cannot justly complain . . . seeing that he made no protest. . . . So, curiously enough, it seems that he gave his consent in whatever way he acted—whether he said yes, whether he said no, or whether he remained neuter! A rather awkward doctrine, this.⁴⁰

³⁹ Claudia Card, "Rape as a Terrorist Institution," in R. G. Frey and Christopher W. Morris, eds., *Violence, Terrorism, and Justice* (Cambridge: Cambridge University Press, 1991), pp. 303–12.

⁴⁰ Herbert Spencer, *Social Statics: The Conditions Essential to Human Happiness Specified, and the First of Them Developed* (New York: Robert Schalkenbach Foundation, 1970), p. 190; cf. Lysander Spooner, *No Treason*, in George H. Smith, ed., *The Lysander Spooner Reader* (San Francisco: Fox and Wilkes, 1992), pp. 49–111; Sy Leon with Diane Hunter, *None of the Above: The Lesser of Two Evils . . . is Evil* (Santa Ana: Fabian Publishing, 1976); and R. S. Radford, ed., *The Power of Congress (As Congress Sees It)* (Orange: Pine Tree Press, 1976). Despite the similarity in logic between the Card passage and the Spencer passage, I have discovered that those who find the Card passage plausible tend to dismiss the Spencer passage, while those who find the Spencer passage plausible tend to dismiss the Card passage. This division strikes me as regrettable.

In both cases, the value of genuine and express consent has been marginalized in favor of a scheme of interpretation that views dissent through consent-colored spectacles (as it were), thus disallowing the possibility of a *no* that means *no*. The victims are merely "forced to be free."

V. IS IMMANENT LIBERALISM NAIVE?

I have said that for Immanent Liberalism the ideal of mutual consent is to be realized primarily at the level of society, rather than at the level of government. In this respect, however, Immanent Liberalism might be accused of missing Vicarious Liberalism's main point. In the social sphere as we actually know it, power differentials among interacting parties may vitiate the genuinely consensual nature of their relationship; and even interactions that are genuinely consensual may impose negative externalities on unconsenting third parties. Leaving everything to society may look on paper as though it maximizes the sway of mutual consent, but if such "consent" takes place within a sociopolitical framework that systematically advantages some and disadvantages others, it begins to look more like exploitation. In such cases, focusing attention on the sociopolitical framework itself seems less like a distraction from contract ideals than like a necessary means to securing those ideals. Doesn't this suggest that Vicarious Liberals simply have a more sensitive and sophisticated grasp of problems that Immanent Liberals are unwilling to face?

It is true, certainly, that power differentials and negative externalities of various sorts can undermine the consensual nature of social interactions; indeed, one of the principal functions of a legal framework is to correct for just such problems. This much is common doctrine between Immanent and Vicarious Liberals. The difference lies in the *way* that the framework is conceived as solving the problem. For the Immanent Liberal, the goal is still mutual consent at the everyday social level, and the role of the political framework is to foster this goal by neutralizing, as far as possible, the factors that impede such consent. For the Vicarious Liberal, on the other hand, consent to and through the political process largely *displaces* everyday social consent as the goal.

Consider, for example, the different approaches of Madison and Rousseau to the problem of majority faction. In good Immanent Liberal fashion, both thinkers recognize (in "Federalist No. 10" and *The Social Contract*, respectively) the inadequacy of majoritarian democracy as a realization of contract ideals:

[M]easures are too often decided, not according to the rules of justice, but by the superior force of an interested and overbearing majority. . . . By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest,

adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . . . If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. . . . When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.⁴¹

[W]hen intrigues arise, and partial associations are formed at the expense of the great association . . . it may then be said that there are no longer as many votes as there are men, but only as many as there are associations. . . . Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular. . . . [T]he vote of the majority always binds all the rest . . . [but only if] all the qualities of the general will still reside in the majority: when they cease to do so . . . liberty is no longer possible.⁴²

Madison and Rousseau thus agree that, from the perspective of genuine liberalism, a majority pursuing its own ends at the expense of minorities is just one more special interest, no more entitled than an absolute monarch to speak for the people as a whole.⁴³

Where Madison and Rousseau part company is in the character of their suggested solutions. Madison regards the elimination of the *causes* of faction as not only impossible but, more importantly, *undesirable*: the freedom to form one's own conception of the good, and to promote its realization through association with others of like mind, is of paramount importance, and the protection of this freedom is one of the chief aims of any legitimate government:

There are . . . two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. . . . Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency. . . . As long as the reason of man continues fallible, different opinions will be formed. . . . The diversity in the fac-

⁴¹ James Madison, "Federalist No. 10," in Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961), pp. 77-80.

⁴² Rousseau, *The Social Contract*, pp. 203-4, 277-78.

⁴³ Cf. Herbert Spencer, "The Great Political Superstition," in *The Man versus the State* (*supra* note 16), pp. 123-66.

ulties of men . . . is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. . . . The regulation of these various and interfering interests forms the principal task of modern legislation. . . . And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. . . . The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*. . . . Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion and interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.⁴⁴

Madison thus advocates a political framework whose incentive structure channels factional interests and neutralizes their effects, rather than attempting to suppress such interests. In short, Madison's solution is squarely in the Immanent Liberal tradition of designing the governmental level so as to preserve, rather than replace, mutual consent at the social level.⁴⁵

Rousseau, on the other hand, attempts to control the *causes* of faction rather than their effects. Accordingly, he endorses all the strategies that Madison rejects.⁴⁶ Political parties and special-interest groups are forbidden outright; tremendous responsibility for eliminating social conflict is placed in the hands of "enlightened statesmen," in the form of the Legislator, who initially molds the souls of the citizens-to-be so as to make them accord with the general will, and of the Censors, who subsequently maintain the citizens' souls in the desired condition through state-imposed moral instruction, including an official and compulsory state religion.⁴⁷ In short, the Rousseauian polity eliminates faction by inculcating in its citizens "the same opinions, the same passions, and the same interests." Despite a strong Immanent Liberal streak, Rousseau in the end adopts a Vicarious Liberal strategy, curbing actual liberty in order to

⁴⁴ Madison, "Federalist No. 10," pp. 78-81.

⁴⁵ It might be argued that Madison's federalist solution has not in practice proven terribly successful in preventing special interests from capturing the political process; but my concern here is with the *kind* of solution that Madison offers, not with the merits of its specific details.

⁴⁶ Indeed, Madison's "Federalist No. 10" may well be intended in part as a reply to the arguments of Rousseau's *Social Contract*. For Madison's general attitude toward Rousseau, see "Universal Peace," in James Madison, *Letters and Other Writings of James Madison* (Philadelphia: Lippincott, 1865), vol. 4, pp. 470-72.

⁴⁷ On the abolition of factions, see Rousseau, *The Social Contract*, pp. 204, 278; on the Legislator, see *ibid.*, p. 214; on the Censors, see *ibid.*, p. 297; on the establishment of a state religion, see *ibid.*, pp. 303-8.

implement the general will, through which citizens enjoy their liberty vicariously.

The difference between Immanent and Vicarious Liberals, then, lies not in their attention or lack of attention to the political framework, but rather in the role they assign to that framework — as the *guarantor* and *enabler* of contract relations, or instead as the primary *embodiment* of those relations.⁴⁸ Nor is Immanent Liberalism *as such* committed to any particular view on the *extent* of government coercion needed to secure genuinely consensual interactions at the social level. Among the classic nineteenth-century proponents of Immanent Liberalism, for example, I would count not only Benjamin Tucker, who argued that socioeconomic inequities could be abolished by dismantling the entire state apparatus and replacing it with a system of “voluntary socialism” (perhaps better described as free-market anarchism) — but also John Stuart Mill, who over the years saw a need to assign an ever larger role to state regulation and redistribution in order to free the economically disadvantaged from intimidation by the wealthy.⁴⁹ The principal issue is not how prominent a role is assigned to the political framework, but whether that framework is made to serve the ideal of authentic voluntary cooperation, or instead to replace that ideal.

One reason that so many contemporary liberals are driven to embrace indirect or fictive versions of consent is, I suspect, an assumption that a social order based solely or primarily on genuine and express mutual consent is impossible in a pluralistic society, because it would require *unanimity* or something close to it. (Hence, e.g., Rawls settles instead for a *hypothetical* unanimity achieved by suppressing all the information on which a disagreement could be based.) But a concern with society-wide unanimity is relevant only to the extent that social order is seen as a product of *centralized* decision-making, rather than as emerging from networks of *local* mutual consent.⁵⁰

⁴⁸ Does this mean that an absolute monarchy would be an acceptable political framework to Immanent Liberals, so long as the monarch enforced liberal rights? Some Immanent Liberals have indeed held that there is nothing *intrinsically* illiberal about absolute monarchy, and that its only drawback is the *pragmatic* difficulty of there being no guarantee that the monarch, or the monarch's successors, will continue to govern in a liberal fashion. I for one do not agree; it seems to me that, pragmatic considerations aside, there is also something *intrinsically* valuable, from a liberal perspective, in having a say in the laws to which one is subject. My point is simply that having such a say is *no substitute* for having a say in the day-to-day control of one's life; the value of the former derives rather from its being an *instance* of the latter.

⁴⁹ See Benjamin R. Tucker, *Instead of a Book, By a Man Too Busy to Write One: A Fragmentary Exposition of Philosophical Anarchism* (New York: Benjamin R. Tucker, 1893); similar views were defended by Francis Tandy, Lysander Spooner, and Gustave de Molinari. For Mill, see especially his *Principles of Political Economy* and *Chapters on Socialism*, in John M. Robeson, ed., *Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1962–1991), vols. 2–3 and 5, respectively.

⁵⁰ Recall the fable of the king who proposed to command that the entire earth's surface be covered over with leather in order to protect his feet — until one of his subjects achieved the same effect by inventing shoes.

Many feminists are wary of the traditional liberal distinction between public and private spheres, and may be suspicious of Immanent Liberalism for similar reasons. But such suspicion would be unwarranted, I think. Feminist skepticism about the public/private or government/society divide stems largely from the fact that the private sphere, supposedly a sphere of freedom, has traditionally been one in which women are oppressed by men, and are moreover disabled from gaining legal relief by the government's hands-off attitude toward, e.g., domestic relations ("a man's home is his castle"). The feminist insistence that "the personal is the political" expresses a determination not to let relations of domination and subordination become invisible simply because they occur in the supposedly "noncoercive" sphere of society rather than in the "coercive" sphere of government.⁵¹ Small wonder that feminists have not always found Paine's notion of an iron wall between government and society an attractive one, and that many feminists have made an uneasy peace with the patriarchal institution of the state (always a risky endeavor)⁵² in order to enlist its coercive powers in the struggle against pervasive male privilege in the private sector.

Feminism and Immanent Liberalism need have no quarrel, however. On the contrary, the aspects of the public/private divide about which feminists have the greatest misgivings are precisely those that characterize *Vicarious* rather than Immanent Liberalism. Women have been among the primary victims of the imputation of vicarious consent—from the assertion, in earlier times, that women did not need the suffrage because they were "virtually represented" through their husbands, to the continuing reluctance even today to recognize rape in marriage, on the grounds (still asserted with alarming frequency) that by entering the marriage contract a wife tacitly licenses her husband's unconditional sexual access to her. The extent to which laws have relegated women to private-sphere exploitation by men is precisely the extent to which contract values have not been realized immanently in that sphere, while it is the patriarchal politics of status that have been the chief legitimizer of women's subjection. Legal authorization and reinforcement of male dominance may masquerade as deference to the autonomy of the private sphere, but in fact represents a governmental intrusion into that sphere on behalf of one group at the expense of another.

⁵¹ See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), pp. 124-33.

⁵² The following proposition seems a fairly elementary one: To the extent that the state is a tool that serves to advance the interests of a wealthy white male elite, any increase in the power of government, whatever its intended result, can only tend to expand and entrench the power of the wealthy white male elite. Hence it is that laws passed to benefit oppressed groups often end up being used against them (as, e.g., when anti-pornography laws written with feminist intentions have been used—by male police and male judges—to censor feminist publications).

VI. RAWLS AS COMMUNITARIAN

John Rawls is widely regarded, by admirers and detractors alike, as the chief standard-bearer of the cause of liberal individualism against the twin foes of utilitarianism and communitarianism. George Kateb even singles out *A Theory of Justice* as "the great statement of individualism in this century."⁵³

Thanks in great part to Rawls's efforts, the battle against utilitarianism has largely been won. (There may be more skirmishes to come, but the tide has turned.) But Rawlsian arguments have proven rather less successful against communitarianism, which seems to respond only with renewed vigor. One reason for this difference in success, I suggest, is that Rawlsian theory, as a vicarious rather than immanent version of liberalism, grants too many of the communitarians' crucial assumptions (just as the bourgeois republican revolutionaries of Marx's example, by endorsing a vicarious rather than immanent version of communitarianism, granted too many of the liberals' crucial assumptions).

A number of critics have pointed out that Rawls's arguments for the difference principle appear to violate Rawls's own criterion of the separateness of persons and thus are implicitly communitarian.⁵⁴ While I am sympathetic to this criticism, my present concern is rather with the whole structure of Rawls's approach. Specifically, it seems to me that Rawls plays into the communitarians' hands by adopting the Vicarious Liberal strategy of displacing the ideal of mutual consent to the hypothetical founding of the liberal social order, rather than seeking to realize that ideal within the social order itself. Moreover, my concern is not with the Rawlsian theory in its own right, but rather with that theory as a symptom of the contemporary communitarianization of liberalism.

Communitarians like Michael Sandel fault Rawls's device of the original position for exemplifying a liberal delusion of "unencumbered selves," i.e., persons regarded as bare centers of agency rather than as constituted by a rich and vast network of particularized social ties. But Rawls's very use of this device shows how far Rawls *agrees* with the communitarian notion that human beings enjoy no *morally relevant* identity independent of their membership in a political community. In contrast to, e.g., Locke's contractors, the Rawlsian contractor brings no rights to the bargaining table; whatever rights she may have must come *out* of the contract. Rights are a product of political association, not its precondition.

⁵³ George Kateb, "Democratic Individuality and the Meaning of Rights," in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge: Harvard University Press, 1989), p. 184.

⁵⁴ Nozick, *Anarchy, State, and Utopia*, pp. 228-31; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), pp. 77-80; Jeffrey Paul and Fred D. Miller, Jr., "Communitarian and Liberal Theories of the Good," *Review of Metaphysics*, vol. 43, no. 4 (June 1990), pp. 803-30.

Ronald Dworkin has suggested that Rawlsian contractors enjoy at least one precontract right: "a right to equal concern and respect in the design and administration of the political institutions that govern them."⁵⁵ If this were indeed true, it would only serve to substantiate the extent of Rawls's concessions to communitarianism: even this one basic human right is only a right to a certain standing within a political community, not a right that could be claimed by one individual against another in personal interaction.

In fact, however, Rawls rejects even this one precontract right that Dworkin tries to offer him:

This is an ingenious suggestion but I have not followed it. . . . I prefer not to think of justice as fairness as a right-based view. . . . I think of justice as fairness as working up into idealized conceptions certain fundamental intuitive ideas [that] reflect ideals implicit or latent in the public culture of a democratic society.⁵⁶

[J]ustice as fairness is framed to apply to what I have called the "basic structure" of a modern constitutional democracy. . . . Whether justice as fairness can be extended to a general political conception for different kinds of societies existing under different historical and social conditions, or whether it can be extended to a general moral conception, or a significant part thereof, are altogether separate questions. . . . [S]ince justice as fairness is a political conception of justice for a democratic society, it tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation.⁵⁷

Here the concession to communitarianism is still greater: Rawlsian justice is justified only for some societies and not others, and only to the extent that it reflects the defining cultural traditions of such societies.

It may seem unfair to saddle Rawls with the labels of Vicarious Liberal and crypto-communitarian. After all, the social order that Rawls ultimately derives from his theory is one in which contract ideals are to a great extent realized *immanently*, e.g., via the principle of equal liberty, as well as the requirement that socioeconomic positions be open to all.

It is undeniably true that the society that ends up getting justified by Rawlsian premises is in large part an Immanent Liberal one. To that extent the title of this section is an exaggeration. It is an exaggeration with a point, however; for it is not *because* the Rawlsian society exemplifies con-

⁵⁵ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 180.

⁵⁶ Rawls, "Justice as Fairness: Political Not Metaphysical," p. 236n.

⁵⁷ *Ibid.*, pp. 224–25.

tract ideals that it gets justified. Rather, it is justified because it is selected by hypothetical bargainers in Rawls's original position, and it is this position that is intended to exemplify contract ideals. If an authoritarian state and a rigid caste system had been favored by the hypothetical bargainers, then the mantle of legitimacy would have settled on those institutions instead. The fact that Rawlsian society in large part *really* and *immanently* embodies the liberal ideal of mutual consent plays no direct role in its justification; Rawls's attention is instead on the vicarious and fictive mutual consent embodied in the original position.⁵⁸ Like the communitarians, Rawls seems to attach more significance to the liberty of the ancients than to the liberty of the moderns; political participation—even the imaginary *shadow* of political participation—takes precedence over the living reality of day-to-day freedom.

Rawls might reply that such "day-to-day freedom" is vitiated by differences in bargaining power for which the original position corrects. Yet Rawls's favored mechanism for implementing such corrections—a powerful, discretionary state—always outweighs citizens in bargaining power. Likewise, in the real world, those with the most bargaining power are typically the corporate beneficiaries of government privilege, protection, and subsidy; bargaining differences in a genuine market context are tame by comparison. Rawls offers us little in the way of suggestions for avoiding the public-choice problems that notoriously accompany such asymmetries; it is primarily at the vicarious level of the original position, rather than at the immanent level of real life, that he is most concerned about eliminating unfair advantages in bargaining power.

Once again, my present concern is not the analysis of Rawlsian theory, but rather the analysis of liberalism. But I find it significant, and troublesome, that a theory that makes such fundamental concessions to communitarianism should be hailed by contemporary liberals as "the great statement of individualism in this century." It only shows how far the liberal mainstream has traveled down the road of Vicarious Liberalism, contenting itself with idealized consensual relations in an imaginary Kingdom of Ends, and abandoning any effort to realize that Kingdom "in England's green and pleasant land."⁵⁹

⁵⁸ Needless to say, if the logic of the original position *had* in fact turned out to favor authoritarianism, Rawls would not have responded by embracing authoritarianism; in accordance with the procedure of reflective equilibrium, he would instead, I am sure, have rejected the device of the original position. My concern, then, is with the misleading structure of Rawls's argument: although *for Rawls himself* there may be a direct connection between liberal society and the ideal of mutual consent, *in Rawls's theory* the ideal of mutual consent is used, not to justify liberal society directly, but rather to justify the original position, which *in turn* is used to justify liberal society—yielding the implication, whatever Rawls's intentions, that the original position is justified by the ideal of mutual consent quite apart from whether or not it generates liberal results—in short, that the value of immanent consent is secondary, and subordinated to the value of vicarious consent.

⁵⁹ Blake, "Milton" (*supra* note 1), p. 238.

VII. SOCIALIST VERSUS CAPITALIST LIBERALISM?

Contemporary liberalism, both as a theoretical ideology and as a practical system of governance, has in recent memory had most of its energies devoted to a different conflict within liberalism, one that cuts across that between Immanent and Vicarious Liberalism. This is the conflict between socialist and capitalist versions of liberalism—or, more precisely, the conflict among various liberalisms defined in terms of their positions along the socialist/capitalist spectrum. This socialist/capitalist conflict is admittedly a significant one for liberalism; but although it has garnered more attention by far, I think it pales in importance beside the Immanent/Vicarious conflict. Socialists and capitalists in the Immanent Liberal camp arguably have far more in common with each other than with either socialists or capitalists in the Vicarious Liberal camp. To the extent that this is true, the current focus on socialist versus capitalist versions of liberalism is something of a distraction from the real issue.

When the socialist/capitalist distinction is combined with the Immanent/Vicarious distinction, the liberal landscape divides into four main camps, each a putative realization of the liberal ideal of society as a system of cooperation for mutual advantage among free and equal persons:

Vicarious Liberalism: socialist model (VL socialism, state socialism): Citizens are taken to consent to a framework in which decisions affecting their mutual advantage are made by a bureaucratic governmental elite.

Vicarious Liberalism: capitalist model (VL capitalism, state capitalism): Citizens are taken to consent to a framework in which decisions affecting their mutual advantage are made by a bureaucratic governmental elite together with a privileged corporate/managerial elite.

Immanent Liberalism: socialist model (IL socialism, libertarian socialism): Citizens themselves make decisions affecting their mutual advantage through participation in decentralized local cooperative associations.

Immanent Liberalism: capitalist model (IL capitalism, libertarian capitalism): Citizens themselves make decisions affecting their mutual advantage through mutually agreeable free exchanges on the unregulated market.

Strictly speaking, these are not separate camps so much as distinct tendencies which may be present in varying degrees or varying combinations in any particular liberal theory or liberal regime. For simplicity's sake, however, I shall continue to refer to them as camps; what I say about any one camp will apply to a mixture of tendencies just to the extent that the mixture embodies the outlook of that camp.

VL socialism and VL capitalism are recognizable as the prevailing ideologies of most existing socialist and capitalist regimes, respectively—though such ideologies are generally less bluntly worded, and prefer to employ rhetoric borrowed from their IL counterparts. As for those counterparts, among the proponents of IL socialism I would count such classic figures as Pierre-Joseph Proudhon, Pyotr Kropotkin, Oscar Wilde, and Emma Goldman, and such contemporary figures as E. F. Schumacher, Kirkpatrick Sale, and Noam Chomsky; among the proponents of IL capitalism I would count such classic figures as John Locke, Adam Smith, Herbert Spencer, and Lysander Spooner, and such contemporary figures (at least in some of their writings) as Friedrich A. Hayek, Robert Nozick, and Murray Rothbard. As this (very incomplete) list should make clear, neither the IL socialist nor the IL capitalist camp is characterized by overwhelming unanimity about much of anything.⁶⁰ What they do have in common is an attachment to the immanent realization of mutual consent, and a distaste for centralized control of any sort: the Jeffersonian slogan “Divide the counties into wards,” the environmentalist slogan “Think globally, act locally,” and the anarcho-capitalist slogan “Sell the streets!” all spring from the same decentralist root.

VL socialism and VL capitalism, for all their differences, also have a significant element in common: both exemplify “top-down” rather than “bottom-up” approaches. More specifically, each endorses a version of “trickle-down” economics. Under VL socialism, vast quantities of resources and power are transferred to the bureaucratic state, on the theory that some of these benefits will trickle down to the common people—while under VL capitalism, the bureaucratic state follows a “supply-side” policy of granting special privileges and protections to favored corporations, once again on the theory that some of these benefits will trickle down to the common people.⁶¹ By contrast, IL socialism and IL capitalism both seek, albeit in rather different ways, to empower ordinary individuals in their everyday associations with one another.⁶²

⁶⁰ Certainly the list shows at least that Immanent Liberalism per se is not committed to any particular view of the value of industrial growth or the legitimacy of the nation-state.

⁶¹ From an Immanent Liberal perspective, the United States, despite a heavy dose of IL capitalist rhetoric, is a predominantly VL capitalist regime. Of the United States’ two ruling parties, one represents a mostly VL capitalist vision, and the other a mix of VL capitalism and VL socialism. For example, the current debate over health care in this country may be seen as a struggle over the precise balance of power between, on the one hand, the state bureaucracy, and, on the other hand, the quasi-private beneficiaries of state privilege—e.g., the American Medical Association (with its state-granted power to control medical licensing) and the insurance industry (which has largely “captured” its regulators). That is, it is largely a debate *within* the Vicarious Liberal paradigm, rather than a challenge to that paradigm itself.

⁶² It is an interesting question whether IL capitalist and IL socialist economic relations could coexist within the same political regime. Given the preference of both for a radically decentralized political order, I am inclined to think that in general the answer is yes; but of course this may not be true for some *particular* IL capitalist or IL socialist theories.

IL socialists and IL capitalists seem, for the most part, unaware of the affinities between their two camps. Each side tars the other with the brush of the other's VL analogue; that is, IL socialists generally dismiss IL capitalists as apologists for corporate privilege, while IL capitalists generally dismiss IL socialists as apologists for central planning. Yet each IL side accuses its own VL counterpart of what the other IL side accuses the first side of generally; that is, IL socialist critiques of VL socialism sound rather like typical capitalist denunciations of authoritarian state socialism, while IL capitalist critiques of VL capitalism sound rather like typical socialist denunciations of the capitalist ruling class. (For example, socialist historian Gabriel Kolko has expressed surprise, and some annoyance, at the popularity among free-market libertarians of his books⁶³ analyzing the influence of capitalist elites in turn-of-the-century America.) All this leads me to suspect that the main lines of opposition within liberalism have been misdrawn.

In response to capitalist criticisms, IL socialists vehemently insist that authoritarian socialism is not socialism at all, and that accordingly its evils should not be laid at the door of socialism per se:

Since its origins, socialism has meant the liberation of working people from exploitation. . . . [T]he socialist ideal [is] to convert the means of production into the property of freely associated producers and thus the social property of people who have liberated themselves from exploitation by their master, as a fundamental step towards a broader realm of human freedom.

The Leninist intelligentsia have a different agenda. . . . For the Leninist, the masses must be strictly disciplined, while the socialist will struggle to achieve a social order in which discipline [becomes] superfluous. . . . Libertarian socialism, furthermore, does not limit its aims to democratic control by producers over production, but seeks to abolish all forms of domination and hierarchy in every aspect of social and personal life. . . .

The Leninist antagonism to the most essential features of socialism was evident from the very start. . . . Lenin and Trotsky, upon assuming power, immediately devoted themselves to destroying the liberatory potential of [Soviets and factory committees], establishing the rule of the Party. . . . Not only the masses, but even the Party must be subject to "vigilant control from above," so Trotsky held as he made the transition from revolutionary intellectual to State priest. Before seizing State power, the Bolshevik leadership adopted much of the rhetoric of people who were engaged in the revolutionary

⁶³ Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton: Princeton University Press, 1965); Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1967).

struggle from below, but their true commitments were quite different. This was evident before and became crystal clear as they assumed State power in October 1917. . . .

Soon Lenin was to decree that the leadership must assume "dictatorial powers" over the workers, who must accept "*unquestioning submission* to a single will" and "in the interests of socialism," must "*unquestioningly obey the single will* of the leaders of the labour process." . . . Lenin and Trotsky proceeded with the militarization of labour . . . the transformation of the society into a labour army submitted to their single will. . . . At the same time, 'factionalism'—i.e., any modicum of free expression and organization—was destroyed "in the interests of socialism," as the term was redefined for their purposes. . . .⁶⁴

Likewise, in response to socialist criticisms, IL capitalists vehemently insist that corporate capitalism is not capitalism at all, and that accordingly its evils should not be laid at the door of capitalism per se:

The story of the emergence and growth of the corporation makes it clear that . . . it was, and still is, based on a *rejection* of traditional capitalism, not, as most Americans have been brought up to believe, on an embrace of traditional capitalism. . . . For the individualism, competition, and serendipity of traditional capitalism—the system of control Adam Smith described as the market's invisible hand—the corporation substituted . . . the visible hand of management [which] entailed . . . hierarchy and bureaucracy. . . . Power over the marketplace and preferment from the state figured prominently in the corporation's business strategies. . . . In the 1850s [railroads] began lobbying for federal land and cash subsidies. . . . [T]he industrial policy that resulted from their efforts transferred to dozens of railroads vast troves of land, cash, and other benefits. . . . The 1920s and 1930s were a high-water mark for the business lobby—and for the antimarket, cartel policies it urged on an increasingly receptive nation. . . . In 1945 . . . the visible hand held unprecedented sway over the U.S. economy. The 100 largest industrial firms produced 70 percent of U.S. manufacturing output. . . . It was . . . a corporatist world of managed oligopoly radically unlike the competitive economy envisioned in the theories of Adam Smith—a world to which the corporation had aspired for almost a century. . . .⁶⁵

⁶⁴ Noam Chomsky, "The Soviet Union versus Socialism," in Dimitrios I. Roussopoulos, ed., *The Radical Papers* (Montreal: Black Rose Books, 1987), pp. 49–51.

⁶⁵ Paul H. Weaver, *The Suicidal Corporation: How Big Business Fails America* (New York: Simon and Schuster, 1988), pp. 109–16, 198–99. Not all IL capitalists would agree with Weaver's suggestion that this VL capitalist plutocracy is now largely fading away; see, e.g., Mary Ruwart, *Healing Our World: The Other Piece of the Puzzle* (Kalamazoo, MI: SunStar Press, 1992).

Nevertheless, IL socialists typically view with skepticism or even derision the protestation, on the part of IL capitalists, that state capitalist regimes are not *truly* capitalist, just as IL capitalists typically view with skepticism or even derision the protestation, on the part of IL socialists, that state socialist regimes are not *truly* socialist. This is in large part because each VL camp has managed to co-opt the rhetoric of its IL counterpart. Hence, VL socialism cloaks itself in the language of IL socialism, while on the other side such terms as *deregulation*, *privatization*, and *laissez faire* — which originally reflected the IL capitalist agenda of subjecting monopolies both public and private to the discipline of market competition — have been appropriated by VL capitalists to defend governmental grants to private firms of protection, subsidy, and monopoly privilege without public accountability.⁶⁶ So-called socialist governments arrogantly hand down their autocratic five-year plans, all in the name of empowering the people; so-called capitalist governments grant to savings and loans free rein to play with deposits that taxpayers are compelled to insure, all in the name of deregulation.⁶⁷ Thus, each VL camp practices a two-pronged bait-and-switch strategy: those who find IL socialist rhetoric attractive are lured into joining the VL socialist cause; those who find IL capitalist rhetoric attractive are lured into joining the VL capitalist cause; those who are repelled by VL socialist reality are misled to VL capitalism as the antidote; those who are repelled by VL capitalist reality are misled to VL socialism as the antidote. The systematic result is that, first, it is made very difficult to find one's way into either of the IL camps, and second, for those who do find their way into one of the IL camps, it is made very difficult to recognize the other IL camp as a potential ally. Hence, the entire Immanent Liberal alternative to the perpetual struggle among Vicarious Liberals that characterizes mainstream politics is rendered effectively invisible.

⁶⁶ Among the most egregious examples of this co-opting process has been the appropriation of Adam Smith by proponents of VL capitalism. Smith was an avowed enemy of mercantilism, the VL capitalism of his day, harboring a profound distrust of businessmen and their tendency to seek special favors from government at the expense of the less privileged. Indeed, he devoted his masterwork, the oft-cited but seldom-actually-read *Wealth of Nations*, to a defense of consumers and laborers against the "mercantile interest." Yet during the 1980s it was common for members of the Republican administration to sport Adam Smith neckties while championing the top-down corporatist policies Smith detested (e.g., the savings and loan "deregulation" described in the text).

⁶⁷ It might be argued that deregulation was a step in the direction of Immanent Liberalism (capitalist model, at least) but did not go far enough, since it failed to abolish federal deposit insurance at the same time. But this objection makes the mistake of assuming that a particular act of deregulation has a fixed significance regardless of the context. Federal deposit insurance, by giving savings and loans a guaranteed claim on the taxpayers' money, in effect converted those savings and loans from purely private firms into autonomous arms of the state; hence, what would, without federal deposit insurance, have been a deregulation of private firms was instead, in the context of unrepealed federal deposit insurance, a "deregulation" of quasi-governmental agencies — a very different matter, and *not* a move in the direction of Immanent Liberalism. (And it is surely no coincidence that regulations were rescinded while federal deposit insurance was not.)

I have suggested that the opposition between Immanent and Vicarious Liberalism is deeper and more fundamental than the opposition between socialist and capitalist liberalism, and that a more productive political discourse might follow from reconceiving the political terrain in terms of the first rather than the second polarity. This does not mean that IL socialists and IL capitalists have nothing to disagree about—quite the contrary. But they also have much to learn from each other, and much to teach their VL counterparts. This, I maintain, is where more political dialogue should be focusing.

Vicarious Liberals may object that Immanent Liberalism has been marginalized in mainstream political discourse, not because it is invisible, but because it is simply impracticable: the ideal of mutual consent *cannot* be realized immanently in society to any significant extent, so we must settle for its vicarious realization instead. This might be true. Before such a verdict could be justified, however, one would have to take due account of the vast and growing literature, from both the libertarian socialist and libertarian capitalist camps, regarding the proper implementation of Immanent Liberalism.⁶⁸ This is a task on which, for the most part, mainstream liberalism has yet to venture.

It should by now be obvious that “Immanent Liberalism” is a label that covers a diverse range of approaches. There are significant disagreements, not only between the IL socialist and IL capitalist camps, but also within each camp. Immanent Liberals are united, not by a common answer, but by a common question: *How may the liberal ideal of mutual consent be realized as far as possible in everyday social life?* Let those of us who share the liberal vision pursue this question together, working to “build Jerusalem in England’s green and pleasant land.” For if we neglect this question, projecting human liberty onto the institutions of government, and contenting ourselves with a merely vicarious or imaginary realization of our ideal, we run the risk of turning the social world of living, breathing human beings over to the care of an illiberal (or only spuriously liberal) order of arbitrary power and imputed consent—whether of a predominantly state socialist or predominantly state capitalist variety.

Let us heed Marx’s warning: “[W]hen man liberates himself politically, he liberates himself by means of a detour, through the means of something else. . . . The state is the intermediary between man and his freedom.”⁶⁹

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⁶⁸ Even to attempt an adequate bibliography here would require far too many pages. I will thus name just two recent efforts: on the IL socialist side, see Joshua Cohen and Joel Rogers, “Associations and Democracy,” *Social Philosophy and Policy*, vol. 10, no. 2 (Summer 1993), pp. 282–312; on the IL capitalist side, see Don Lavoie, “Democracy, Markets, and the Legal Order: Notes on the Nature of Politics in a Radically Liberal Society,” *ibid.*, pp. 103–20.

⁶⁹ Marx, “On the Jewish Question,” pp. 44–45.