ABSTRACT

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ABSTRACT

This dissertation attempts to create a justification of liberty from an evolutionary perspective. I argue that the classical liberal institutions of rule of law, private property, and the private sphere fulfill natural human desires while creating a spontaneous order in which cooperation can flourish. These classical liberal institutions are good for humans because they satisfy our evolved human nature. This human nature has evolved primarily through natural selection. It is complex and yet predictable if one understands the environments in which we evolved. Human nature will include both universal desires and patterned variability in those desires.
NORTHERN ILLINOIS UNIVERSITY

THE LIBERATED BEAST: EVOLUTION AND LIBERTY

A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE
DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

BY
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DEDICATION

To my family: Mom, Dad, Marah, Ryan, Grandma Ingrid, and Grandpa Wolff
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CHAPTER 1: INTRODUCTION TO THE PROJECT

Introduction

I argue that classical liberal institutions are good for humans because they satisfy our evolved human nature. This human nature has evolved primarily through natural selection. It is complex and yet predictable if one understands the environments in which we evolved. Human nature will include both universal desires and patterned variability in those desires.

Classical liberal society (or free society as I will sometimes refer to it) is a society in which the government plays a minimal role and in which individual freedom is maximized wherever possible. This includes free markets, but the major force of my argument will be the role of individual freedom in making day-to-day decisions about one's own desires and how those desires relate to the kind of life one wants to live.

Classical liberal societies support individual freedom within a stable rule of law. This rule of law creates a general framework that prevents individuals from harming one another while providing important information about the environment and the individuals in it that aids cooperative action. The classical liberal government is defined by broad, open-ended freedom, proscribing only certain means (such as force or fraud), and generally allowing individuals to rank their ends as they see fit.

Human nature is complex and will express itself differently in different
environmental contexts. This human nature, however, also manifests important universals that provide an anchor for that variation. Human nature is both individualistic and highly social, and we expect both self-interest and social pressure to play important and interrelated roles in human behavior. The individualistic and social desires will often conflict. These conflicts can be resolved through a spontaneous order where individual self-interest and the social desires of humans are both allowed to play a role in human life.

Assumptions

My rooting of human values in biological facts appears to violate the fact-value distinction, and it does in some ways. I believe, however, that it is time to reject or at least modify that distinction and to realize that insofar as biology affects human life and happiness, then facts really do bear on values. If we want to know what the best way of life is for humans, we must understand what humans are like. Evolutionary psychology, sociobiology, behavioral ecology, and other fields of study in the life sciences can help us understand what we are and why.

Ultimately, I do not violate the fact-value distinction, because I do not argue that whatever is part of human nature is somehow good. But I do argue for looking at human nature and trying to determine what the best way of organizing ourselves is in order to take advantage of both the individualistic and social desires. How we organize ourselves socially affects the extent to which we fulfill the potential within human nature as well as the amount of suffering individual humans experience. Individual suffering is the obvious negative outcome of bad social organization; failure to achieve the potential
contained in human nature is another, less obvious result of bad social organization.

My argument has two facets. In the first place, I argue that certain traits of human nature such as our lack of omniscience make liberal institutions more efficient than their more centralized counterparts at providing humans with what they need for a comfortable existence. This is the pragmatic side of the argument. Second, I argue that liberal institutions minimize the coercion that leads to some of the causes of human suffering by providing humans the freedom to live according to their natural desires. Liberal institutions therefore minimize suffering and maximize the actualization of the potential of human nature. This is a moral argument, as least insofar as suffering is bad and achieving one's potential is good. Not all kinds of suffering are avoidable, and not all kinds of suffering are bad, but it is my contention that since there are plenty of unavoidable causes of suffering in human life, letting the government add to that suffering seems unnecessary and wrong. Moreover, I assume that a life lived in accordance with the natural desires that together create a complete life is the only way to human flourishing and that such a life is the best life.

I assume that government-induced suffering is bad. I do not spend time defending this assumption in detail. Obviously one could argue that some forms of government-induced suffering are good and/or necessary, such as punishing criminals, but whether that punishment is actually good for the criminal is an argument as old as Plato. Apart from punishment and other less-clear forms of governmental coercion, it at least seems obvious to me that governmental coercion of innocent citizens, especially in areas of evolutionary import like reproduction and child-rearing, leads to excessive individual suffering as well as governmental inefficiency. Even classical liberal societies
allow for some coercion in order to protect all individuals from the threat of force or fraud. Coercion for this protective purpose is ideally the only justifiable reason for coercive action by government, though there may be some exceptions.

The pragmatic and moral arguments for individual freedom intersect. Governments that are contrary to human nature are less efficient because they require overcoming people's innate desires and tendencies, which causes individual suffering as well as large-scale suffering since inefficient governments cannot provide well for their citizens. The more government needs to overcome human nature, the more coercion is required. Coercion is expensive for the government and painful for the people. Less coercive societies are less expensive in governmental terms and cause less suffering.

As far as large-scale societies go, liberal institutions are best for humans. If one chooses to live in a small-scale society, the situation may be somewhat different, but human nature still restricts what even the smallest and most voluntary societies may do, as I will suggest later in considering the case of the kibbutzim. It is important to see human nature as a real and permanent limit on what government is capable of achieving through positive law. These limitations do not mean that we must give up on trying to make life better, only that we must do so in a way that is compatible with human desires and human freedom.

Organizational Logic

I start out with a justification for the application of evolutionary psychology to political theory. In this chapter I take a look at criticisms of evolutionary psychology and
argue that the evidence from evolutionary psychology is robust enough to serve as the basis for my discussion of human nature. In attempting to use human nature to support a particular political regime, I discuss not merely the universal desires that unite people, but also the important differences between people that create the incredible variation we see in the human species. Such variation is as politically important as the universals, and I hope that I succeed in treating both adequately. Much of the resistance to evolutionary psychology comes from overly simplistic forms of the hypotheses generated by that field. Evolutionary psychology is a broad field with complex hypotheses that take into account development, environmental differences, stage of life, and other important causes of human variation. Evolutionary psychology does not expect that all humans act the same way, especially under different circumstances.

I rely heavily on Adam Smith and Friedrich Hayek as two of the foremost proponents of classical liberalism. I have many reasons for doing this. In the first place, both have been somewhat overlooked as political thinkers, and their complex theories of human behavior and society are worth a second look, no matter what your ideological persuasion. Both have a deep appreciation for the benefits of free society, and both base their opinions on specific beliefs about human behavior.

Smith and Hayek have an understanding of society that closely mirrors the one that emerges from biological paradigms. Smith's arguments for grown institutions and Hayek's emphasis on spontaneous order as the basis for free society both demonstrate an understanding of evolutionary processes and the ways in which order gradually emerges from disorder. Human nature is ultimately influenced by two kinds of evolution: social and biological. Biological evolution places the rough groundwork in place, while social
evolution takes that rough groundwork and molds specifics according to environmental pressures and the particular circumstances of a people. Smith and Hayek concentrate on social evolution, but it is necessary to understand both kinds and their influence on human behavior.

Another, related reason to deal with Smith and Hayek rather than other political thinkers devoted to free society is that both have a thread in their thought that needs to be more clearly defined. This thread is a kind of thinking that I will refer to throughout this dissertation as "natural conventionalism." I see both Smith and Hayek as believing that conventions, rather than being purely man-made, are rooted in human nature. Smith especially focuses on the natural moral sentiments and extrapolates much of human social life from these sentiments. If conventions are in fact heavily influenced by nature, there may be a way, through the combination of the thought of Smith and Hayek and evidence from biological sciences, to eradicate or at least temper the often acrimonious distinction between nature and convention that has run through political philosophy for millenia.

Simply coining a phrase does not mean that one has created or discovered something new. This idea of natural conventionalism is present in Burke, Smith, and other thinkers, especially those of the Scottish Enlightenment, yet none of these thinkers had the knowledge of what precisely was meant by the natural part of the equation, thus leading to accusations of relativism or conventionalism by detractors. I believe that this idea is underdeveloped in many of these thinkers and worthy of more attention by political thinkers of today.

By natural conventionalism I mean that the natural human desires shift and mold
human conventions to create conventions that have their roots in nature, but whose full form can only be fulfilled through human social customs, conventions, and laws. Natural conventionalism is therefore related in some ways to the biological theory of emergence, and is also closely related to ideas of spontaneous order. I think that Smith and Hayek represent two of the most original thinkers in terms of finding a middle ground between nature and convention, and it is for this reason as well that I think they fit extremely well with a discussion of the relationship between biological nature and human social organization.

My use of Smith and Hayek as important representatives of classical liberal thought does not assume that either of the two are the ideal representatives of classical liberal society. In fact, in many ways I think that both miss out on important aspects of classical liberal or free society that could make the case supporting these societies much more strong. I try to supplement their views when possible with evidence from the natural sciences, and in other places I will point out thinkers who actually get it right where I think that Smith, Hayek, or both fall short. I chose these two thinkers because, overall, I think their work is some of the best in describing and justifying the foundations of a free society, and because in both of their cases their thinking overlaps with biological justifications for free society.

The three main chapters, on rule of law, private property, and the private sphere, are organized around three main threads of thought. I lay out Hayek and Smith's particular understanding of each classical liberal institution. I then turn to the evidence from human nature that supports the naturalness of each of these institutions. In some cases, the biological evidence supports Smith and Hayek's discussions, and in other cases
it supplements their thought. In each case I argue that these three classical liberal institutions grow out of our biological human nature.

I take up the primary classical liberal ideas of rule of law, private property, and the private sphere and individual rights. In the chapter on rule of law I argue that there is an innate rule of law that supplements positive rule of law, and that makes us particularly social. This innate rule of law makes much positive law unnecessary, but also supports the need for a minimal rule of law that prevents force and fraud in human interactions. In the chapter on private property I argue that humans have a natural desire for private property, and that private property rights are naturally conventional in the sense that they grow gradually out of natural human desires for territoriality and control over resources. In the chapter on the private sphere I argue that it is natural for humans to have a private sphere that is outside of governmental control where individuals make their own decisions regarding survival and reproduction. I argue that particularly in terms of parenting and livelihood humans should be left alone to pursue these goods as they see fit, with government interfering only to prevent force and fraud.

After these three basic chapters, I turn to some objections that might be made to the conclusion that classical liberal institutions best fulfill human nature. The first objection is that regimes based on equality may allow for greater fulfillment of human nature than regimes based on liberty. I argue that apart from classical liberal regimes being compatible with human nature, there are psychological barriers that are the result of evolution that prevent large-scale (or even small-scale) societies based on equality from being successful. These barriers include inclusive fitness, status and dominance hierarchies, and individual differences. The latter can be caused by a variety of
evolutionary factors, not to mention the numerous environmental factors like education and upbringing. In the second of these chapters I respond to the objection that free societies occasion a loss of excellence in human life, and that perhaps we should be willing to incorporate more coercion in human life in exchange for more excellence in the form of honor, courage, and justice. I respond that classical liberal society properly understood actually promotes individual excellence, though I admit that there may be some corresponding losses, such as the desire for military valor. Moreover, classical liberal society provides the most comprehensive fulfillment of human nature, providing an outlet for all of humanity's various desires. The excellence of a classical liberal society is therefore more comprehensive than the excellence of societies that base themselves on one specific aspect of the human experience. I also include a chapter on Herbert Spencer. Spencer is another classical liberal thinker who uses evolutionary thinking as a foundation for his arguments. Spencer, however, diverges from Smith and Hayek in that he promotes a kind of utopian anarchism that is based on Lamarckian evolution. I argue that such a view of evolutionary processes leads to a view of human nature as radically malleable, which makes Spencer closer in spirit to utopian egalitarians than to the classical liberals with whom he is usually grouped.

I finally spend a short chapter replying to various arguments concerning the fact-value distinction, the problem of radical variation, and the problem of historicism. I respond to each of these by arguing that the fact-value distinction is a false distinction, and that facts affect human values because we have natural human desires, which are, by definition, both facts and values at the same time. In terms of the problem of radical variation I argue that human nature, while it presents us with variation, does not present
us with radical variation. Instead, the variation of human nature is patterned variation, or variation according to natural principles. Finally, I argue that even though evolutionary theory is a historical theory, it does not lead to the relativistic problems of historicism since it creates, for all practical purposes, stable human desires that do not change.

I end with a conclusion that summarizes my major points, as well as outlining what I think the major political implications of the previous discussion are. One of the major themes that runs throughout the dissertation is the problem of complexity. Just as Smith focuses on grown regimes and Hayek focuses on spontaneous order to explain the complexity in human nature, I argue that the complexity of human nature precludes simple answers to the question of how to organize ourselves. The advantage of classical liberal theory is that it advocates limited government as the proper response to human complexity. This complexity will tend to support prudential contemplation rather than dogmatic assertions and actions and will, I think, bring us back to a more ancient understanding of man in contrast to the overly-simplified modern view.

**Why Such a Project Makes Sense**

It has been argued persuasively by many before me (Arnhart 1998; Masters 1989) that in order to properly understand the science of politics one must understand the science of human nature. Every species of which we are aware has a particular social structure ranging from solitary to highly complex. The form of these social structures depends on the kind of animal under investigation. One does not expect the high levels of cooperation seen in wasps to also work among groups of unrelated monkeys.
Understanding human nature can help us understand politics. Human nature can help us identify what works and also can help us identify what does not.

Moreover, understanding human nature is required if we are to predict even some of the outcomes of particular political policies. A lack of respect for the stability of human nature has created human suffering throughout history. This suffering has often been the result, not of malice, but of good intentions that went awry. Utopian thinking, in general, tends to assume a malleable human nature. If the assumption of malleability is false, it is important to understand what that means for the quest for perfection.
CHAPTER 2: IN DEFENSE OF EVOLUTIONARY PSYCHOLOGY

I will argue that certain permanent facets of human nature place restrictions on possible political systems. These facets of human nature evolved through natural selection and therefore they are enduring. I draw much of my material from the field of evolutionary psychology. However, evolutionary psychology has come under fire from numerous directions in recent years, from the predictable attacks of creationists to the more surprising internal critiques from those within the broad field of evolutionary theory. In this chapter I will respond to David Buller's (2005) critique of what he calls "narrow" evolutionary psychology. I hope to show that even the most thorough criticisms do not detract from "broad" evolutionary psychology's use as an analytic tool. There is ample evidence from "broad" evolutionary psychology (which includes both "EP" and "ep", as Buller designates them), which includes sociobiology, ethology, and evolutionary theory in general that humans have a relatively fixed nature that restricts human activities. For my purposes, that is all that is necessary. My argument does not assume or necessarily require the massive modularity and other more controversial claims of "narrow" evolutionary psychology, though, as will be discussed below, such claims have more merit than Buller suggests. Moreover, though I have used the terms "narrow" and "broad" evolutionary psychology, it is somewhat unclear whether these distinctions actually have much meaning.
Buller's work is, on first read, persuasive. Like most scholarly work, however, the devil is in the details, and Buller's work is an excellent example of the importance of details. Buller takes aim at four or five of the major findings in evolutionary psychology. He begins by questioning the argument that the brain is massively modular, and that each of these modules were evolved and are adapted for a particular reasoning task that was important in the Environment of Evolutionary Adaptation (EEA). He then moves into questioning the evidence for cheater-detection in social contract reasoning, the Cinderella-effect, as well as patterns in sexual jealousy. I will briefly lay out Buller's major arguments. This will be admittedly over-simplified, since his book is both dense and long. After this, I will lay out the responses from evolutionary psychologists and other scholars to Buller's claims.

Buller's first target is EP's "massive modularity" hypothesis, and he looks at Cosmides and Tooby's work on cheater-detection as a way of arguing against modularity. Cosmides and Tooby use the Wason selection task to argue that humans are better at the task when it triggers social contract reasoning. Their major contention is that in logically identical sets of the task, people are incredibly bad at a content-neutral form of the game, but very good at a game in which the content it designed to discover cheaters.

Buller argues that the differential success on Wason selection tasks is not due to our sensitivity to the content, but to our sensitivity to the particular form. He argues that Cosmides and Tooby accidentally combine deontic conditionals, those which are concerned with an obligation, or an implicit request for action, with indicative conditionals, which are mere statements of fact. The reason then that we do better on some tasks than others is that while the content is different, the form of the task is
Buller argues that we are more sensitive to deontic conditionals since they require action than we are to indicative conditionals (2005, 174).

Buller's next criticism is leveled at the data from Buss on mate-choice, particularly the argument that men and women differ in how they choose mates. Buller questions the mate-choice argument on two grounds. The first is the ground of ultimate explanation, which is the question of whether these preferences really are adaptations. The second ground is the question of whether such preferences actually exist. Buller settles mostly on the latter, arguing that Buss's contention that males prefer young females while females prefer high status males is not borne out by the data (209). Moreover, Buller questions the claim of universality that Buss makes, arguing that “the mate preferences in which Evolutionary Psychologists are interested tend to vary with age and social class, among other things” (210). Buller spends the rest of the chapter picking apart Buss's data and research, and concludes that the patterns we see do not corroborate Buss's hypotheses. Buller prefers the alternative hypothesis of “homogamy,” meaning that people generally tend to prefer partners similar to themselves (215).

Buller moves on to a systematic critique of Buss's research on jealousy. His final conclusion is that “jealousy may well be a human psychological adaptation, but there is simply no good evidence that men and women possess distinct psychological mechanisms that have been tailored by natural selection to perform different functions” (345). Buller's alternative to the Buss argument that men and women are sensitive to different types of jealousy is the “relationship jeopardy hypothesis,” where both sexes are capable of learning and determining what poses the greatest danger to their relationship, whether it be emotional or sexual infidelity (332). Buller claims to have struck a middle
ground between an argument for no adaptation in jealousy and the Evolutionary Psychology approach. He also claims that cross-cultural data and research from other scientists in fact supports the relationship jeopardy hypothesis rather than the sex-differences hypothesis of EP.

Buller next takes aim at the “Cinderella effect.” Margo Wilson and Martin Daly have argued that the presence of a step-parent in the home is a risk factor for abuse, since from an evolutionary perspective, step-parents have no genetic incentive to care for unrelated offspring, and may in fact have an incentive to get rid of step-children since they are often competitors to their own biological offspring. Buller argues that the data that Wilson and Daly cite fail to support the claim. He points out that the effect they find could be due to reporting bias, since it is likely that doctors and others will be more willing to believe a step-parent capable of abuse than a biological parent. Additionally, the data they claim supports their theory actually shows the opposite pattern to the one expected if one follows evolutionary psychology’s logic (417).

Buller offers the competing hypothesis that instead of abuse being triggered by the lack of parental love, as Wilson and Daly claim, it could be triggered by the presence of “psychological factors that are not at all widespread in the population of (substitute) parents” (412). If this is true, then we would expect to see radically different patterns of child abuse than Wilson and Daly posit, and Buller argues that we do in fact see these different patterns.

Buller finally turns his attention to the broad concept of human nature. He ends the book with what appears to be a call for relativism, arguing that if we look at the situation in the correct light, “universal adaptations will appear no more definitive of our
'nature' than nonuniversal adaptations or nonadaptations" (480). Ultimately, he argues, "we will see that human nature is just as great a superstition as the creation myth of natural theologians" (ibid.). Buller derives this claim from his argument that cultural universals are not the same thing as psychological universals, and that in EP’s desire to find the latter, it has confused them with the former. Buller’s overall point is that we are still adapting to our environments, and that evolution properly understood will supply us with many more differences than the similarities we seek. If this is true, then the quest for a human nature, at first glance at least, seems to be a moot one.

Cosmides and Tooby, Daly and Wilson, and Buss and Haselton have all written letters defending their research against Buller’s critiques. In each case, Buller ignores scores of supporting evidence, or manipulates existing evidence to fit his theory. Daly and Wilson challenge Buller’s argument that evidence of increased abuse by step-parents could be the result of a recording bias. Buller ignores the magnitude of the effect, which Daly and Wilson argue “would require that every Canadian preschooler’s death considered accidental, plus hundreds more that were blamed on specific diseases, were really disguised murders” (507). The possibility of a recording bias would require such a magnitude of recording bias as to essentially require a large-scale conspiracy against step-parents. Moreover, Daly and Wilson point out that Buller ignores the “dozens of confirmatory studies” of the “Cinderella effect,” and in fact misrepresents the content of the studies he does cite to support his criticisms (ibid). There seems to be no reason to dismiss the common-sense and empirically supported fact that the presence of unrelated individuals in a home can lead to stressful situations that can, in turn, lead to abuse or neglect (see also Daly and Wilson’s more extensive reply to Buller’s criticisms on the UC
Moreover, “Other lines of evidence provide additional support for the Cinderella effect,” including “victim self-report studies, and the reports of stepparents themselves” that they feel less affection and concern toward stepchildren than toward their biological children (Miele, 5).

Cosmides and Tooby offer a short reply to Buller’s claims, pointing out similar problems with his research to those cited by Daly and Wilson. Buller seems to have focused primarily on a small subset of the research done on cheater detection, ignoring experiments where “subjects perform poorly on deontic rules – even natural, familiar ones – when these do not resemble social contracts or precautions” (Cosmides, et al. 2005; 505-506). Buller’s claim that the ability of individuals to perform on tests is related not to the presence of social exchange or cheaters, but to whether the tests are deontic (involving obligations) or indicative (involving facts) in nature is not borne out by other research that he does not cite.

Cosmides et al. further point out that evidence from cases of neural trauma shows that “focal brain damage can selectively impair social contract reasoning while leaving precautionary reasoning intact” (505). They also cite evidence that such “dissociation within the domain of deontic rules has recently been replicated using neuroimaging” (ibid.), thus offering support for the existence of different modules for reasoning about contracts and reasoning about hazardous situations. If there are different brain areas for handling different kinds of deontic rules, Buller’s argument that the real difference is the type of logical set-up is much less persuasive. It seems highly likely from the evidence that humans respond differently to the content of the task in which the reasoning takes place, rather than to different logical forms of the task. The evidence from neuroimaging
also supports the idea that responses to logically identical tasks with different social content are handled by different parts of the brain, which could support the argument for modularity in social contract reasoning.

Buss and Haselton reply to Buller's attack on their research on male and female jealousy (2005, 506-507). Again, the primary issue is that Buller underestimates (or purposely simplifies) the complexity of the evolutionary hypothesis. The hypothesis concerning sex differences in jealousy is a multi-faceted one, made up of thirteen separate “sex-differentiated design features” (506). Buller focuses on only two of these, and Buss claims that “he misrepresents even these” (ibid.). Buss points out that in his research he has always been “careful to state the prediction not in terms of absolute levels of jealousy, which are affected by many factors external to the hypothesis, but rather in sex differences in sensitivity to different forms of infidelity” (ibid.). In fact, Buss argues, the data that Buller provides in the book in fact supports Buss's overall claim, but does not support the strawman, simplified argument at which Buller takes aim. Studies of sexual jealousy are complex, and evolutionary psychology predicts complex responses, especially when there are external factors that bear on the response, such as presence of children, attractiveness of mate (in physical and material terms), length of relationship, and so on. Nowhere do Buss and the others who have worked on jealousy make the simplified absolute claims that Buller criticizes. His critique of the simplified claims works, but only to actually further support the actual claims made by Buss and his colleagues.

Other evolutionary psychologists, psychologists, and philosophers of science have come to the aid of evolutionary psychology, though in some ways the aid may have
come too late. Buller's book was received favorably in the press, including an article in *Slate* headlining “Evolutionary psychology gets evolution wrong” (Schaffer, 2005). It is apparent that many of those who read Buller's book and wrote on it were unaware and did not bother to check on the data and methods he uses to reject an entire field of study. It is also apparent that many who jumped on Buller's bandwagon were probably sick of the simplistic use of evolutionary psychology by the media and popular culture. Evolutionary psychology is a sexy and intriguing paradigm, which means that it will be both overexposed and oversimplified. At any rate, one of the primary issues that other reviewers found with Buller's book is his sketchy treatment of data, either ignoring studies that do not support his arguments, misrepresenting conclusions of research that he does use, and playing with his own data to the point of it becoming meaningless. Add to all this the strawmen arguments he accuses evolutionary psychologists of making, and you get a recipe for confusion.

In Buller's treatment of Buss's research on mate-choice, the way Buller aggregates the data on mate-choice across all cultures, rather than looking for the result that men prefer younger women within each culture “gets rid of the theoretically expected effect, but that is no criticism, because it does not test the evolutionary paradigm at hand” (Holcomb 2005, 400). Evolutionary theory does not predict that we will find the exact same patterns of mate-choice across all cultures. Some cultures marry earlier than others, others have high divorce rates, while in others marriage is relatively stable. The evolutionary paradigm predicts that within the variation of human cultures we will find that men generally prefer younger women and that women generally prefer higher status men. These patterns will vary in strength based on cultural norms, but the patterns will
still exist. Aggregating the data only hides the within-culture patterns. Again, the misuse of data to test theories that no good evolutionary psychologist would espouse seems surprisingly unscientific for a philosopher of science.

Others say simply that “...Buller's criticism fails on both theoretical and empirical grounds” (Bryant 2006, 482). Buller's criticism of modularity, for example, and its corresponding arguments for “cortical plasticity” is “inconsistent with a large body of data in cognitive and social psychology detailing extensive non-adaptive behaviors in contemporary environments, only explicable in reference to past adaptive problems” (ibid.). If human evolution really is occurring as rapidly as Buller claims, and if the brain is as plastic as he believes it is, it is unclear what to do with the data Bryant cites on non-adaptive behavior as well as the immense data on the results of neural trauma to different parts of the brain.

In defense of Cosmides and Tooby, Bryant points out that cheater-detection “stands as one of the more robust theories in cognitive psychology in the last two decades, and the work has been recognized” by the major associations in psychology (not simply by fellow evolutionary psychologists) (484). Indeed, the peer-reviewed articles by Cosmides and Tooby alone on the Wason selection task and cheater-detection in general are extensive. Moreover, Cosmides and Tooby have gone above and beyond the call to respond to the criticisms of their work, including doing work on deontic and indicative conditionals that Buller ignores.

Even more dubious than Buller's specific attacks on particular research are the overall conclusions he draws concerning human nature. Bryant concludes his review of Buller's book, pointing out that “the denial of species-typical design is an implicit
rejection of all scientific psychology, let alone physiology and anatomy” (486). The fact that human nature varies makes the study of it no less scientific than the study of anatomy. The human body varies across many categories, but no one argues that this variation precludes us from understanding what the human body generally looks like, or from categorizing and studying its many parts. Every science deals with some degree of variation. Human behavior is variable, but it is not radically so.

Buller himself argues that there probably are adaptive mechanisms in human nature, and praises the work of some within the field of evolutionary psychology. Even if the evolutionary arguments behind EP are incorrect, that is, if we do discover that it is not the result of natural selection but, perhaps, intelligent design, it is extremely difficult to get around the fact that the patterns of behavior described by evolutionary psychologists and those in related fields in the areas of mating, mental reasoning, social situations, parenting and childcare, and so on, are universal, having been replicated numerous times in different environments and with different cultures. If there is in fact no human nature, it is not only difficult to explain these outcomes, but all the research in psychology proper, experimental economics, anthropology, sociology, and political science that demonstrates durable patterns of human behavior needs to be reexamined under the light of “plasticity” of a kind never before seen in the animal kingdom. Such a view is simply not supported by the evidence from any known science of human behavior.

The major criticism of Buller's work seems to be that the hypotheses that he consistently takes aim at are strawmen set up in overly-simplified terms. Bryant argues that “the all-or-nothing strawman is knocked down, and victory is declared. In the
celebration, a new hypothesis is often presented that is quite comparable to the actual position of the evolutionary psychological theory he attacks" (485). As Bryant points out in reference to Buller's criticisms of Buss, the argument "seems to be about denying the proposition wrongly attributed to Evolutionary Psychologists that all males prefer nubile females all the time" (ibid.). Holcomb agrees, arguing that "Buller's original criticisms... sometimes lapse into caricatures of work he attacks" (393). Buller ignores the subtleties of evolutionary psychology's arguments. Evolutionary psychology is about, more than anything, patterns of human behavior. These patterns are often context-dependent: they depend largely on the age of the individual, the type of mating pool available, the environmental resources at one's disposal, as well as myriad other indicators from the broader social and physical environment. What evolutionary psychology does so well is to predict what the effect of particular contextual cues will be on these patterns of behavior. The subtleties of evolutionary psychology that Buller misses are integral to the science itself. Because human nature is not a one-size fits all mechanism we would expect quite a bit of individual variation. Evolutionary psychology can explain how and why that variation exists; it is unclear whether Buller's alternative hypotheses can do either.

Buller further mischaracterizes the field by polarizing the field between "Evolutionary Psychology" and "evolutionary psychology," one of which is a dogma, and the other is a field of inquiry. However, as many reviewers have pointed out, many of those whom Buller claims as being members of the latter group (of which he approves) actually see their work as complementary to the work done in EP. In fact, there really is no real line between "EP" and "ep." What we have is a dynamic field
where important issues are being debated, where people agree and disagree and carry on research to prove their point. All, however, are tied together by the conviction that by understanding our evolutionary past we can understand our present psychology. By presenting the field as fractured and split by dogma, Buss does an injustice to the myriad aspects of human psychology on which almost all evolutionary psychologists agree.

To further the idea of a schism, Buller argues that “dogma” like massive modularity is wholly accepted by “EP.” Miele (2007) points out that Buller’s criticism of modularity as the central dogma of EP is creating a strawman, since “...modularity and adaptation to novel environments are two of the central debates, not dogmas, in EP” (2). There are many evolutionary psychologists who express concern over the massiveness of the massive modularity hypothesis (Bechtel, 2003). Even Buss, Miele points out, acknowledges that there are probably domain-general mechanisms, and that “no evolutionary psychologist has ever claimed that domain-specific modules are hermetically sealed off from each other by any neurocognitive firewalls” (3). In fact, the interaction between these modules “lies at the cutting edge of research” (ibid.). No evolutionary psychologist has claimed that we know everything we need to know about how human psychology works. The hope is that understanding the ultimate explanations of human behavior might help shed light on the proximate mechanisms, many of which are still very much mysteries. Evolutionary psychology is a large and growing field, with many different researchers focusing on many different aspects of the human psyche. There are, fortunately, debates to be had and research to be done, which is the sign of a healthy field, not a schismatic one.

Ultimately, the attention that Buller’s critiques have brought to the field will
probably be helpful. What does not kill you makes you stronger, and this is true especially of scientific criticisms. Most of Buller’s main points have been refuted. But a few criticisms are likely to stick and will be healthy for the field as a whole. In the first place, the overuse of evolutionary psychology by those who are unfamiliar with its subtleties and methodologies has become somewhat of an embarrassment to those well-versed in both broad and narrow EP. The practitioners of the field should perhaps try harder to refute those doing sloppy research in EP as a way of purifying the field and maintaining standards. Moreover, more attention should be paid to well-respected researchers who offer alternatives within the framework of evolutionary psychology. As Holcomb points out, “When [Buller] recounts the criticisms, claims, and alternatives of such respected scientists, his book succeeds...” (Holcomb, 393). As Holcomb points out, scientific progress requires the consideration of many different hypotheses, weighing each on their relative merits (394). What Buller’s book does well is to offer alternative hypotheses that might fit the data, as well as bringing to light less well-known evolutionary psychologists who offer alternatives to the mainstream scientists.

It is too bad in some ways that Buller’s book has such serious methodological and theoretical problems, since a focused criticism of evolutionary psychology would be beneficial to the field as a whole. There are, however, a few ways in which evolutionary psychology can become stronger.

Evolutionary explanations can benefit from more integration with animal behavior. Buller pays almost no attention to the myriad studies in animal and primate behavior that show very similar behavioral patterns to the ones he is claiming do not exist in humans. It would be very strange indeed for something to be present throughout
mammals and our closer relatives and to be completely absent from us. Hrdy's (1999) work on motherhood is an excellent example of a broad approach to evolutionary psychology that uses evidence from primate behavior, historical studies, and cross-cultural studies. Finding evidence from primates or even other, less related mammals that matches evidence from human psychology, the odds significantly increase that such a behavior is an adaptation.

Evolutionary psychologists should play up one of their primary strengths, which is using a mix of methods. Focusing on different methods from animal behavior, neuroimaging, studies of neural trauma, ethnography, cross-cultural data, and other tools from both the biological and social sciences will help to create a solid body of evidence that adequately defends the claims of evolutionary psychology. It is for this reason that I have tried to compile a mix of data and evidence from very different sources as a way of avoiding the pitfalls of focusing on one particular methodology. On this same note, more attention needs to be paid to methodology by both those who blindly follow and those who blindly criticize evolutionary explanations of human behavior. Those who accepted Buller's faulty evidence and distortion of facts are as bad as those who swallow weakly supported evidence and wild claims based on evolutionary logic.

How I Use Evolutionary Psychology

I will try to make a persuasive case that classical liberal regimes are the most compatible with what we know about human nature. My understanding of human nature
is heavily influenced by evolutionary psychology, broadly conceived. There is considerable confusion as to what the term “evolutionary psychology” means. I use the term broadly, to denote, as Buller terms it, a “field of inquiry” (2005, 8) rather than a set of “specific theoretical and methodological doctrines” (8). It should be pointed out as well that many of the “specific theoretical and methodological doctrines” that Buller cites are criticized by those within the field as well as those without, and that the work of “broad” evolutionary psychologists has played an important role in questioning some of the major tenets of more “narrow” EP. In the chapters following I will refer to evolutionary psychology, which I see as a “large, sprawling, heterogeneous scientific community that includes psychologists, anthropologists, biologists, and others” (Delton, et. al. 2006, 265). I look at evolutionary psychology as a method of providing ultimate explanations for human behavior based on the environment in which we evolved, as well as a way of pinpointing stable and universal aspects of human nature. I disagree with Buller's overall characterization of EP and evolutionary psychology as separate entities, since I see both as providing important evidence of a universal human nature, and both having much to offer the broad attempt to understand both the stability and variability of human nature.

In some respect, what follows does not inherently stand or fall with evolutionary psychological explanations of human behavior. Even if Buller and other critics of narrow evolutionary psychology are correct, and much of the research done thus far has been flawed in that it makes leaps from behavior and ultimate explanations of that behavior, what remains from much of this research is a broad understanding of human nature as complex, variable, and yet with universal desires, wherever they come from.
What evolutionary psychology helps us do, as Buller admits, is to create hypotheses for what kinds of adaptations we might need or want to look for, and then suggests ways to test this. That there might be problems within evolutionary psychology as far as how its hypotheses are tested does not seem to have much relevance for the seemingly commonsense arguments about human nature such as that parents love their children, that private property is a natural desire for humans, or that, more broadly, humans have a natural rule of law which provides a framework for different levels of law like custom and positive law, thus providing the pattern within the patterned variation of human life. Even if we are wrong about the ultimate basis of this universal human nature (which seems unlikely given present evidence) it would be extremely unlikely that all the patterns we have discovered in human psychology from fields as various as ethology, evolutionary psychology, experimental economics, and sociobiology are mere chimeras. What might prove dangerous to an argument like mine would be the discovery that there was no human nature, or that the human nature that actually exists is radically different from the one I derive from my evidence.

In Buller's final statement concerning the myth of human nature, I think we find a radical misunderstanding regarding what precisely human nature means. Part of human nature will be the universal desires like those of parental care and mating, which even Buller must acknowledge to be the closest thing we have to psychological universals on his definition. It is these universals that Buller appears not to like (though it is unclear then how he can agree with some kinds of evolutionary psychology). What Buller and others seem to miss is that human nature is characterized as much by differences between people as it is by the universals that humans share. What is important in human nature is
that there are somewhat predictable patterns of differences, so that we can argue with some certainty why it is that these differences exist, as well as predict the environmental circumstances in which these differences would probably occur.

Anyone looking around the world can reject out of hand a static human nature that makes all of us have the same desires and rank those desires in exactly the same way, irrespective of environment, social milieu, and stage of life. No evolutionary psychologist claims such a thing. It is, however, the goal of evolutionary psychology as a field to pinpoint and highlight the universals that we find across human cultures, and if they give short shrift to the differences, perhaps that is simply because highlighting those differences can best be left to other fields, or another time. My argument for classical liberalism relies heavily on both the universals of human nature and the patterned variation within human nature. That the latter is evidence that there is no human nature is just as false as saying that the universals preclude that variation.

As stated above, I have tried to get my evidence from a mix of fields including experimental economics, evolutionary psychology, and animal and primate behavior, as well as the intuitions and theories of political philosophers. In large part because the field of biopolitics is so new, much of what I claim here is tentative. However, I believe that the evidence that exists supports my claims, and that if, indeed, human nature is what we think it is, that political implications follow. Evolutionary psychologists and political theorists alike may not like my application of biological principles to politics. But it seems obvious that insofar as man is an animal, and a political animal, we must try to understand humanity in terms of its animal nature. Doing so will hopefully throw into relief all the ways in which man has emerged from that animal nature, not the least of
which is in his capacity for freedom. Though I expect people from both fields to be somewhat averse to such a treatment of humanity, I am not the first to attempt such a study and, with the growing movement toward consilience in the sciences, both social and otherwise, I will almost certainly not be the last.
CHAPTER 3: INTRODUCTION TO
THE THOUGHT OF ADAM SMITH AND FRIEDRICH HAYEK

Adam Smith

Adam Smith is perhaps best known for his *Wealth of Nations* and for being one of the best-known proponents of capitalism and free markets. His thought, however, is much deeper and more complex than such a reputation would seem to support. His primary interest is moral philosophy, and he saw economics as a branch of moral philosophy, rather than as a separate discipline. He saw his works fitting into a whole system of philosophy, but it is sometimes difficult to see the connections between his various works on moral sentiments and economic theory. In particular, *The Theory of Moral Sentiments* (*TMS*) and *The Wealth of Nations* (*WN*) seem at times blatantly contradictory, which some thinkers have termed “The Adam Smith Problem” (Haakonsen 2006, 164-165, 369-371). The Adam Smith problem consists in the difficulty of understanding why Smith promotes and defends capitalism even in the face of his own criticisms that it lowers the level of the human experience, and may actually detract from happiness rather than promote it, or in the words of one commentator, why “Smith bases his moral philosophy on the motive of sympathy and his economic theory on the motive of self-interest” (164). In the following I lay out briefly his works and how I see them fitting together, and I try to demonstrate why Smith's work in particular is
useful for those of us interested in the biological explanations of human nature and politics. What will come out in the rest of the dissertation is that human nature consists of both sympathetic and self-interested impulses, which together create a spontaneous order or "invisible hand."

_The Theory of Moral Sentiments_ serves as an attempt to lay out how moral judgments are made. One of the most important statements in _TMS_ is the first sentence: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it" (9). These principles of human nature that concern man with the fortune of others are at the heart of Smith's argument in _TMS_, and also at the root of the argument from the classical liberal tradition. Men are naturally social, according to the classical liberals. They are not, like Hobbes supposed, created in a State of Nature that must be modified through government to allow for survival. According to Smith (and later, to Hayek) man is certainly naturally selfish, but he is also a social creature who is concerned in varying degrees with his fellow man. This natural sociality makes government, and especially free government, possible.

Moreover, this natural sociality plays an integral role in the very creation of government. There is no state of nature at all, according to Smith. Government grows slowly out of the society in which it is found, according to the circumstances and needs of that society, especially that of property (Smith, 1982a). This rejection of the state of nature can be found in other classical liberals like Burke in their preference for grown rather than founded regimes. This gradual growth of governmental institutions is further
related to the classical liberal reliance on spontaneous order, and in Smith's case, with his suspicion of "men of systems" (1982a, 233-234).

In the final sections of *TMS*, Smith lays out the major systems of moral philosophy. According to him, all of them miss some important aspect of human nature and morality, though each contains a germ of truth. His system is the most comprehensive, but for that reason the most complex and least concrete. Smith sees the quest for simplicity as inherently dangerous since it necessarily conceals important aspects of what it means to explain.

In one section of *TMS*, Smith shifts from the moral sentiments to the political, demonstrating the interrelated nature of his studies. He discusses the dangers of innovation for political systems, and points out the conceit of the man of system who strives to "new-model the constitution, and to alter, in some of its most essential parts, that system of government under which the subjects of a great empire have enjoyed, perhaps, peace, security, and even glory, during the course of several centuries together" (232). Radical innovation is dangerous in politics, and Smith's argument is supported by his later arguments concerning the role of the "invisible hand" in bringing about slowly (and more safely) what the innovators would like to do drastically.

At the root of Smith's argument is the assumption of complexity. Smith argues that the man who truly loves his country will "respect the established powers and privileges even of individuals, and still more those of the great orders and societies, into which the state is divided" (233). Further, this man will learn to accept the "confirmed habits and prejudices of the people" where he cannot change them through persuasion, and will "remedy as well as he can, the inconveniencies which may flow from the want
of those regulations which the people are averse to submit to” (ibid). Political life for Smith is much more complicated than simply making laws and enforcing them. It requires an understanding of the prejudices and habits of a people, which requires an understanding of their history. It requires combining careful, gradual innovation when possible with the utmost respect for established institutions that have weathered the test of time and which are unlikely to be either wholly harmful or useless. Smith's discussion of government seems more Aristotelian than Lockean, and it emphasizes the complex interplay between the best and the best possible. It is precisely this difficulty that makes central control counterproductive if not dangerous.

Smith's stress on the complexity of human nature that we see in *TMS* supports his arguments for the invisible hand in the *WN* (though he only uses that term once), and it also supports to his arguments for the gradual growth of governmental institutions in the *Lectures on Jurisprudence (LJ)*. Smith saw moral philosophy as encompassing most of what we consider the social sciences. Economics, political science, and even our biology as feeling animals are all part of a system of moral philosophy that attempts to explain how humans behave toward one another and how we ought to live together. The biology of human nature influences our sociality which influences the systems we create for living together. However, along with the interrelation of various studies, perhaps the most encompassing description of Smith's thought is his overall suspicion of systems, or at least his suspicion of systems wrongly understood. A complex human nature cannot support a simple system, whether of moral philosophy, economic theory, or government. Smith sees systems as inherently dangerous, and argues for allowing complexity to work itself out at the level of the individual.
The effect of this complexity on Smith's view of government is best described by the only system he views favorably, the "system of natural liberty" (1981, 687). According to this system, "the sovereign has only three duties to attend to": that of protecting the society from external dangers, that of protecting individuals within the society from violence of other members, and finally that of supporting public goods that cannot be effectively maintained through market forces. More generally, "every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men" (ibid). Thus, men are left to pursue their own varied inclinations and interests their own way, provided they do not turn to force or fraud. Leaving men thus free allows the most efficient use of their own particular talents and goods given their own peculiar circumstances, while at the same time discharging government from the onerous and counterproductive task of ordering the lives of individuals.

This system of natural liberty is the only system that Smith seems to view with a kindly eye, and is the important bond that ties TMS, WN, and LJ together. Smith sees the moral sentiments as providing the bond that ties men together prior to government, and also as a flexible (though not infallible) system for judging the actions of men. These moral sentiments will guide individuals through their daily lives and interactions with others. One facet of the moral sentiments is that we feel more strongly for ourselves and those close to us than those who are farther away or unknown. Smith saw the combination of these natural moral sentiments with the force of the market as a way to provide for those unknown individuals while supporting oneself and those nearby. Thus,
our natural moral sentiments, when supported by market forces and free trade, gradually create a complex system of government that approximates a "system of natural liberty" whereby individuals use their own knowledge and feelings about events to unknowingly influence the greater good.

Hayek's Thought

Hayek follows in the footsteps of Smith as a defender of classical liberalism and free markets. The two differ theoretically, however, especially in regard to their particular views on nature, as well as on the moral status of free market systems. Hayek is more prolific than Smith, and his work is thus somewhat easier to discuss in terms of general themes than specific works. By far his most comprehensive work is the Constitution of Liberty, which lays out, at least to some extent, the major themes that Hayek sees as at the heart of classical liberalism. These major themes include the problem of knowledge, the importance of the spontaneous order, rule of law, the ends versus the means of government, and the moral status of freedom and individualism. As with Smith, these major themes are all interrelated. For Hayek, the fundamental issue is the problem of knowledge and the argument that no one person can have the knowledge necessary to centrally control a society or an economy. This concern, while implicit in Smith's discussion of the complexity of human nature, is not laid out as forcefully in Smith's thought.

Perhaps the best statement of the tradition in which Hayek sees himself comes in the Constitution of Liberty, where Hayek differentiates between the British and French
traditions (1960, 54-62). Hayek traces the origins of the British tradition (of which he sees himself as a part) to the Scottish enlightenment, including “David Hume, Adam Smith, and Adam Ferguson, seconded by their English contemporaries Josiah Tucker, Edmund Burke, and William Paley, and drawing largely on a tradition rooted in the jurisprudence of the common law” (1960, 56). Hayek sees the fundamental distinction between the French and the British tradition as a distinction between concern over who rules and how one rules. For the French (who include some English thinkers like Hobbes), the question is not whether the content of rules are legitimate, but whether the ultimate source of those rules is a legitimate source. For Hayek, as we will see especially in the chapter on rule of law, the point is not necessarily who is making the particular rules, but what the content of those rules is, and how they are enacted. For the French, with their preference for democracy and equality, the primary concern is who makes the decisions.

One key difference between the English and the French, and one that will be discussed in the rest of this dissertation, is that of the ends of government. While the English see themselves as broadly supporting a certain way of life including liberty, comfort, and commercial interests, they do not see themselves as supporting particular social outcomes beyond the creation of a general framework. The French, on the other hand, see government as solving particular problems rather than as supporting a framework for individual action. One could argue that the English concentrate on the individual good while the French focus on the common good, but this would ignore the point of much of Hayek’s discourse, which is that the attempt by the French to create social equality, or commit to particular ends, actually prevents the achievement of those
ends, as government becomes more and more inefficient. Thus, not only does the classical liberal constitution support individual liberty, but it also tends to support the comfort and overall well-being of the society as a whole. The argument that free government supports both the well-being of the individual and that of the greater society is central to both Smith and Hayek's justifications for classical liberal government.

For Hayek, the problem of knowledge is at the heart of complex societies. Hunter-gatherer societies have relatively few variables to deal with since they are generally small and each member's interests are closely allied with those of the other members of the group. This small number of variables and convergence of interests means that central planning is possible and perhaps even necessary for the survival of the group. Some amount of central planning is necessary for the creation of hunting parties, and the divvying up of goods, as well as in the planning of migration patterns. The case becomes radically different once we see a shift toward agriculture and division of labor. Smith points out in *LJ* (1982b, 14-15) that in the different levels of society, hunters have the least government (almost to the point of no government at all) and little property. Hayek agrees (1983, 49).

The more complex societies become, however, the more the problem of knowledge becomes manifest. It becomes impossible to regulate and guide the movements of thousands of people with various interests, different families, and a variety of goods to barter or sell. Hayek argues that the only way of dealing with the problem of knowledge is to allow for the creation of a spontaneous order. The spontaneous order emerges from the actions of thousands of unrelated individuals who pursue their own interests, guided by traditional and generalized rules of conduct.
These traditional and generalized rules of conduct form the basis for the rule of law that is integral to the success of the spontaneous order. It is interesting that while there is a connection in Smith's thought between the moral sentiments and the invisible hand (though it is by no means an unproblematic connection), Hayek eschews the natural moral sentiments in favor of basing his spontaneous order on a rule of law that consists of general, customary rules that create a framework in which individuals can pursue their varied interests. Hayek looks to custom where Smith looks to nature. In either case, the spontaneous order is created through the separate actions of individuals who are operating within a framework of general guidelines. These general guidelines, which do not aim at any specific end, but instead attempt to make prediction more simple and make knowledge more readily available to diverse individuals, are at the heart of what Hayek sees as the job of the true legislator. The job of the legislator is not to figure out how to achieve particular ends, but to figure out the best way of supporting the actions of millions of unknown individuals in unknown pursuits. The government supports spontaneous order by creating a broad framework but leaving the particular ends of that framework up to the individual operating within it. This is a very different view of government than that of the French thinkers who prefer direct action aimed at a specific end.

Hayek and Smith on Nature

While both Smith and Hayek make persuasive cases for free-market economies and free government in general, their arguments are theoretically vulnerable at the base.
Both men root their arguments in a kind of understanding of nature that is either somewhat empirically flawed, or is simply theoretically vulnerable. Hayek operates primarily off a flawed understanding of human nature. Smith's problem is more one of theoretical confusion. His view of human nature is supported by modern biological accounts of human nature, but his theoretical basis for that nature leaves his theory open to charges of relativism. In both cases, evolutionary theory and other evidence from the biological sciences can provide support for Smith and Hayek's conclusions, while supplementing their theories and providing a solid grounding for their theories.

One way in which Hayek and Smith differ from each other, and in which evidence from evolutionary theory strengthens their positions, is in their discussion of nature. While the role or status of nature is dubious in Smith's thought, it is almost non-existent in Hayek's. The problem with ignoring nature is that both thinkers place themselves on the slippery ground of conventionalism, which makes their overall arguments, which claim to be true everywhere and always, suspect.

Smith uses nature more directly than Hayek. He uses the term “nature” continually throughout all of his works. The terms “nature” and “natural” come up continually in the *TMS*, and the “natural” processes of commercial society are continually referred to the *WN*. What is more difficult is to understand precisely what Smith means by this nature. In *TMS*, the use of nature seems to come close to that of the evolutionary argument. The moral sentiments are the natural sentiments of mankind. They seem to be somewhat universal, though they can be perverted. The foundation of this nature is unclear, however. According to Smith, the moral sentiments are put in place by the Author of Nature, who could be God (as seems intended in some places) but
could very well be something else entirely. Either way, according to Smith, “by acting
according to the dictates of our moral faculties, we necessarily pursue the most effectual
means for promoting the happiness of mankind” (1982a, 166). Moreover, at one point
Smith argues that “the administration of the great system of the universe, however, the
care of the universal happiness of all rational and sensible beings, is the business of God
and not of man” (237). Man's business is to care for his own happiness and that of those
closest to him. Thus, whatever the grounding of this nature, it is part of man's nature to
care about different people differently, and the inability of man to be universally
benevolent is part of the foundation for classical liberal thought which dictates that we
concentrate on those closest to us, and in this way support those farther away.

The problem for Smith is that his understanding of nature becomes somewhat
relativistic. The moral sentiments, however natural, can be easily perverted and
corrupted, most particularly by wealth. It is unclear what the foundations of these
sentiments are, and therefore it is unclear whether they are based in anything stable
enough to avoid relativism.

While Smith's nature is somewhat confusing and possibly somewhat relativistic,
Hayek's approach is to ignore the natural impulses of man, because he sees them as a
danger to capitalist society. I describe his argument in more detail later on, but the
important point is that Hayek chooses to base his theories on convention rather than
nature. This conventional emphasis opens the door for a kind of relativism that
eventually undermines his argument. Hayek's rejection of nature makes it impossible for
him to make a moral argument for the free society. Instead, he must argue from a
pragmatic perspective, leaving his moral and philosophic claims for a free society (what
there are of them, that is) undefended.

He certainly makes both practical and moral arguments for classical liberalism, though his major defense of the free society is that it solves the problem of knowledge. This epistemological argument, while a strong one, begs the question of why this problem of knowledge exists in the first place. To answer this question one must go back to the existence of a complex human nature.

Hayek does in fact root this problem of knowledge in a certain understanding of human nature, but it is an extremely simplistic one, based on what we all lack rather than on what we all share. He lays out two propositions that are at the heart of classical liberal thought. The first is “an expression of the belief in a certain similarity of all human beings: it is the proposition that no man or group of men possesses the capacity to determine conclusively the potentialities of other human beings and that we should certainly never trust anyone invariably to exercise such a capacity” (1960, 88). The second is that “the acquisition by any member of the community of additional capacities to do things which may be valuable must always be regarded as a gain for that community” (ibid.). The major impulses that lead one away from the free society and toward socialism are an exaggerated belief in the power of man's reason on the one hand, and on the other, an desire rooted in envy that men be made equal. These two together are the prime enemies of the free society, and Hayek accordingly does his best to eliminate both of these from circulation. The problem is that both of these are results of man's nature. On the one hand, Hayek argues that we all naturally cannot know what we need to know for central planning to work. On the other hand, he argues that we naturally desire equality, and that this natural desire must be suppressed. He thus argues
that we use the free society to compensate for our natural ignorance on the one hand, while such a society requires the suppression of our natural desire for equality on the other. This love-hate relationship with nature forms the basis for much that is inconsistent in Hayek's thought.

His dislike of nature arises in one place from his argument that the determinism of the modern science of human nature has eradicated the free will that is necessary for the development of responsibility. He argues, "the admission that the working of man's mind must be believed, at least in principle, to obey uniform laws appeared to eliminate the role of an individual personality which is essential to the conception of freedom and responsibility" (1960, 72). Fortunately for our purposes, evolutionary theory is not deterministic, and the very fact that it produces variability within populations and flexibility within individuals actually supports Hayek's arguments rather than refutes them. But it is obvious that simplistic understandings of human nature left Hayek suspicious of all attempts to make human nature more predictable, for fear it would open the door to more centralized control.

Hayek then shifts to a conventional defense of the traditional rights that are at the core of classical liberalism. He eschews the natural rights of Locke and Hobbes, in large part because such rights tend to be used by the French revolutionaries, for example, to encourage governmental interference rather than limit it. Hayek, however, goes too far in his dislike of natural rights. He denies the natural foundation of rights, arguing, "What exactly is to be included in that bundle of rights that we call 'property', especially where land is concerned, what other rights the protected sphere is to include, what contracts the state is to enforce, are all issues in which only experience will show what is the most
expedient arrangement. There is nothing 'natural' in any particular definition of rights of this kind....." (158). Hayek here is partially right and partially wrong. Certainly an understanding of human nature will never tell us with any exactness what kinds of property we should protect, nor will it allow us to limit precisely what is included in the private sphere. However, the sciences of human nature do provide us with certain basic guidelines. As I argue elsewhere, property itself is a natural phenomenon (as Hayek seems to concede by quoting Hume) and there are property systems that are better than others at solving the tragedy of the commons, for example. What ought to be included in the private sphere can be demonstrated with some accuracy if we know what those things are that humans care the most about. These foundational desires should, in general, be left to the care of the individual rather than the government. I could go on, but the point is made. Hayek, in his fear of how nature has been misused, jettisons the entire concept, and leaves himself as a result on shaky ground.

Exactly how shaky this ground is can be seen in Hayek's brief discussion of natural law. Hayek sees himself as part of the natural law tradition, and this tradition he identifies as agreeing on “the existence of rules which are not of the deliberate making of any lawgiver” (237). Laws should be found rather than created. While Hayek seems to argue for finding rather than creating laws, his arguments for downplaying or suppressing nature in some cases, and for a hazy conventionalism in others, makes one wonder how much his conventionalist laws are actually “finding” anything or whether they are really simply creating laws slowly over time. If the latter, then Hayek's view might be more close to a sort of legal positivism, though not exactly the sort he criticizes. His argument for a set of grown laws that are limited by certain existing conditions...
would be stronger if he had a cohesive understanding of the natural laws of human nature that limit what positive law can do. What Hayek needs is a dose of nature, and that is precisely what I try to provide in the rest of this dissertation.

The application of evolutionary theory to arguments such as Smith's and Hayek's might seem at first glance a little strange. Yet actually, evolutionary theory offers a few important benefits. In the first place, evolutionary theory supports an understanding of nature that corrects Smith's lack of specificity as to exactly what this Author of Nature is, or how He or it operates. If the Author of Nature is some sort of blind process like natural selection, then we can learn more about how it operates, and our knowledge will help us understand how this process produces aspects of human nature like the moral sentiments, as well as how those sentiments work, and what their benefits might be to human life as a whole. Understanding how these natural laws operate can only help us further define what it means to be human, and further what, given that information, is the best way to live.

The second way in which evolutionary theory helps us is by providing a clearer understanding of what is actually contained within human nature. Hayek's clear preference for conventional laws leads to a kind of relativism based in traditionalism from which he has a hard time escaping. If we understand what humans are and how we got that way, we can correct in large part the Hayekian relativism, and replace his fear of nature with a view of nature that supports classical liberal ideals. Moreover, understanding the evolutionary roots of human nature allows us to make the argument for the free society even stronger than that made by Smith and Hayek. Instead of merely arguing that humans are more comfortable and have more to eat under commercial
systems, we can argue that classical liberal systems provide humans with psychological
comfort, promote individual responsibility and overall excellence, and allow for the
fulfillment of natural human desires. In effect, we can offer moral and political
arguments rather than merely pragmatic arguments. To be sure, Hayek offers moral and
political arguments for a free society, but his arguments cannot be sustained on the basis
of his conventionalism. Such arguments require that we understand the innate,
permanent desires and inclinations of human nature and how those desires and
inclinations affect our political systems. By providing us with a concrete theoretical
foundation on which to develop our arguments, and by further giving us empirical
evidence to support our claims about human nature, evolutionary theory offers both
theoretical and practical support for Smith's and Hayek's arguments for a free society.

There are also some smaller, incidental similarities between Hayek and Smith that
make the application of evolutionary explanations to their thought particularly attractive.
Smith and Hayek both emphasize the way in which society spontaneously orders itself.
Evolutionary theory focuses on the spontaneous order of biological phenomena. In both
cases, the evolution of complexity (whether cultural or biological) occurs spontaneously.
Smith uses the term “invisible hand,” while Hayek speaks of spontaneous order, but the
idea is the same. Both cultural and biological change occur through the actions of
millions of interacting events and individuals, without any broad oversight or control by
any central force or authority. Moreover, according to Smith and Hayek (and,
interestingly, some critics of modern biotechnology), such evolution ought to occur in
this “blind” fashion precisely because of the complexity of the process and the intricacies
of the many parts involved. The problem of knowledge is insurmountable in complex
systems, and thus the only way to produce effective change that does not shock the system unnecessarily (whether the system be biological or cultural) is to allow the gradual shifting and changing to occur unconsciously.

There is a further relationship between Smith and Hayek on the one hand and evolutionary theory on the other. This relationship is perhaps the most important, since it supports the classical liberal ideals while offering a grounding for human nature. Evolutionary theory predicts (and studies done on humans have shown) that human nature will be complex and variable. While there will be consistent aspects of this nature, the form these aspects take in any given environment will be difficult to predict. Thus, what we know about human nature from the spontaneous order that is evolution tells us that human societies will be equally complex and difficult to control. This complexity supports Hayek's discussion of the problem of knowledge as foundational to the problem of politics while at the same time supporting the spontaneous order, which is (an albeit incomplete) answer to that problem of politics.

Perhaps the most important support that evolutionary theory and other sciences of human nature offer the classical liberal tradition is that human nature is mixed, and that such a mixed nature neither requires the draconian control of Hobbes, nor can it support the utopian visions of equality. As Smith points out in TMS, we are both naturally social and naturally selfish. The classical liberal regime is that regime that supports our nature most closely, supporting and enhancing the social and cooperative aspects of our nature while at the same time controlling the effects of our selfish instincts through rule of law, property rights, and the private sphere.

This last argument is made quite well by Steven Pinker (2002). He takes Sowell's
Conflict of Visions, which is essentially a reformulation of Hayek's British and French distinction, and argues that evolutionary theory supports the Tragic (or British) vision as opposed to the Utopian (or French) vision. The distinction is important since the debate over what kind of nature humans have has been at the core of the question of how we ought to live. Pinker sides with the Tragic vision, as do Sowell, Hayek, and Smith. Siding with this particular vision means that we accept certain limitations on government, and accept that there will be imperfections that might be necessary for the stability of the overall system. Pinker highlights seven primary discoveries of evolutionary psychology and other fields within the human behavioral sciences that he sees as serious barriers to the Utopian framework. Among these are family ties, reciprocity, dominance and violence, ethnocentrism, heritability, self-deception, and the "biases of the human moral sense" (294). I will discuss many of these in the following chapters, and some have already been discussed by thinkers like Arnhart (1998, 2005) who argue for a kind of Darwinian conservatism. The interesting point is that even if not explicitly discussed, and even if the foundations for such aspects of human nature are fuzzy, Smith and Hayek recognized all of these facets of human life and recognized in them support for their arguments for the free society. What I hope to do in greater detail is demonstrate that classical liberalism is the regime most in line with human nature, and that a greater understanding of that nature can help support the work of thinkers like Smith and Hayek, while at the same time clarifying their thought.
I argue in this chapter that humans are infused with a kind of rule of law in the form of general moral or social emotions (see Smith 1982a and Arnhart 1998) that prevent evolutionary liberty from becoming license. I call this rule of law “internal,” and distinguish it from “external” rule of law discussed by Hayek and Smith. I use Smith's “moral sentiments” as a guide to the internal rule of law that influences other levels. I take Hayek's discussion of three sources of human values - nature, custom, and reason - as a departure point for an argument that there are rules of action on all three of these levels, which create patterns that help us move throughout our social environment. Moreover, these levels interact in important ways, with nature supporting and in some cases restricting the laws that can be enacted on other levels. I use evidence from the social and biological sciences to support Smith's, and to a certain extent Hayek's, understanding of internal rule of law, and show how it supports other levels of law, particularly customary law. I further argue that customary law will act as a buffer between natural and positive law. This system of interacting levels of law with a reliance on flexible customary law supports local liberty, which in turn allows for faster adaptation to local circumstances. It also provides natural support for a typically “conventionalist” or “traditionalist” focus on customary law.

It makes sense in any discussion of rule of law to determine what we mean by the
term to begin with. I follow Hayek’s understanding in his discussion of “The stratification of rules of conduct” where he lays out the “three sources of values” (1979, 153). His discussion is not radically different from previous political thinkers who argued that nature, custom, and reason all influence human action. His argument for natural values is problematic in some ways, as I will discuss later, but his definition of nature as a foundation is similar in many ways to what I will argue is a kind of “internal” rule of law that supports external rules. He argues, “There is, of course, in the first instance, the solid, i.e. little changing foundation of genetically inherited, ‘instinctive’ drives which are determined by his [man's] psychological structure” (1979, 159). Thus nature is the most foundational and in many ways the least changeable of all three sources, though custom comes in close second due to the fact that customary laws are not chosen by the individual who, often, does not even really understand himself as following a set of rules, in much the same way as instinctive tendencies are often far from conscious. Hayek goes on to argue that it is neither nature nor reason that makes men good, but tradition or custom. I argue that this is overly simplistic, and that Hayek’s aversion to natural explanations can be understood in large part as a reaction against the socialistic tendencies he sees as inherent in human nature. However, his is an unduly narrow view of human nature.

My understanding of rule of law includes the different levels of rules that guide human action, starting with the most basic natural inclinations and ending with the positive law with which most of us are familiar. I argue that these levels represent a movement from internal to external restrictions on human action that, as Hayek argues, serve mostly to provide more information about the environment rather than representing
the coercive desires of any particular person external to the individual. Customary law provides a middle ground in that it is a mix of internal and external, as customs and traditions, or manners and mores as other thinkers call them, become internalized through long habituation and education over the years. Thus, as I argue later, customary law operates as a buffer between natural and positive law, often manipulating natural inclinations toward more socially acceptable outcomes, or softening the expression or enforcement of positive laws that go against our natural inclinations.

Obviously these levels of law are different in important ways. Natural laws tend to be more general inclinations that apply across the population. Just as some people break positive laws, so too do some people go against their natural inclinations. Some people, psychopaths in particular, seem to lack these natural social inclinations in the first place (Mealey 1995; Arnhart 1998), leaving society with little other choice than to control them through other means, such as a natural desire for retribution, customary rules, or positive law. Natural laws are in one respect the least restrictive and in other ways the most restrictive of these levels. Natural inclinations are easily manipulated by custom and tradition. Many religious orders, for example, capitalize on the natural concern for kin, referring to other members of the congregation or order as brother or sister, mother and father. Yet, these natural inclinations place limits on the other levels of law in that they prescribe a general set of human desires that is reflected in customary and positive law and which prevents voluntary obedience to laws that are radically opposed to these natural desires.

All these levels of law are similar in that all create patterns of behavior that make predictions of the behavior of others more accurate, thus providing individuals with the
knowledge that Hayek argues is at the core of classical liberal thought. All laws obviously limit human action in important ways, but the issue for Hayek and others is not necessarily the limitations on human action, but that these limitations provide predictive power for individuals who need knowledge to successfully cooperate with others in their environment.

Throughout his work Hayek discusses "...the law in the proper meaning of the word, as contained in such expressions as the 'rule' or 'reign of law', a 'government under the law', or the 'separation of powers'." He argues that "The law will consist in purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of future instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans" (86). Upon close examination we find that the innate rule of law fulfills Hayek's definition of external rule of law. In many cases the "laws" of empathy-based altruism are purpose-independent. We do not, in general, feel empathy for individuals because we think it will lead to a good outcome. We refrain from harming others in many cases not because we think that it will lead to some good, but because we feel somehow that it is the right thing to do. This is the essence of Hayek's argument for "purpose-independent" rules. In Hayek's case, rules are established to support the creation of a spontaneous order, not to lead to some predetermined end like economic equality. In the same way, the evolution of "rules" like empathy or care for close relatives did not evolve because they led to some specific good but because they allowed individuals to coexist, thus further supporting human life on both the group and individual level. Obviously, survival and reproduction are ends, but only in the same
way that the creation of a spontaneous order is an end for Hayek. Both are requirements for life and as such must be supported. It is more specific societal-wide ends that Hayek argues against and which evolution in particular does not provide for.

Certainly evolutionary laws “govern the conduct of individuals towards each other”; that is precisely what they are meant to do. The natural moral emotions won out over other types of emotions in that they facilitated social endeavors (Barkow, Cosmides and Tooby 1992, 169, 435-438). Moreover, evolutionary rules apply to “an unknown number of future instances,” in that they evolve over time and, having no specific end in mind, will apply to various circumstances. Also, as will be argued further elsewhere, evolved desires do in a certain way define a “protected domain” of individuals by creating desires that are strong enough to defy all but the most coercive control. As is also argued elsewhere, the human desire for care of children creates a protected sphere that limits the amount of coercion the state can place on reproduction. Last, the entire point of rule of law of all types, but especially evolutionary rule of law, is that it allows people and organisms to make plans. We are a variable species, but there is a certain human nature that allows us to predict with some success what individuals will do in particular situations and adapt ourselves to those situations. It is only because there is a human nature that we can plan anything, from having children, to how to care for those children, to how to provide for those children within the wider sphere of society. Human nature, and more specifically, a rule of law that consists in emotional responses to distress, etc., allows us to plan our lives with some accuracy. As Montesquieu (1989) points out, “if one could imagine another world than this, it would have consistent rules or it would be destroyed” (3). The very fact that humanity and human societies have
survived is due to the rules that bound the actions of individuals within those communities, whether innate or culturally created.

In what follows I lay out Smith and Hayek's conceptions of rule of law. Both Smith and Hayek support an argument for the interaction of various levels of law that is best accomplished through the slow, gradual change of customary law. One important facet of both Smith and Hayek's arguments is that the closer laws come to being internalized, the more free we are in that society requires less coercion and focuses more on voluntary obedience to norms of conduct within a framework of laws that serve as an adaptation to particular circumstances and the general character of a people. Because of their flexibility, internalized laws (whether in the form of instinctive natural laws or customary laws that are internalized through habitual learning) are able to reconcile themselves with the other desires of human nature better than external laws that rely on coercion. Internalized laws come closest to the ideal of liberty as voluntary obedience to a general framework of laws that provide us with information about our social environment.

Smith's Rule of Law

Smith's understanding of rule of law is quite close to the internal rule of law that is the result of our evolutionary past. Smith focuses on natural moral emotions that form the basis for other levels of law in his Theory of Moral Sentiments (TMS). He also discusses the influence of custom on the moral sentiments, and the influence of the moral sentiments on custom.
Smith argues in *TMS* for a kind of law that comes from nature, which will be quite similar to the kind of natural or "internal" law for which I argue later in the chapter. It will also bear some resemblance to Hayek's understanding of natural laws. For Smith, the moral sentiments are those natural feelings that regulate our actions. They are put in place by nature (9, 128-130n, 76-77n), and this nature seems to have done this for the happiness of man and the order of society (9, 86, 116, 166). The key moral sentiment for Smith is sympathy, which he defines as "fellow-feeling with any passion whatsoever" (10) and as distinguished from pity and compassion, which are fellow-feelings with grief and sorrow only. This sympathy, however, is given by the spectator in relation to the propriety of the emotions of the agent. We have less sympathy with a man prostrate with grief over a small loss, since such a display seems improper to us. We decide on the propriety or impropriety of a man's emotions and actions in accord with what we ourselves would feel in a similar situation. Thus, the imagination is integral to the development of sympathy and all the moral emotions.

We go further in determining the propriety and impropriety of our own actions or the actions of another when we appeal to the "impartial spectator," who is the spectator who, unlike us, is not influenced by the particulars of the moment, but who judges our actions impartially, from a distance. How precisely we arrive at these impartial judgments is unclear from Smith's account, but it seems to be a combination of imagination, sentiments like sympathy, and reason (26, 189, 319-320). The impartial spectator is important for both the spectator and the agent himself as a way of judging the propriety of the sentiments of both parties. The spectator looks to the impartial spectator to determine whether the behavior of the agent deserves our approbation, while the agent
looks to the impartial spectator and attempts to tone down his own distress or enjoyment to a level that can be shared by others. For, as Smith himself points out, "mankind never conceives... that degree of passion which naturally animates the person principally involved" (21). The agent meanwhile desires and requires the sympathy of those around him, for Smith sees such sympathy as the key bond which ties men together (86, 224), and which "enlivens joy and alleviates grief" (14).

Thus, for Smith, human relations from the beginning are founded upon an imagination that allows us to place ourselves in the situation of another, and feelings which then result from such placement. These feelings are bounded by a notion of propriety, which seems to be limited by the feelings of the mass of mankind rather than by any particular natural law. The moral sentiments are therefore "naturally conventional," if one can understand them in this way. They are somewhat variable in that they can be manipulated by custom or other human contrivances, but will be generally stable in that they are the feelings of most of the people most of the time, because they are put in place by nature. Each person's understanding seems further linked to some understanding of the impartial spectator or the internal equivalent, the "man within the breast" which seems to be our conscience, that tells us how we ought to act in a given situation to procure the good opinion of our fellow man.

That these sentiments form the basis for any kind of law is clear from Smith's own discussion of the role these sentiments and passions play in regulating human affairs. He argues,

All general rules are commonly denominated laws; thus the general rules which bodies observe in the communication of motion, are called the laws of motion. But those general rules which our moral faculties observe in approving or condemning whatever sentiment or action is subjected to their examination, may
much more justly be denominated such.... They have a greater resemblance to what are properly called laws, those general rules which the sovereign lays down to direct the conduct of his subjects. Like them they are rules to direct the free actions of men: they are prescribed most surely by a lawful superior, and are attended too with the sanction of rewards and punishments” (165-166).

The major elements of law for Smith seem to be that they must be general rules, that guide men's actions rather than coerce them, that they are legitimately laid down, and that rewards and punishments accompany them. If this be Smith's general conception of law, then the moral sentiments certainly fall into the category of laws, though perhaps the most general and most ill-defined, as he himself admits. It is for this reason that we need custom and positive law to fill in whatever gaps there might be. However, in filling in the gaps Smith admits that we risk distorting our natural sentiments and creating unnatural systems that go against both the happiness of mankind and the order of society, and even at times, virtue and justice broadly understood.

The purpose of these laws, the happiness of mankind and the order of society, are not dissimilar to what we will see Hayek arguing is the function of law. For Hayek, the creation of a spontaneous order relies on there being understood rules that guide men and give them knowledge on which to base their decisions. Hayek says little about the happiness of mankind, however, at least insofar as he seems less concerned with the happiness of mankind per se as with the general freedom from coercion. Smith seems concerned with the happiness of the individual, but the relationship between the happiness of the individual and the happiness of society becomes problematic for Smith, especially when we compare what he says in the Theory of Moral Sentiments with the Wealth of Nations. However, at the very least, Smith argues that we are naturally social, and that nature has instilled within us moral sentiments that guide our actions with others.
and which are the basis for affection and the emotional needs of human beings.

Again, Smith sees the ultimate basis for laws in the moral sentiments. As a result of this, he is suspicious of moral “systems” that attempt to derive law from reason, rather than understanding the link between the sentiments and law. This is supported by his argument that positive law should arise out of natural sentiments of justice. He argues, “The general maxims of morality are formed, like all other general maxims, from experience and induction. We observe in a great variety of particular cases what pleases or displeases our moral faculties, what these approve and disapprove of, and by induction from this experience, we establish those general rules” (319). Thus, the only way in which we determine right from wrong is through what our moral sentiments say about particular experiences. We can then generalize from these experiences toward more universal, abstract laws, but these laws will always be in need of explication and application back down to particular circumstances. Smith calls these more generalized versions of the moral sentiments “general rules,” and argues that “When these general rules, indeed, have been formed, when they are universally acknowledged and established, by the concurring sentiments of mankind, we frequently appeal to them as to the standards of judgment, in debating concerning the degree of praise or blame that is due to certain actions of a complicated and dubious nature” (160). These general rules then form the basis for law, both customary and positive. In fact, one might well equate these general rules with customary law, since they are the internalized rules with which we are habituated in childhood, and which form the basis for our conformity to a particular society (160). Ultimately, it is important that for Smith the ultimate grounding of general rules of morality and moral judgments comes not from reason, but from the
sentiments (320).

The foundation of law in our moral sentiments, and the importance of particular circumstances for the expression of those moral sentiments, makes the creation of any rationalistic system of law or morality necessarily suspect. If law is based in our moral sentiments, and those sentiments are the result of our reactions to particular circumstances, then there will be inconsistencies and conflicts between those sentiments and other sentiments. The fact that our moral sentiments are reactions to particular circumstances makes an axiomatic system of universal norms impossible to attain. Smith focuses on a system of generalized laws that arise from the aggregation of particular experiences, and “when those different beneficent affections happen to draw different ways, to determine by any precise rules in what cases we ought to comply with the one, and in what with the other, is, perhaps, altogether impossible” (226). The reconciliation of these conflicts “must be left altogether to the decision of the man within the breast, the supposed impartial spectator, the great judge and arbiter of our conduct” (226-227).

Thus, the impartial spectator, or that ability of mankind to draw away from one's own interests in a particular case and judge of his own sentiments and those of others, is a first step toward a prudential jurisprudence that takes both general rules derived from human moral sentiments and the particulars of time and place into account. Such a jurisprudence is necessarily more complicated and less precise than an abstract system based solely on reason, but it will be more true to human life and the nature on which that life is based.

For Smith then, the role of positive law is an uncertain one. Though positive law deserves the “greatest authority” it is also the most liable to go against the natural
sentiments though it is based on them (341). He points out that “Every system of positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence, or towards an enumeration of the particular rules of justice” (340). The general rules arising from the moral sentiments need to be enforced, lest every man be a judge in his own case (340), and they must therefore be outlined and made into law that can be enforced. However, in the process of creating law we must be somewhat careful not to move too far away from our natural moral sentiments, or at least we must be aware why we are moving away from them when necessary. Because the moral sentiments are somewhat changeable depending on mood and situation (157), and tend to be “loose and inaccurate” (174, 327), they will often require a separate enforcement mechanism through the power of the commonwealth.

The primary danger of the “man of system,” or he who desires a rational system of law, is that such systems tend to go against the moral sentiments and lead to unfortunate tendencies. As he points out, “Sometimes what is called the constitution of the state, that is, the interest of the government; sometimes the interest of particular orders of men who tyrannize the government, warp the positive laws of the country from what natural justice would prescribe” (340-341). He further argues that positive law is, at least from what we can learn from existing states, incapable of precisely coinciding with natural justice (340). To some extent, this is due to the conflict between man's moral sentiments and certain natural outcomes, especially in the case of capitalistic systems. Hayek points out a similar trend, and it is important to take a slight detour to explain this apparent inconsistency.

Smith makes the claim at one point that the laws of nature differ from the laws of
man as derived from our moral sentiments, and yet these sentiments are put in place by nature. This conflict is especially true in the case of distribution of “prosperity and adversity” (167), whereby we feel that one's moral character ought to play a role in his success, even if his effort does not demand such an outcome. He points out that “...human laws, the consequences of human sentiments, forfeit the life and the estate of the industrious and cautious traitor” (168). Thus, our natural sentiments tend to favor virtue over industry (at least when they are at odds with one another), and Smith seems ambivalent about the wisdom of such a course. It seems obvious then that for Smith, the basis of laws in the moral sentiments can, at times, be somewhat at odds with the basis of capitalistic, industrial society. It is unclear, however, at least from this discussion, what the alternative is. Smith seems to argue that there needs to be a separation between these two different laws when he says, “The rules which [nature] follows are fit for her, those which [man] follows for him: but both are calculated to promote the same great end, the order of the world, and the perfection and happiness of human nature” (168). Yet it is unclear how this separation between the natural outcome of industry and the natural human desire to reward virtue ought to be reconciled in human law.

This is, perhaps, part and parcel of what is often termed the “Adam Smith problem,” or the connection between his arguments for industry in the Wealth of Nations and his arguments for moral sentiments in TMS. It should be pointed out that both these laws, however, seem to support the happiness of mankind as Smith points out, in that the natural moral sentiments reward virtue and thus prevent men from taking advantage of each other, at least insofar as their weak enforcement mechanisms allow. Yet, the natural rewards of industry even apart from virtue lead to civilization and the comfortable relief
of man's estate (to use Bacon's phrase). Thus, the two may necessarily be in a kind of uncomfortable coexistence, whereby the natural sentiments of man control vice at the level of individual discourse, while the course of nature provides for mankind as a whole by rewarding industry. Perhaps the key then is to generally support the industry of man unless it be attached to gross deceit, fraud, or other dishonest methods of gaining wealth that go against what is necessary to the preservation of the state. The role of positive law is narrowly defined as preventing force or fraud. It is left to the moral sentiments to handle less obvious improprieties and misdemeanors, or more generally, any social interactions that fall outside of the definition of force and fraud.

Getting back to Smith's overall theory of law, his understanding of law seems to agree with Hayek's in that there exists a problem of knowledge regarding the particulars of time and place that prevents "men of systems" from creating a useful rational framework of law: "Some general, even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist upon establishing, and upon establishing all at once, and in spite of all opposition, every thing which that idea may seem to require, must often be the highest degree of arrogance" (234).

The answer to this problem might be to rely on customary law rather than positive law. Smith seems to support such a move. As he points out in the section on custom in *TMS*, "the sentiments of moral approbation and disapprobation, are founded on the strongest and most vigorous passions of human nature; and though they may be

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1 This is related to the tension Hayek points out between the free society and the just society. The latter necessarily interferes with the existence of the former since it requires continual manipulation of the market, thus preventing free association between individuals. The enforcement of virtue or justice must, for both Smith and Hayek, be left to the informal social realm.
somewhat warpt, cannot be entirely perverted” (200). Though custom can certainly warp our moral sentiments to a certain extent, it will generally be in line with those sentiments, and can often enhance them, as Smith points out: “When custom and fashion coincide with the natural principles of right and wrong, they heighten the delicacy of our sentiments, and increase our abhorrence for every thing which approaches to evil” (200). I will go into more detail concerning how customary law can operate as a buffer between our natural inclinations and positive laws later in this chapter.

Hayek's Rule of Law

Hayek, in line with all classical liberal thinkers, distinguishes between liberty and license. For Hayek, rule of law is integral to liberty, and provides the framework for action that makes liberty possible. In this section I explain Hayek's understanding of rule of law, both as an external framework in which individuals make decisions, and as the internal framework of rules, norms, manners, and mores that support the external framework. While Hayek is much less focused on the natural basis for moral actions than Smith, he does offer a kind of internal rule of law in the form of habituation and education that forms a link between the innate moral emotions and rationally constructed positive law.

For Hayek, rule of law is an answer to the problem of knowledge. As he points out throughout his work (1994, 80-81; 1979, 133-135; 1948/1980, 77-91; 1960, 156-159; and elsewhere), knowledge is necessarily dispersed among many people in different
circumstances, and any one individual's knowledge will necessarily be incomplete. For this reason, he supports spontaneous order rather than top-down control. It is also for this reason that rule of law becomes absolutely necessary for liberty. Rule of law provides, for Hayek, a framework of abstract, general rules that do nothing more than improve the individual's ability to predict how others will behave. For Hayek, "The ideal type of law... provides merely additional information to be taken into account in the decision of the actor" (150). Rule of law is a way of increasing individuals' knowledge, especially in the realm of predicting the behavior of other, often unknown, individuals.

In *The Road to Serfdom*, his most accessible work, Hayek argues that at heart rule of law means that "government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge" (80). Again, the central role of knowledge and decision-making, as opposed to any direct moral arguments, is obvious.

Freedom for Hayek is completely dependent on a proper understanding of rule of law. His definitions of freedom revolve around being generally free from the will of another within a framework of abstract rules that provide guidance without unnecessarily restricting the ends toward which we aim. He argues in the *Constitution of Liberty* that "...freedom does mean and can mean only that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all" (1960, 155). He argues a few pages earlier that "The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their
application to us, we are not subject to another man's will and are therefore free” (153).

His general idea of the rule of law is not much different from the traditional understanding of rule of law as distinguished from rule of men, whereby the laws apply equally to everyone. As Hayek states, “the rules must apply to those who lay them down and those who apply them – that is, to the government as well as the governed – and that nobody has the power to grant exceptions” (155). Hayek distinguishes between rule of law and arbitrary government, which distinguishes him in some ways from previous thinkers. In the first place, his emphasis on epistemological concerns rather than morality or justice is relatively unheard of outside of the classical liberal tradition. Second, Hayek, like most moderns, eschews talk of ultimate ends of government, instead focusing on the ways in which government operates: “The distinction we have drawn before between the creation of a permanent framework of laws within which the productive activity is guided by individual decisions and the direction of economic activity by a central authority is thus really a particular case of the more general distinction between the Rule of Law and arbitrary government” (1994, 81). Hayek's ultimate point is that the former is more in line with the common good than the latter, but he focuses on the proximate mechanisms, not the intentions of the rulers. Indeed, one of Hayek's primary arguments is that good intentions (such as social equality) often lead us toward despotism. Thus, instead of rooting his idea of good government in the intentions of the rulers, Hayek roots it in the methods by which government acts.

Hayek's approach to law differs as well from the legal positivism of Hobbes in that he focuses on *nomos*, or customary law, rather than *thesis*, or rationally constructed positive law. For Hayek, the rule of law is understood as the rule of a particular kind of
law, nomos. Nomos is the customary law of a people, sometimes called common law, a kind of law that deals with the actions of individuals toward one another (sometimes called private law) rather than governmental organization (public law), which Hayek terms “thesis.” Nomos differs from thesis not only in the origin of the laws, but also in their content. Nomos is primarily concerned with what Hayek terms “rules of just conduct” (127), while thesis, or measures of government, or “particular ends of authority” (120), or commands (126), is generally concerned with actions that produce a specific end, like taxation. The proper end of taxation is providing necessary revenue for governmental operation. The proper end of the nomos is no particular end, but the creation of a spontaneous order in which many individuals interact according to known rules while pursuing their own ends. As Hayek points out, the distinction is not perfect. He argues, “A statute (thesis) passed by a legislature may have all the attributes of a nomos, and is likely to have them if deliberately modeled after the nomos. But it need not, and in most of the cases where legislation is wanted it cannot have this character” (127). One of the primary differences between nomos and thesis is that “a rule of conduct [nomos] cannot be 'carried out' or 'executed' as one carries out an instruction.... A rule of conduct merely limits the range of permitted action and usually does not determine a particular action; and what it prescribes is never accomplished but remains a standing obligation on all” (127). Thus, nomos and thesis differ in their origins (custom vs. legislation), their purpose (creation of a framework for action vs. execution of a particular task), and their form (generalized rules rather than direct commands).

Hayek's primary concern is with nomos, and particularly with preventing thesis from encroaching on nomos or the customary order, as well as preventing thesis from
interfering with nomos through positive laws passed for particular social ends, such as social equality. These concerns are best left to the spontaneous order, not legislated mandates. However, this list of types of law is not exhaustive. For Hayek there is at least one more important level at which law operates, and this level tends to support customary law or nomos.

The third level of law for Hayek is one of natural values, similar in some ways to Smith's moral sentiments but which he sees as often at odds with customary law rather than supporting it. Hayek is less clear than Smith on the connection between innate or natural "internal" rules like the moral emotions and this greater, external framework. Hayek, following in the footsteps of Burke, generally eschews discussions of natural rights, or of natural inclinations in general. In fact, he argues that much of external rule of law is an attempt to control innate traits that are maladaptive in large commercial societies: "From that stage [that of small bands of hunter-gatherers] practically all advance had to be achieved by infringing or repressing some of the innate rules and replacing them by new ones which made the co-ordination of activities of larger groups possible" (1979, 161). I discuss why his view here is flawed later in the chapter, while I contend at the same time that his rejection of natural desires as support for a liberal system does not contradict the overall argument that evolutionary theory supports his conception of rule of law.

Perhaps Hayek's best statement on internal rules of conduct occurs in *The Constitution of Liberty*: "We understand one another and get along with one another, are able to act successfully on our plans, because, most of the time, members of our civilization conform to unconscious patterns of conduct, show a regularity in their
actions that is not the result of commands or coercion, often not even of any conscious adherence to known rules, but of firmly established habits and traditions" (1960, 62). These “unconscious patterns of conduct” are differentiated from Smith's moral sentiments largely because Hayek attributes them to tradition and custom, rather than nature. Thus, one primary difference between Smith and Hayek is the origin of the internalized rules that they see as so important. Hayek relies on traditional laws that are internalized through habituation, while Smith concentrates on innate moral sentiments that all humans share. Moreover, Smith's moral sentiments are more generalized emotions, while the unconscious rules Hayek refers to seem to be somewhat more specific manners and mores – actual rules rather than impulses rooted in sympathy. These traditions and customs that become internalized through habituation and education form the basis for Hayek's preference for customary rules and norms over positive law. A healthy society will always rely more on voluntary submission to rules rather than the coercive power of the state, and this voluntary submission is gained through the gradual evolution of customary laws rather than the implementation of rationalistic positive law. Hayek similarly argues, “freedom has never worked without deeply ingrained moral beliefs and that coercion can be reduced to a minimum only where individuals can be expected as a rule to conform voluntarily to certain principles” (1960, 62).

Hayek's emphasis on tradition or customary norms rather than positive laws is understandable given his suspicion of centralized, powerful government, and his argument for the voluntary obedience of a people that is at the core of classical liberal theories. His preference for tradition rather than nature has roots that are less clear. This preference seems to be rooted in large part in Hayek's distrust of innate emotions like
Smith's moral sentiments, which he seems to see as supporting socialistic projects (a point which, as we saw above, Smith also recognizes). As he argues in a series of lectures titled *Knowledge, Evolution, and Society*, “In a sense, we are all socialists. We are still governed by feelings that are based on what was necessary in the small group of known people among whom each had to aim at fulfilling the needs of persons he knew.... Our instincts still tell us to strive to serve the known needs of known people and that our pleasure in life is derived from the consciousness that we follow a set of common purposes with people whom we know and who share our environment” (1983, 41). He goes on to say that “Our whole modern society, based on far-ranging division of labour, is, however, essentially dependent on two factors that conflict with our natural instincts” (42). The first, he argues, is that modern commercial societies rely on the ability to serve the common good while following the “impersonal signals of the market.” The second factor is that “for this purpose we can follow our own individual aims with freely chosen associates and are not bound to serve the concrete ends of the group into which we were born” (42). Certainly there is an extent to which the emotions required in a small, closely related, tight-knit hunter-gatherer society are not the same as those which dominate in a large, commercial society.

Hayek seems to underestimate the fact that even in large-scale commercial societies, people generally seek to create smaller communities of neighborhoods, families, and other networks in which these “socialistic” tendencies are necessary. He also seems to overestimate the sociality of these emotions when he argues that rationally constructed societies are connected to “the feeling that one ought not to work for one's individual aims but will feel the supreme elation that a person can experience only if he
joins with his known fellows in the pursuit of some known, common purpose” (ibid), or that “what we call the natural instincts are precisely the instincts which we adopted during our experience in a small bands of a few dozen people, a society where everybody knew his fellow members, where everybody served the same purpose” (55).

Certainly humans are naturally disposed to cooperate, as evidence in the rest of this chapter suggests. However, it is not so clear that this is the only motivator for most humans, and commonsense experience of the world tells us that often we struggle between cooperation and defection, between our social emotions and our individualistic impulses. Hayek tends to ignore the naturally individualistic side of human nature that makes the market so successful to begin with, focusing instead on the socialistic side of human nature. Why is it that the spontaneous order, so little understood, works so well? It seems that it does in large part because humans do naturally desire to pursue their own ends and act with views toward both the good of their neighbors and the profit motive. Certainly, socialistic societies can manipulate and foster the social impulses of man, just as capitalistic thinkers rely on the individualistic side. But, as I will argue throughout this dissertation, it is only in a liberal society with rule of law, private property and a private sphere that both of these impulses in human nature find their most complete fulfillment. Modern liberal societies channel our individualistic impulses into the market, promoting competition on a scale that would not be possible if it were consciously controlled, while at the same time allowing for the existence of small communities, neighborhoods, and families that support the socialistic impulses of human nature and in which those impulses can thrive without interfering with the impersonal market mechanism.
Hayek's desire to disprove socialism leads him to overestimate some parts of human nature while underestimating other parts. This helps explain why he shifts away from natural moral sentiments, unlike his predecessor Smith. He argues, "I think we all know that it is more pleasant to know that one works for the needs of one's immediate familiar environment or for a common purpose with our known fellows rather than pursue alone one's individual ends, that is, to pursue one's own profit irrespective of what one's immediate neighbors do" (42). This statement demonstrates the Hayekian problem. On the one hand, he seems to argue that our natural impulses make us inherently socialistic, while the liberal society requires the vanquishing of this nature. Yet elsewhere, especially in the *Constitution of Liberty*, he argues for local liberties and the creation of small communities that rely on self-governance rather than centralized control. Liberal society does not and should not promote a simple-minded pursuance of "one's own profit irrespective of what one's immediate neighbors do." In fact, it is in large part the complexity of the liberal system, one in which small communities cooperate consciously to promote the well-being of the group while at the same time participating somewhat unconsciously in the greater market, that allows the spontaneous order to flourish.

It is generally the habit of philosophers to attack most strongly that which they see as the greatest danger, and perhaps this is Hayek's problem. In attempting to prove that socialist societies are less efficient and antithetical to human liberty properly understood, he finds socialism in human nature and argues that we must overcome that nature as a result. He focuses instead on tradition and custom at the expense of the natural moral sentiments. Yet, without basing these traditions and customs on anything...
other than the unconscious creation of man, he becomes a mere conventionalist, one who has a hard time making moral judgments about those societies. It is perhaps as a result of this that Hayek's argument overall tends to be based on efficiency rather than morality. He rarely makes normative claims, pointing out instead that capitalism simply works better than the alternative. Even leaving aside his problematic conventionalism, the biggest problem with his rejection of nature is that it is rooted in an oversimplification of human nature that tends to undermine his own argument. It is well-known that humans are both individualistic and social, and that even in hunter-gatherer societies, there are frequently times when the good of the individual conflicts with the good of the group, and it is not always that the group-good wins out (Lee 1993; Shostak 1983). By focusing on human nature as it actually is, Hayek could have derived valuable support for liberal institutions while basing his philosophy on more solid ground than merely conventional truths.

Another reason behind his dislike of natural explanations for political phenomena lies in what he sees as the rejection of custom by sociobiologists. In his discussion of "The errors of sociobiology" (1979), he takes issue with a comment by a sociobiologist that there are only two sources of values – either innate (genetically determined) or rationally constructed. This is obviously untrue, and much of the argument in this chapter is that there are at least three levels of values, all of which work together (and sometimes against one another) to produce a kind of order. Hayek's criticism is therefore valid. He argues, "Culture is neither natural nor artificial, neither genetically transmitted nor rationally designed" (155). However, the overlooking of custom by sociobiology hardly refutes the positive arguments of that field. Indeed, many modern
sociobiologists study on the close interaction between genes and culture, pointing out the genetic roots of customary law, as well as the influence of behavior on genetic evolution (Jablonka and Lamb 2006; Wilson 1998; Richerson and Boyd 2006; Ridley 2004).

What Hayek ignores in general is that many of the laws present in advanced cultures are those that support these natural or innate tendencies. Certainly there is a certain amount of channeling of “primitive” desires that needs to occur. However, laws that support child-care, family, property rights, marriage, and other evolutionarily important goods exist in roughly the same form as they do in hunter-gatherer societies. At the very least, however different the forms, the intent is the same: to preserve the family, protect parent-child relationships, protect some understanding of a private sphere, and in general to create a framework in which our natural cooperative instincts can flourish without unnecessary coercion.

Despite Hayek’s rejection of nature, his argument is still compatible with an argument basing classical liberal institutions on natural grounds. The importance of custom and tradition is recognized in evolutionary explanations; and custom, as I will argue later in this chapter, actually provides an important buffer between natural and positive laws, operating as a way of preserving flexibility in human action. Moreover, the similarities between Hayek’s cultural evolution and biological evolution are obvious, and the two not unsurprisingly interact in important ways. Understanding how the two interact requires that we accept that cultural evolution is impacted by natural desires and impulses, and that these natural desires form the basis from which we then adapt to our environments. Much of the variation in human cultures is “shallow” variation of means, rather than variation in the ends of culture itself. Understanding these universal ends

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provides support for Hayek's arguments for tradition and customary law. Both Hayek and Smith share a focus on internalized rules of conduct, whatever their origin. These internalized rules provide an alternative to rationally constructed positive law.

Hayek's understanding of the importance of customary law draws heavily from an evolutionary conception of law as gradually evolved through a long process of selective retention and rejection of rules and norms that operate as an adaptation to local circumstances (1960, 57). For Hayek the best laws serve as adaptations to time and place that occur over time, allowing human sentiments themselves to adapt to the rules and norms, and allows both to be internalized together, thus limiting external coercion. Hayek distinguishes between the rationally constructed positive law favored by the French tradition and the gradually evolved customary law (or common law) favored by the British. For Hayek much of the benefit of customary law comes from its non-rational character, whereby law is not trusted to the wisdom of one man, or even to the wisdom of one generation, but is entrusted to the collective wisdom of numerous generations and individuals who are acting only semi-consciously. The good and the bad is then sorted out by a natural process of retention of beneficial laws and rejection of those that do not work, generally unaided by rational human contemplation. Such a system is superior to others because it is gradual, allows for innovation without the dangers of radical changes, and takes advantage of the cooperative endeavors of many individuals whose combined knowledge of particular circumstances is much greater than the knowledge any one man can have, however wise.

There are three primary benefits of customary law for Hayek. The first is that such law secures voluntary obedience rather than requiring coercion and that voluntary
obedience to the laws is one of the primary facets of a free society. As he points out, "There probably never has existed a genuine belief in freedom, and there has certainly been no successful attempt to operate a free society, without a genuine reverence for grown institutions, for customs and habits and 'all those securities of liberty which arise from regulation of long prescription and ancient ways" (61). Such customary rules tie a people together, creating a love of law and of country that makes much coercive force unnecessary. These customary rules, moreover, are internalized at a young age and thus coexist next to more instinctive rules of conduct, and it is left up to the individual how to deal with conflicts between the two, rather than repressing one for fear of the punitive power wielded by positive laws.

The second benefit of customary law for Hayek is that such law allows for gradual innovation by individuals who believe that change is worth the social consequences that follow. Just as in biological evolution, in customary or cultural evolution, variation is needed for adaptation to occur. There is no evolution of either sort unless there exists the variation on which selective pressures can act. Hayek argues that it is, in fact, often "desirable that rules should be observed only in most instances and that the individual should be able to transgress them when it seems to him worthwhile to incur the odium which this will cause" (63). In the case of positive law, such transgressions do not lead to innovation. Any breaking of the law is punished, and the law continues to stand. In customary law, the breaking of the law leads to social consequences that can be dealt with by brave individuals who see the need for innovation at that particular time. This variation then acts to gradually change the law being broken itself, either reforming the law or making the punishment less severe over time, assuming
that other individuals, understanding the benefits of the original transgression, follow suit. Should society “agree” that such a transgression is not in the best interest of society, the rule will continue to stand, and the original transgressor will reap the consequences of disobedience. This system allows for significantly more variation than positive law, whereby the law can be changed only by the rational decision of the legislator, and whereby the punishments are often much more coercive than mere social disapproval, thus making innovation less possible, and changes to the law sudden rather than gradual.

The third and final benefit of customary law for Hayek is related to the first two in that such law allows for gradual variation and experimentation without the shock of sudden changes occasioned by positive law. Again as we see in biological evolution, macromutations (or mutations that result in large changes to an organism) are rarely beneficial to the organism, and in fact are usually fatal (Futuyma 1998, 680). The same can be said for cultural evolution. Gradual small changes allow individuals to experiment with different combinations of customs and traditions while preserving the stability of the law that is necessary for voluntary obedience. Positive law, when it is changed, is necessarily changed all at once, which leads to an instability of law that is undesirable, and which can result in unforeseen consequences in the same way that drastic changes to an organism’s DNA often lead to unexpected results. Thus, positive law is both less flexible than customary law and therefore more unstable in that when it is changed it must be changed all at once.

Hayek’s last major argument for customary law is that what it means to be human comes from these gradually evolved moral rules rather than from reason or from instinct (1960, 62; 1979, 166-167). Our instincts, he points out, are usually shared by animals on
some level, and the coercive force of positive law brings out little more than our fear of punishment, again something we share with other animals. Human cooperative endeavors, on the other hand, are based around a framework of customary laws that rely neither on "base" instincts nor on fear, but on the attachments of a people to each other, and the cooperation which habitual obedience to unspoken rules of conduct allows. Hayek makes the argument clear when he says, "We understand one another and get along with one another, are able to act successfully on our plans, because, most of the time, members of our civilization conform to unconscious patterns of conduct, show a regularity in their actions that is not the result of commands or coercion, often not even of any conscious adherence to known rules, but of firmly established habits and traditions" (62). Thus, the flourishing cooperation that is one of the hallmarks of the human species is the result, not of instinct or positive law, but to the human ability to internalize habitual norms of conduct. As I argue later, however, customary law provides a buffer between natural law and positive law that tends to moderate the effects of both.

Hayek's overall point is that free society is not possible without customary laws and traditions which bind a people together, creating a framework for action that permits some gradual innovation while at the same time maintaining the predictability and lack of coercion that arises from voluntary obedience to habituated and internalized norms of conduct. While Smith bases his thought on the moral sentiments and Hayek bases his on customary norms of behavior, both agree that what allows human societies to flourish is rarely positive law, but more internalized levels of law that comes from a combination of nature and habit, instinct and tradition. Customary law secures the voluntary obedience of a people, and provides the necessary framework for action which is integral to free
society. As I will discuss later in the chapter, customary law tends to support natural
instincts, and provides a valuable middle ground between natural law and the more
coercive, less flexible positive law. The existence of natural human instincts that lead to
strong desires requires that legislation be carefully adapted to human nature. Since it is
unlikely that any human has the requisite knowledge to achieve such an adaptation, the
best way to achieve the adaptation of law to human nature and to particular
circumstances is to trust in the gradual change of customary laws. That we have a human
nature that creates an internal rule of law is the subject of the next section.

Evolutionary Rule of Law

Evolutionary law is generally most concerned with internal rule of law – that is, the
innate impulses and desires that control our actions and set up an emotional
framework in which we operate. However, it is also true that these internal rules support
the creation of external rules. All human societies have, in addition to universal moral
emotions, more generalized, abstract, and somewhat consciously understood laws and
rules that act as the more filled-out expression of those moral emotions. Just as parental
care is an innate desire in humans, so all societies are concerned in some ways with
written or unwritten rules that formalize aspects of that parental love. In the following, I
will lay out evidence from evolutionary psychology, game theory, and experimental
economics which supports the idea that humans have innate moral emotions that guide
their actions. I then argue that these moral emotions provide the basis for external rules
and laws that further formalize the framework and help adapt those moral emotions to the
particular cultural and environmental circumstances. I conclude by arguing that the interplay between this internal rule of law and external rule of law supports Hayek and Smith's arguments for customary law over strict positive law (though obviously some positive laws are necessary). I also argue that such customary law supports local liberties and self-rule, another facet of classical liberal theory.

Obviously to a certain extent any innate tendencies or desires can be understood as a kind of rule of law, since all of them provide a framework in which we act. Here I discuss those innate tendencies that have evolutionary import and which bear on how men treat each other in social situations. The sociality of these innate tendencies is important since rule of law is, inherently, the answer to the problem of sociality. Thus, determining whether there are innate rules or dispositions or tendencies that guide our social interactions provides support for the concept of an internal rule of law. More particularly, my concept of an internal rule of law focuses on those instances in which humans in social situations act within a framework of general rules supported by moral emotions demonstrating a concern for both oneself and the others in the social situation.

There is ample evidence from evolutionary psychology, experimental economics, and cognitive neuroscience that humans have innate tendencies, especially in social situations. Cosmides and Tooby's research on cheater-detection is probably the best known research that argues that humans have adapted responses to social contracts. Cosmides and Tooby argue that humans are better at selection tasks that involve detecting those who are breaking social rules than at other kinds of logically equivalent tasks (Cosmides and Tooby 1992, 163-228). While there are questions regarding this research, most commonly concerning its assumption of "massive modularity" (Hagen
there is ample evidence from other areas of the study of human behavior that demonstrate that however modular the brain, humans are naturally concerned with and attentive to the rules and regulations of social conduct.

Evidence from the ultimatum game (Camerer 2003; Sanfey et al. 2003; Nowak et al. 2000; Henrich, 2000) suggests that we have emotional responses to unfair divisions of goods that can be recorded with the use of fMRI and other tools of neuroeconomics and neuroscience. The logic underlying the ultimatum game comes from rational choice theory, which predicts that players should accept any division of resources since any division, even extremely unfair ones, leaves players somewhat better off than before. For example, in a game in which $100 is to be split between two players, the player accepting the offer should accept any split, from one cent to the full amount, since rationally, even one cent is better than nothing at all. What research finds, however, is that humans are often more concerned with the fairness of a proposal, and will reject obviously unfair proposals even if it means losing money. Moreover, evidence suggests that players understand this tendency, and generally make fair offers even when it might be rational to make an unfair one. Sanfey et al. (2003) look at the role of emotion in decision making, arguing that humans have both rational and emotional reactions to unfair proposals. The authors found that, as is usual in ultimatum games, players accepted fair proposals, and acceptance decreases as proposals become less even. They further note that the area of the brain that seems primarily concerned is that of the anterior insula, a part of the brain usually associated with emotional response. This agrees with players' own understanding of why they reject unfair offers, which they usually argue is the result of anger at being offered obviously unfair proposals. Nowak et al. (2000) argue for an
evolutionary rationale behind the apparently irrational response of those playing the game. In their case, they offer the possibility that humans, naturally concerned about their reputation, will be concerned with appearing either unfair or as accepting of low offers. In either case, those who make low offers and those who accept low offers, the damage to reputation would be clear as the first are avoided for being unjust participants, while the latter may be sought out by unjust participants as being easy targets.

There does seem to be some cross-cultural variation in these patterns. As Henrich (2000) points out, there seems to be a difference between Westernized societies and less industrialized societies. In his study with the Machiguenga of the Peruvian Amazon, Henrich found that most participants accepted even unfair offers, and expected the proposers to make unfair offers, while the proposers expected the accepters to accept almost any offers. The mean for industrialized societies hovered around fifty percent for most offers, while the mean for the Machiguenga was closer to 25%. However, it is at least somewhat important that there were very few extremely unfair offers (such as those less than 10%) among any of the groups, which seems to demonstrate some understanding that those kinds of offers will be rejected. While what is seen as a fair offer may change based on different societies, there are still very few extremely unfair offers made, and even fewer accepted. Moreover, there may be some complicating factors in the study in question, since the exchanges use money with traditional hunter-gatherers for whom monetary exchange may be relatively new. Perhaps research done with more traditional modes of exchange (food, for example) would elicit similar patterns to Western countries. Camerer (2003) summarizes the cultural variation seen in many games as generally corresponding to the pattern of “primitive groups behav[ing]...
self-interestedly" while "subjects in developed countries do not" (467). However, the evidence from such disparate societies as Los Angeles, Tokyo, Jerusalem, and Yogyakarta all demonstrate similar patterns, with few offers falling too far short of 50%. It would be interesting to see if there is a baseline of self-interestedness below which few societies fall. It would also be important to determine how environmental pressures (relative scarcity, for example) influence our preferences for sharing with others.

Further evidence for an innate rule of law is demonstrated by reactions to particular formulations of the trolley dilemma. Josh Greene et al. (2001) hooked subjects up to fMRI machines to determine which part of the brain lights up when subjects were asked about hypothetical situations. In one version of the dilemma, a trolley is out of control and is heading down a track on which five people sit. The subjects have the choice of letting the trolley hit the group, or shifting the trolley to another track with the push of a button – a track which contains a solitary man. Most people choose to sacrifice the one man for the sake of the five people. However, the case becomes more complicated when, instead of simply pushing a button, the dilemma involves pushing a large man onto the tracks in order to stop the trolley. The cases are logically equivalent, but in the second case the emotional control centers light up and fewer people opt to sacrifice the one for the five. The formulation of the trolley dilemma involving physical violence is more "emotionally salient" than the alternative. Moreover, the decision is not made by a rational part of the brain that decides that for some reason pushing a man over is qualitatively different from switching the tracks. The decision is made by the emotional part of the brain, which for whatever reason, feels that pushing someone over a bridge, even to save five children, is qualitatively different from flicking a switch.
Insofar as one can generalize, this study might support a general human disinclination for physical violence which can, of course, be overcome by habituation and training (as the case of soldiers attests).

The proximate grounding for these various emotional reactions to social situations and dilemmas can be found in research on mirror neurons, which also seem to support a kind of Smithian "impartial spectator," or at least the ability to imagine oneself in the position of another. Ferrari et al. (2003), demonstrate that when monkeys see another monkey eating, the same neurons light up as when the monkey himself is eating. Other research (Rizzolatti and Craighero, 2004) hypothesizes that these neurons may be extremely important to human communication, as they allow us to place ourselves (almost literally) in the position of the other, much as Smith hypothesizes in The Theory of Moral Sentiments. Other researchers (Williams, et al. 2001) have considered the possible relationship between the malfunction of mirror neurons and autism. Autism is a particularly interesting disorder from the perspective of innate laws, since autistics have a hard time relating to other people and understanding emotional cues. They seem incapable of true moral sentiments in the Smithian sense, and do not seem able to imitate other humans (291). An inability to imitate other humans, especially from a young age, may make it difficult to pull up the "impartial spectator," in large part because such an impartial spectator is based largely on what we understand others to be thinking of us, which is, in turn, based largely on what we ourselves feel in a specific situation. Without moral emotions of our own, it is difficult if not impossible to speculate as to the moral emotions of others.

This partial literature review supports the idea that humans have an innate set of
laws that regulate social situations. Whether it is the innate sense of justice evidenced in the ultimatum game, the emotional morality we see in the trolley dilemma, the enforcement mechanisms evident in our propensity for gossip, or the Smithian spectator we see in studies with mirror-neurons, humans are wired for social interaction and there are innate rules that guide those social interactions. These rules are laws just as customary and positive laws are laws. They fulfill Smith's definition in that they are "rules to direct the free actions of men: they are prescribed most surely by a lawful superior, and are attended too with the sanction of rewards and punishments" (1982a, 166). We have the option to not follow these social guides, and some people do not. However, there are consequences, rewards and punishments, that attend these rules. This innate rule of law also corresponds to what Hayek saw as the best kind of law – law where the consequences are both foreseeable and avoidable (1960, 206-209). We know what happens when we break social rules, and with this knowledge comes the ability to avoid those consequences. As I will argue further in the next section, the fact that there are innate rules that guide human interactions and that these rules are both internally and externally enforced supports a classical liberal conception of rule of law. In particular, the interactions between natural, customary, and positive law support the classical liberal argument for customary law as an important way of allowing these levels of laws to shift together to provide flexibility and adaptive ability in new and changing circumstances.
An Evolutionary Argument for the Primacy of Customary Law

I argue in the following that evolutionary rule of law supports the classical liberal reliance on customary law, in large part because customary law acts as a flexible but stable intermediary between the less flexible levels of positive and natural law. Natural law is general, and while there is evidence that there are evolved tendencies in the human race that are environmentally dependent (such as certain genes turning off and on in the presence of certain environmental triggers) much of natural law must be general in order to deal with varied environments. Customary law fills in the gaps, growing out of natural law to better adapt the population to its particular environment, both cultural and physical. Montesquieu argued that one set of laws could hardly fit a different society, presumably because the understanding is that those laws are particular reactions to particular environmental influences. Customary law, as a gradual process, has a good chance of gradually, without undue shock, changing and adapting the cultural practices of a people to the environment.

Positive law, on the other hand, can be quite problematic, as we saw in both Smith and Hayek's discussions. Because it often attempts to create particular outcomes with necessarily limited knowledge, it tends to disrupt the spontaneous order that occurs when customary law and natural law move together. If law is little more than an adaptation allowing people to live in harmony with both each other and the environment, surely there can be little good in uprooting the customary traditions of a people, or worse, going against the natural law which frames those traditions, yet this is what positive law often attempts to do. Just as in biological evolution, macromutations of the law will
more often do harm than good, primarily because such large-scale changes have the potential to damage the entire spontaneous order that rests on this web of laws.

For Hayek, legislation becomes problematic when it ceases to grow out of natural and customary roots, and becomes a renegade seedling of its own, divorced from the solid grounding of the parent plant. When positive law seeks a specific end, it departs from the natural and customary framework, which due to the diverse ends of humanity, is necessarily a framework rather than a linear path to an end. Once positive law departs, pushing human action toward a certain end (such as distributive justice, an example Hayek uses often), it often betrays natural and customary law along the way since the rational construction of law is limited by a lack of knowledge of particulars which include human nature and the way it interacts with custom. Thus, just as we look with some suspicion on attempts to change human evolution radically through biomedical enhancement, surely we ought to look askance at attempting to radically change our cultural evolution without thought of possible consequences in areas we hardly considered.

Obviously, some positive laws are necessary because humans have diverse interests which often conflict. There are, however, always ways of channeling those diverse interests into paths which are good for the group. Humans have been living in social groups (albeit primitive ones) for hundreds of thousands of years. If family life, ambition, or nepotism or any of the other numerous moral emotions and innate internal laws had nothing beneficial to offer society, either those innate rules or society would be gone by this point in our evolution. One must strive not to eradicate such human behaviors, but instead to take the beneficial aspects of human nature and use them to the
fullest while attempting to control, as far as possible, the negative effects of nepotism, selfishness, and other human behaviors. It is best to control negative consequences of natural human behaviors, not to suppress the behaviors themselves.

Constructing society in line with general human desires as evolved (including liberty and justice) will require fewer positive laws and coercion because such a life is more natural for humans. Plato's *Republic* and other utopian societies necessitate lying to the public, censorship, and other strict social control mechanisms primarily because these systems are contrary to innate human behavioral tendencies. The more natural the system, the more the natural laws support the positive law. Montesquieu argues in his *Spirit of the Laws* for just such a moderate balancing act (1989, 494-518). The more a system like *The Republic* creates positive laws which go against human nature, the more coercive the system will become, because the result is essentially two competing systems of laws, one natural, the other positive and coercive.

Ideally, governmental systems would be set up with our innate evolutionary desires as the most basic, and most controlling level of law. Cultural norms and social laws would follow in importance, since they are more flexible than natural laws, but also have the opportunity of evolving in line with human nature over the ages. Last comes the positive laws necessary to restrict those human desires which specifically make social life dangerous. Preventing coercion of some individuals by others may require positive laws to supplement natural and customary laws, especially in large societies where inhabitants are strangers. Positive laws ought to be generally in line with the other two levels, and ought to be the least restrictive of all, since the social and natural laws provide

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2 Unfortunately, there is what appears to be a natural human tendency to prefer positive law to less direct forms of legislating, which probably derives from the simple fact that it is easier to understand direct causes than indirect ones.
enough control that more coercion is superfluous. Montesquieu (1989) and Hayek (1979, 159-160) argue for such a nested hierarchy of laws. The main point is that rule of law is consistent with evolutionary liberty, with the coercion of positive laws minimized as much as possible, and society relying primarily on social norms and instinctual and emotional cues like Smith's moral sentiments to ensure proper social behavior.

As we can see from Hayek's treatment of customary law, it can operate as a useful buffer between two, less flexible, types of law. The consequences of breaking customary law are less stringent than for breaking positive law, which allows for a certain amount of innovation that can allow societies to adapt, over time, to new environmental pressures. At the same time, custom can be used, as Smith pointed out, as a way of heightening, or in some cases, deadening, our natural moral sentiments. In the following section, I will present the case for customary law as a sort of middle ground between natural law and positive law that allows human societies to adapt to their environments, that is a less coercive form of law than positive law, and that avoids the upheaval often associated with positive law that radically conflicts with human nature.

Customary law, as was briefly mentioned above, is less coercive than positive law. As Hayek points out, customary law allows one to break it without incurring any serious penalties other than the social disapproval that is a powerful but not prohibitively powerful force against innovation (1960, 63). Choosing to break customary law allows one to innovate when it seems necessary. Positive law, because it restricts innovation with specific punitive measures that tend to discourage all innovation, should generally be restricted to preventing force and fraud. Customary law, because it is more flexible than positive law, can be expanded to include a much larger set of rules that guide us
through the intricacies of social interaction. Innovation and faster adaptation to changing environmental circumstances can be promoted by combining strict, limited positive laws with a more flexible, though much broader, set of customary laws. The interaction between the two results in a spontaneous order. This flexibility allows society to adapt gradually to new circumstances as individuals choose whether to risk societal disapproval by breaking customary laws, but also provides a stable grounding below that of the strict positive laws, since societal disapproval will, in many cases, prevent people from innovating. Moreover, since customary law grows out of our natural inclinations, it rests on a more permanent foundation that reflects the constant adaptation of natural law to particular environments.

The strength of natural law seems to be reflected in the strength of customary laws. Those customary laws that support important natural laws seem to be those which are most universal and which breaking seems to produce the most social disapproval. Customary law can be seen in many cases as a way of filling out the very general natural moral emotions. The case of incest is a good one here, in that incest avoidance seems to be natural in our species and in all closely related mammalian species (Arnhart 1998, 32; Pinker 2002, 436), and is universally reflected in customary laws, though how custom deals with incest avoidance will vary from society to society. At least in our society, the social disapproval for breaking customary rules about incest is great, and such disapproval is unlikely to be reduced through cultural selection pressures due to its strong foundation in natural law.

Customary law also represents an important middle ground between natural and positive laws in terms of the internalization of laws. Customary law is less coercive than
positive law not only because people can risk society's disapproval in cases they deem important, but also because it is a more internalized form of law that is often put in place by habituation and education early on. The more internalized a form of law, the more individuals see their actions as arising from their own voluntary choice rather than a fear of punishment. In addition, a more internalized, less conscious form of law like customary law can, through habituation, be brought into line with natural laws in a way that is not possible to do in a rational, conscious way. Customary laws are more capable than positive laws of moderating undesirable natural laws or of finding ways to make those natural laws work for the community rather than against it, in large part due to their nature as gradually constructed and executed largely unconscious laws.

A further reason for the supporting customary law rather than positive law is that customary law tends to allow change without radical upheaval. When the kibbutzim of Israel decided to go against human nature and customary law and raise children communally, the negative consequences were obvious within a generation (see Tiger and Shepher 1975; Arnhart 1998; and Pinker 2002) and the change was eventually reversed, resulting in much consternation and conflict within the community. As Smith points out (219-223, 229, 237, 292), we naturally care for those closest to us and this natural preference is reflected in customary laws that support family life and parental care. Trusting (in general) the customary traditions of a community helps to prevent upheaval by allowing gradual change within the framework of natural laws while at the same time preserving the respect for the laws that is necessary to a regime based on voluntary obedience to those laws.

Last, and perhaps most important, is that customary laws are a response to
information about the environment that allows for adaptation to the environment while preserving variation within the system. As Chisholm (1999) points out, "organisms are seen as having evolved a hierarchy of mechanisms or processes for responding to (tracking) environmental changes" (63). These mechanisms include what Chisholm calls social intelligence (at the summit), which is what allows for the creation of both customary and positive laws, and then moves down into "anatomical, physiological, endocrine, and developmental mechanisms for responding to somewhat slower, more pervasive change" (ibid.). This hierarchy of mechanisms is supported by phenotypic plasticity, which is essentially the ability of an organism to change in response to environmental pressure. This plasticity, seen at both the individual and the social levels, preserves important variation. In the case of customary law, as we saw above, individuals have the option to risk social disapproval in pursuing alternative strategies. Such strategies will, presumably, undergo selection in the same way that genetic mutations undergo selection. The key for both levels of evolution is preserving the variation that allows evolutionary change to take place.

Understanding the ways these different levels of law interact helps us understand how cultural and political change occurs. When one level of law is at intense odds with another, one will have to change in response. Natural laws are less capable of change than customary laws. Positive laws are less capable of subtle change than customary laws due to their rationally constructed nature. Thus, customary law allows the different levels to adapt to one another and the environment without the negative consequences of continually changing positive laws.

As I have argued above, there is an innate rule of law in humans that supports the
other levels of law in human social life. Innate rule of law interacts with both customary law and positive law to produce a spontaneous order in which individuals have the knowledge necessary to make decisions about their actions in a particular environment, while still maintaining freedom. These different levels of law ideally support voluntary obedience to the law by focusing on customary law as the most broad form of law, while positive law is, in general, restricted to preventing force and fraud. These different rules of law support the classical liberal understanding of law as a broad framework that supports spontaneous order and the voluntary obedience to laws that is at the heart of classical liberal thought.

Moreover, the best type of law is that which grows out of our natural desires. Customary law, because it is gradually grown out of the customs and manners of a people, is more likely (generally speaking) than positive law to be in line with natural human desires, and will generally have fewer undesired side-effects. The gradual growth of customary law out of the interaction of natural human desires and environmental influences is an important example of what I will call in the rest of the dissertation “natural conventionalism.” In the case of rule of law, the laws that many argue are purely conventional, or in other words, man-made, actually arise out of the natural needs and desires of humans. These laws are supported and continue because they tend to help humans survive and reproduce in social organizations. In this way, what is conventional is actually natural, or at least the result of a natural process. I will argue in subsequent chapters that private property and the private sphere are examples of naturally grown institutions that have emerged from our nature as social primates. One of the interesting side-effects of understanding evolutionary theory is that it helps to eradicate the too-often
cited differences between nature and nurture, and nature and convention. If man has a nature, then his nature will influence convention.
CHAPTER 5: EVOLUTION AND PRIVATE PROPERTY

Property, especially private property, is one of classical liberalism’s most important institutions. It also happens to be an institution that comes under frequent attack. The following chapter attempts to lay out the evidence for the “naturalness” of private property and property rights in general. I start by laying out Smith and Hayek’s conceptions of private property, as well as describing the reasons they give for its importance. Next I move to what I call the “evolutionary” argument, which is really simply evidence from primates, studies in children, cross-cultural research, and other disparate fields showing that the ability to control certain objects or territories (which is what we essentially mean by property) is natural, universal, and innate. Besides demonstrating the universality of property concerns, I also hope to demonstrate the importance of property rights for a free society, which will lead into the next chapter on the private sphere. I use the term “property” to refer to possessions in general, which can include land, objects, or simply wealth. I consider property to be anything that one has an exclusive right to, one that allows us to prevent other men from using the resource in question. This definition does not, however, include people, since ownership of people is incompatible with a free society.
Smith's Understanding of the Origins and Benefits of Property

Adam Smith does not attempt a broad philosophical justification of property. His approach is primarily historical. He discusses how property is acquired and the origins of laws concerning property in various types of societies. He does, however, combine his historical analysis with his moral teachings in the *Theory of Moral Sentiments* in an attempt to provide moral justification for various kinds of appropriation and transfer of property.

Property rights and regulations depend on the state society is in at the time. Smith argues that there are four states through which societies pass: Hunters, Shepherds, Agriculture, and Commerce. Not only does what is considered property shift from age to age, but so do the various ways in which property rights are established. In the age of hunters, there is little to be stolen, and therefore property laws are almost nonexistent. Once the society shifts to herding, for the first time theft becomes a real and serious danger to the livelihood of the property owner. “In this state many more laws and regulations must take place; theft and robbery being easily committed, will of consequence be punished with the utmost rigour” (1982b, 16). Once agriculture becomes the dominant mode of life, there are fewer opportunities for theft, but more to be stolen. In this case, “The laws therefore tho perhaps not so rigorous will be of a far greater number than amongst a nation of shepherds” (ibid). As a general conclusion, he points out that, “The more improved any society is and the greater length the severall means of
supporting the inhabitants are carried, the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property" (ibid). Property law naturally becomes more complicated the more complex the society, since there will be greater and greater objects that fall under the umbrella of protected property, as well as many more people to be protected from.

The ways in which property may be acquired are five according to Smith:

"There are five causes from whence property may have its occasion. 1st, Occupation, by which we get any thing into our power that was not the property of another before. -- 2dly, Tradition, by which property is voluntarily transferred from one to an other. 3dly, Accession, by which the property of any part that adheres to a subject and seems to be of small consequences as compared to it, or to be a part of it, goes to the proprieter of the principall, as the milk or young of beasts. -- 4thly, Prescription or Usacapio, by which a thing that has been for a long time out of the right owners possession and in the possession of an other, passes in right to the latter. -- 5thly, Succession, by which the nearest kin or the testamentary heir has a right of property to what was left him by the testator" (14).

Occupation and accession are the two "original methods of acquiring property" (27). The others all involve voluntary transfer either between the living or between the dead and the living. Occupation and accession, however, both involve taking something that is still "in the commons" and claiming a right to it. It is these two therefore that require the most extensive justification. Smith justifies the method of occupation by appealing to the impartial spectator, who played a large role in *TMS*. For Smith, rather than relying on some sort of complicated analytic justificatory mechanism, he relies on
the common-sense sentiments of the impartial spectator. “The reasonable expectation therefore which the first possessor furnishes is the ground on which the right of property is acquired by occupation” (17). The impartial spectator views that a person has a right to a particular object when he himself “enters into his thoughts and concurs in his opinion that he may form a reasonable expectation of using the fruit or whatever it is in what manner he pleases” (17). The impartial spectator's agreement is based on the reasonableness of the act given the circumstances and various other claims. Smith's justification does not provide us with a hard and fast rule by which we can always judge in every case. It instead relies on the reasonableness of a man's actions as determined by the spectator who, while feeling with the man in question, is also somewhat distanced from the agent's particular passions and prejudices.

The right of accession is also based in the moral sentiments, most particularly the sentiment of impropriety. Just as we feel it would be improper to take fruit from a man who has collected it, so we also deem it an impropriety that the milk of a sheep owned by a man should remain in the commons while the sheep itself does not. Again, Smith relies on our moral sentiments or our intuitions about what constitutes right property rather than providing a coherent system of justification. Accession varies in particular societies as the types of property vary. There is little concern in pastoral societies with accession, with the exception of the offspring and produce of animals owned. The case gets more complicated once private property in land is introduced (28). Once private ownership in land is introduced, problems such as mineral rights, water rights, and ownership of trees and stones come into being, requiring much more complex legislation that often cannot be determined solely by relying on the impartial spectator. Smith does argue that the
primary case in which there is difficulty determining accession is in the case where "the accession is the property of a different person from the proprietor of the subject" (as when "one builds a house on another man's grounds") (29). This is one of the first cases where one determines, not the whole right to both land and house, but a partial right in one or the other. Either the house owner pays rent or recompense to the landowner, or the reverse. Smith's account of property is therefore partially natural and partially conventional. Property itself is based in a natural human desire and supported by the natural moral sentiments. Yet as the complexity of a society grows, the conventions associated with those natural desires for property become more and more complicated. Both the root and the growth of the conventional norms are natural, even while the specific form of laws regarding property might be decided by convention.

The other three methods of acquiring ownership rely on voluntary transfer and thus need only be justified insofar as contracts between individuals need to be justified. Smith sees property rights in general as coming originally from a gradual growth, though he does seem to recognize the importance of labor in creating property rights, therefore following Locke and, to a certain extent, Hume. He argues in the *WN* in a section on apprenticeship that "The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable" (138). This section is somewhat difficult to understand in conjunction with Smith's *LJ*, where we see him argue that property is justified by the approbation of the impartial spectator and where he argues that in hunting societies, "In most cases... property was conceived to commence when the subject comes into the power of the captor" (18). In the case of hunting a hare, for example, such possession requires a good deal of labor. In the case of
plucking an apple, the labor seems much less, and Smith's argument for labor as the basis for property in the WN does not seem to be borne out in LJ.

Smith's discussion in the WN on the labor theory of value may be related to his argument that labor is the original foundation of all property. The apparent inconsistency between WN and LJ on the origins of property may not be an inconsistency at all, however. It is possible, though Smith does not seem to lay this out, that the impropriety the spectator sees when a man is deprived of something he possesses comes from a natural human sentiment that what a man possesses or has placed labor into becomes, properly, his property. Thus, the moral sentiments of the spectator may simply be a way of underscoring the importance of labor in property acquisition. Ultimately, however, the importance of original acquisition is minimized since it occurs in rare cases in the commercial world. Most property is acquired through transfer after the original parceling out of land (1982b, 22). As Smith points out, "The first origin of private property [by which Smith seems to mean private property in land, rather than private property in general] would probably be mens taking themselves to fixt habitations and living together in cities, which would probably be the case in every improved society" (ibid). It is after this parceling out occurs that the other methods of acquisition become more important. Tradition, prescription, and succession can only become possible once original acquisition has been justified and is considered relatively stable.

I will now move into his discussion of the benefits of private property, especially in land. While Smith is perhaps more ambivalent on the benefits of private property ownership than some classical liberals, he generally believes that the acquisition of property, especially great property, becomes a source of benefit for society, in large part
through the famed "invisible hand."

Despite the wealth generated by ownership, the most foundational good deriving from property is that to protect property man gradually builds up systems of justice and civil government: "The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government" (1981, 710). The relationship between property and civil government arises in large part due to natural forces in human nature. The poor envy the rich, whose avarice and ambition further create inequality that further breeds envy. As Smith points out, "Wherever there is great property, there is great inequality" (ibid.). This inequality, breeding resentment, leads the rich to require a system of justice through which they can defend their property from the encroachments of the poor. Hunters have little need for civil government because they lack extensive property: "Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour; so there is seldom any established magistrate or any regular administration of justice" (1981, 709). The argument regarding property and civil government becomes a kind of chicken-and-egg problem in that it becomes unclear precisely which needs to come first. He points out, "It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security" (710). Extensive property requires civil government for its protection, but civil government requires property as an impetus for its formation.

Smith's answer to this apparent paradox is a rejection of the contract theory of Locke and Hobbes. He argues instead for a gradual growth of both property and civil
government together. As each system becomes more complex, the other system necessarily grows with it. Thus, civil government is not based on some contract at some particular point in time, but grows up out of the complex interplay of a people moving through various stages of growth, with new properties being added to the existing system, and therefore requiring new laws and regulations and therefore new powers of government. Smith argues that "...the necessity of civil government gradually grows up with the acquisition of valuable property, so the principal causes which naturally introduce subordination gradually grow up with the growth of that valuable property" (710; see LJ 201-205, 207-208, 228 for similar arguments). The importance of property for civil government is seen in Smith's first page of LJ, where he argues that "The first and chief design of every system of government is to maintain justice; to prevent the members of a society from incroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property" (5). Thus Smith follows Locke (1988) in arguing for the centrality of property in the creation of civil government, but offers a more organic view of the relationship than the contractual theory set forth by Locke.

Once civil government has been established, there are numerous benefits that property offers the state. One of these is that property leads the rich to spread out their wealth: "They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species" (1982b, 184-185). Because the rich cannot in reality consume much more of the
necessary goods of life than the poor, they must do something with their excess wealth. Very often, the baubles on which they spend their wealth have the side-effect of providing the poor with work. The poor then “derive from his luxury and caprice, that share of the necessaries of life, which they would in vain have expected from his humanity and justice” (184). This argument is by now familiar to most of us, but it is no less true now. The large property owner or even the simply very wealthy man necessarily spends much money that provides the sustenance of numerous servants, tradesmen, farmers, and others. Without inequality of property we would certainly be more equal, but it would be an equality of poverty rather than an equality of wealth. Moreover, the desire for wealth (and property in general, not simply land) is beneficial in that it is a natural desire that prompts “men to cultivate the ground, to build houses, to found cities and commonwealths, and to invent and improve all the sciences and arts, which ennoble and embellish human life...” (183). The desire for wealth leads to civilization, and the possession of wealth supports that civilization by spreading that wealth to the less fortunate.

Further, property promotes general abundance in that it supports Smith's division of labor. Smith's arguments for division of labor in the *WN* depend in large part on the existence of property rights. In order for division of labor to operate, one must have something with which to exchange for the goods of another. Whatever this something is, one's ability to trade with it requires that one owns it, either through occupation or accession or various forms of transfer. Without ownership, the basis for division of labor becomes meaningless, since one would have no right to anything, and we would necessarily return to a kind of state of nature where everything is in the commons and
everyone provides everything for himself. Thus, property is at the root of division of labor, which Smith sees as the foundation for much of what makes commercial society successful at providing for the wants of man.

Property also creates its own dangers, however. It breeds inequality and provides an important motive for harming others. It seems clear from Smith's treatment, however, that property, though associated with costs of its own, creates the conditions for abundance, and therefore for the comfort of the entire society. Smith is less sanguine about the motives of the wealthy than Hayek, as we will see later, but his argument for the invisible hand demonstrates that even in the midst of the vice and luxury of the wealthy there exists unintentional virtue. We are confronted with a problem in Smith then, which is that while he sees the acquisition of wealth to be a necessary component of the comfort of mankind in general, he also sees it having a negative impact on the individuals who possess it. I will deal with this issue at length in the chapter on “Evolution and Regimes of Excellence,” but for now I will simply argue that Smith's understanding seems to be a simplistic one, perhaps intentionally simplified for rhetorical purposes.

It should be noted briefly that Smith's arguments for property are not limited to private property. There are situations in which common property will be more beneficial or less dangerous than private ownership. These situations may be few and far between, but communal ownership is not rejected out of hand. As Smith argues, “By the severall methods above mentioned property would in time be extended to allmost every subject. Yet there are still some things which must continue common by the rules of equity” (1982b, 23). The navigation of rivers, for example, and water fountains by the road,
should be left in the commons. Thus, the privatization of property does not necessarily extend inevitably to all objects.

Overall, Smith seems to see private property as growing out of the natural human desires that, moreover, we share with other animals. Smith argues that animals share much the same desires as we do, but that animals are not capable of formalizing their desire for property in any way that benefits individuals and the group. He argues, “The effects of those different geniuses and talents, for want of the power or disposition to barter and exchange, cannot be brought into a common stock, and do not in the least contribute to the better accommodation and conveniency of the species” (1981, 30). Because man has the capability to use civil government to formalize his desires for property, such property can contribute to the increase of wealth of the whole population.

Hayek and the Origin and Benefits of Property

Hayek follows Smith in that his discussion of the origin of property focuses on the gradual and contextual growth of property rights. Hayek is, like Smith, less concerned with some theological or contractual basis for property than with the gradual growth of property rights out of particular circumstances. This gradual growth necessarily makes the foundations of property rights less clear, but what we lack in clarity we gain in realism. Hayek's concern with the origin of institutions is never terribly deep, but we do see him here referring to anthropological and historical data on historical rights in an attempt to determine how such rights must have originated. He argues that, “With respect to some objects, the notion of individual property must have
appeared very early, and the first hand-crafted tools are perhaps an appropriate example” (1988, 30). Further, “Modern anthropology confirms the fact that 'private property appears very definitely on primitive levels' and that 'the roots of property as a legal principle which determines the physical relationships between man and his environmental setting, natural and artificial, are the very prerequisite of any ordered action in the cultural sense'” (1960, 140). However, “The extension and refinement of the concept of property were... necessarily gradual processes that are hardly completed even today” (1988, 30). Even understanding the foundations of property in our primitive past does little to help us understand how those rights work out in a larger commercial society. Hayek argues that the ultimate reason for the origination of property rights was “Probably the need to keep a workable holding intact,” which “gradually led from group ownership to individual property in land” (1988, 31). However, this original justification holds little relevance for why property rights are important in commercial societies. For Hayek, the importance of property rights is similar to Smith's: “The crucial point is that the prior development of several property is indispensable for the development of trading, and thereby for the formation of larger coherent and cooperating structures, and for the appearance of those signals we call prices” (ibid.). This is similar to the implicit argument in Smith that property rights are necessary for institutions like the division of labor. The ultimate point is that property rights sustain systems of cooperation between unknown individuals. Just as with Hayek's argument for rule of law, property rights create a framework in which cooperation can occur: “Yet somehow, however slowly, however marked by setbacks, orderly cooperation was extended, and common concrete ends were replaced by general, end-independent abstract rules of conduct” (ibid.). Such
cooperation is required for the creation of a free society.

While Hayek does not spend time laying out the different ways in which acquisition of property is legitimate, he does refer to succession or inheritance in various places, suggesting that he finds it more important or at least more interesting than other forms of acquisition. Hayek spends more time justifying succession or inheritance than Smith does, probably due to the fact that inheritance came under attack in socialistic systems, while it was largely accepted in Smith's time. His arguments are similar to what I will argue in the section on evolution and property, in that the concepts of family and of property are closely linked. For Hayek, the desire to help kin is a natural phenomenon that is better incorporated into the social framework than pushed out. We need to “recognize that belonging to a particular family is part of the individual personality, that society is made up as much of families as of individuals and that the transmission of the heritage of civilization within the family is as important a tool in man's striving toward better things as is the heredity of beneficial physical attributes” (1960, 90). Furthermore, inheritance operates as “an inducement for [property's] accumulation” (91). Perhaps most importantly, preventing individuals from passing on what they have gained in their lives has the effect of simply pushing them to get more creative in how they help their relations: “It seems certain that among the many ways in which those who have gained power and influence might provide for their children, the bequest of a fortune is socially by far the cheapest” (91). Hayek points out that the rampant nepotism and assignment of government offices to relatives in communist regimes is only one example of the unintended effects of eradicating the less damaging institution of inheritance.

For Hayek, the benefits of property to society are much more obvious than those
we see in Smith. His primary argument is again similar to Smith's, in that property rights are the foundation for civil society. "...the whole system of separate enterprises, offering both employees and consumers sufficient alternatives to deprive each organization from exercising coercive power, presupposes private ownership and individual decision as to the use of resources" (124). The importance of private property as a way of reducing coercion is highlighted again when Hayek argues that "We are rarely in a position to carry out a coherent plan of action unless we are certain of our exclusive control of some material objects; and where we do not control them, it is necessary that we know who does if we are to collaborate with others. The recognition of property is clearly the first step in the delimitation of the private sphere which protects us against coercion; and it has long been recognized that 'a people averse to the institution of private property is without the first element of freedom'" (140). I will be dealing with the importance of the private sphere in another chapter, but it is certainly true that private property is an integral part of the private sphere, a sphere within which ideally government exerts little or no control. Thus, even while as Smith points out, property provides the impetus for the creation of government's powers of coercion, it also provides the limitation for those powers, since it creates a free sphere in which the rights of the property owner to use his property (and the resources coming out of that property) as he sees fit within general limits. Thus, we have another paradox of property that nonetheless makes sense when understood in the context of a gradual growth of property rights and governmental coercion: property provides the basis for governmental coercion while limiting its breadth and effects (while also limiting the coercion of individuals by other individuals).

One further benefit of private property occurs in Hayek's discussion of the
wealthy. Hayek is much less ambivalent about the wealthy than Smith. Hayek, on the other hand, sees much of the creative powers of civilization as arising from the leisure which those with extensive property and wealth can command. He argues, “The man of independent means is an even more important figure in a free society when he is not occupied with using his capital in the pursuit of material gain but uses it in the service of aims that bring no material return” (1960, 125). These aims include those that the market would not necessarily take care of on its own, including art and philanthropy. These are, importantly, signs of status as well as being meaningful in their own right. Smith's apparent belief that the wealthy never act for the well-being of the common good is not Hayek's. He appears to trust to some extent the wealthy to pursue more than simple material gain, though he by no means depends on the altruism of the rich. Hayek's emphasis on the benefits the wealthy provide to society stems from his concern with envy. Envy, while a natural human emotion, is particularly dangerous in capitalistic societies, where some inequalities are the necessary outcome of the system, and where the freedom to create those inequalities is precisely what creates abundance for all. Hayek pleads: “If through envy we make certain exceptional kinds of life impossible, we shall all in the end suffer material and spiritual impoverishment” (130).

Smith seems to see the problem of envy as well, pointing out that the lowest peasant in Europe is better clothed and fed than an African king, even though his relative comfort compared to a European prince seems quite low (1982a, 23-24). However, as he points out in _TMS_, envy is often in powerful opposition to our natural sympathy toward the well-being or prosperity of others. As he points out continually in the _TMS_, envy is one passion that prevents us from being the impartial spectator of the conduct of others.
He describes it as “that passion which views with malignant dislike the superiority of those who are really entitled to all the superiority they possess” (244). Thus, there are times when the peasant is incapable of understanding his absolute wealth, focusing instead on envying those above him. There are then, according to Smith, two conflicting desires in human nature. The one is the desire to admire those superior to us: “Where there is no envy in the case, we all take pleasure in admiring, and are, upon that account, naturally disposed, in our own fancies, to render complete and perfect in every respect the characters which, in many respects, are so very worthy of admiration” (1982a, 250). The other is the passion of envy, which prevents us from properly admiring the actual superiority of those above us. As I will argue in the chapter on “Evolution and Equality,” envy is a natural human emotion and one that spurs much of human progress, yet it needs to be channeled rather than set free. Hayek's concern about envy is an important one. It is perhaps the best example of a natural desire that is dangerous to a classical liberal society and which must be dealt with carefully. I will go into this argument more in depth later, as I mentioned above. For the moment, it suffices to point out that both Smith and Hayek see the difficulty envy presents to liberal systems. The human fixation on relative position rather than absolute well-being is a continual challenge to classical liberal institutions, especially that of private property.

One last important benefit of private property for Hayek is the effect it has on personal responsibility. In speaking of rent control, Hayek argues, “It has also contributed much toward weakening the respect for property and the sense of individual responsibility” (343). Hayek's general argument on rent control is less important for our purposes than the fact that it highlights the important connection between private
property and personal responsibility. Private property, because it allows one to control resources in his possession, allows one to take risks with those resources in hopes of greater gain, but it also requires that individual to bear the responsibility for any failures. The responsibility both for one's gains and losses contributes to the psychological benefits of property while at the same time promoting the proper care of resources and responsibility for one's actions. The alternative is the well-known tragedy of the commons in which no one holds property, and therefore no one is held responsible for the depletion of communal resources. Thus, private property provides a psychological benefit with real-world consequences. Personal responsibility for one's actions results in the better stewardship of resources that might perish were they held communally.

The Origins and Benefits of Property from a Biological Perspective

The argument from anthropology and related fields ends up being quite similar to the arguments set forth by Smith and Hayek in the previous sections. Rather than being the result of contract or positive law, property rights appear to grow out of natural human desires as a response to particular environmental pressures. Richard Pipes (1999) has done an excellent job of summarizing some of the best literature concerning the natural and historical bases for property rights. I will spend most of the next section outlining and discussing his arguments, as well as dealing with other related literature on the natural basis for property.

There has been some effort to point out the natural basis of property in recent years. Arnhart (2005) goes through the natural, customary, and positive roots of property
in *Darwinian Conservatism*. He points to arguments made by Smith and Burke among others for the naturalness of private property, deriving further support from thinkers like Pipes, Darwin, and Westermarck. Many of these thinkers underscore the natural growth of property rights into customary law.

I will focus primarily on Pipes's argument. The argument has three primary foci. Pipes deals with the rudimentary roots of property in animals, the psychological roots of property in children, and then moves to an anthropological survey of property rights among primitive peoples. Each of these approaches is a way of confronting the argument that property is an inherently customary construct. Evidence from animals demonstrates that it is found in other species, and that it is therefore a much older instinct than previously thought (and therefore unlikely to be eradicated). Evidence from children further shows the unlikelihood that desires for property are purely socially constructed. Finally, anthropological evidence demonstrates that some notion of private property is universal across human cultures and therefore probably serves some important social functions in addition to probably being an innate desire. Evidence from these three fields should hopefully demonstrate the naturalness of property by demonstrating that the desire for property is deeply rooted, innate, and universal to human cultures.

Pipes deals first with acquisitiveness among animals, arguing that property in animals is primarily that of territory (1999, 66). He argues that maintaining distance from individuals of other species and from individuals of one's own species is an important aspect of territoriality. These distances depend in large part on what kind of animal we are dealing with, whether social or unsocial, whether carnivorous or otherwise, and other species-specific properties (69). For humans, who are social, one
would expect close proximity to members of own species with territoriality between
groups, and restricted access even within groups, as kin separate themselves off from the
rest of the group. The desire to defend a set (though flexible) territory is universal
among animals, even down to protozoa (68).

The three major functions of property (or territory as the case may be) are to
escape predators, provide for oneself and one's young, and to breed (68). Going along
with these primary goods, property serves an epistemological function. By focusing
one's energies on a particular territory, an animal develops a close knowledge of the way
that particular territory works. Predator and prey patterns, hiding places, and food caches
all represent important information that is more easily acquired in a known territory than
in a non-territorial system. Moreover, part of the territorial system of animals acts in
much the same way property and rule of law works in human political systems. With a
known territory, an animal is better able to predict what other animals (whether of his
own species or not) will do. This predictive power thus enables the animal to make
better choices concerning his own survival and reproduction. Thus, territory for animals
serves to reduce uncertainty, which is much like Hayek's arguments for increasing the
predictive power and knowledge of individuals. Thus, apart from any particular "rights"
one might have in property, it serves a natural epistemological function in helping deal
with the problems of knowledge all animals face.

Pipes's evidence for possessiveness in children is further support for the
naturalness of some understanding of property rights. He points out that "toddlers are
exceedingly possessive and learn to share as they grow up because they are taught to do
so" (71). Possessiveness is therefore prior to altruism, as least as far as child
development is concerned. Further, in studies of groups of children the major source of conflict was disagreements over toys and other possessions (74). This pattern of property-based aggression was present even in communist societies like the kibbutzim. More than simply describing the possessive desire in children, Pipes also offers arguments relating to the importance of property and the possessive desire in psychological development. Pipes cites evidence from clinical studies of children that point to a continual development of acquisitiveness that starts with a special toy at the age of eighteen months, morphing into feelings of ownership, only developing the ability to share later in childhood (73). Ownership in property may be integral to the development of personality and individuality. A sense of ownership is integral to defining oneself in opposition to others. In fact, Pipes implies that in some ways a desire for acquisition comes prior to the ability to differentiate oneself from others, and that it is this desire that pushes us to differentiate ourselves from others through our differentiated property. If this is true, property is even more foundational to individualistic understandings of human nature than previously thought. Property may be at the very root of the individual's understanding of himself.

As Pipes argues, “the leading causes of human acquisitiveness are economic and biological: the need of territory and of objects with which to sustain oneself and to procreate” (71). Acquisitiveness is at the very root of survival and reproduction. It would be very strange if humans did not have the desire to acquire goods. Indeed, the desire to acquire goods and “own” them individually is universal across all human societies. Pipes's discussion of property among primitive peoples supports the evidence from animals and children, while demonstrating the universality of property, even among
supposedly "communistic" societies.

Ownership among primitive peoples is usually discussed in terms of individual ownership versus group ownership (79). Tribal ownership usually extends to territory and land, much like we see in animal groups, rather than to specific objects. Individual ownership usually extends to portable objects that the individual uses daily, which are often regarded as part of the individual (79). Primitive societies even assert ownership over intellectual property, including "songs, legends, designs, and magic incantations, which are believed to lose their effectiveness if learned by others" (80).

Pipes's overall discussion supports the classical liberal groundings of property. The primary goals of property are to preserve for individuals scarce resources, and to alleviate problems of knowledge. The grounds of property rights are both natural and customary. Property rights grow out of natural human desires, and in this way the very growth of these rights, though the specific form takes place conventionally, the growth itself is very natural. There is, then, a kind of natural conventionalism to property rights. This natural conventionalism supports both Hayek's and Smith's arguments for a natural, gradually grown institution of property.

Family and Property

There is an element of Pipes's discussion that is implicit but which ought to be drawn out further, and that is the connection between property and the family. I have noticed with interest the connection between the assault on property and the assault on the family, both of which tend to play some role in schemes of equality, whether Plato's
Republic or the Israeli kibbutzim. The connection may be quite simple. Both property and family are guided in large part by “love of one's own” which is, in general, at the root of human nature. The two become even more intertwined when we look at the debates over inheritance, or the ways in which people leave their property to kin. Very few people will argue that family is not natural, but probably a similarly few number would argue that property is natural. The connection then seems to be mostly a semi-conscious one, and there is little in the literature explaining why (or even that) the two tend to be fundamentally connected, especially in utopian attempts to create equality. I believe, however, that property is as natural as the family, or at least that it grows out of the same concerns expressed in preference for kin, and that in fact much of the desire for property and control over resources arises out of a desire to provide for one's nearest and dearest as well as oneself.

While humans are social creatures, they are not indiscriminately social. They care for kin more than for strangers, and therefore, nepotism has undoubtedly played a large role in human society for millenia. As Hayek's pointed out, private property serves as a barrier to the more damaging aspects of the nepotistic desire. In fact, both Smith and Hayek see inheritance as one of a few ways in which property can be legitimately acquired. There may then be an important link between property and family. This link may serve to underscore the difficulty of eradicating either institution. It may also serve to demonstrate the incredible complexity of human institutions, especially those gradually grown institutions like property. It is unlikely that an institution grown over thousands of years will not be inextricably connected to other important institutions. This connectedness makes the pulling out or eradication of one institution while leaving
others intact impossible, and generally serves to caution us against hastily uprooting any long-existing institution in the name of abstract goods.

Back to the main point: Property has two primary goals both for simple societies and for complex societies like our own. It first of all helps deal with the problem of scarcity and helps alleviate the tragedy of the commons, and it helps deal with the problem of knowledge that plagues all non-omniscient creatures. Moreover, in modern commercial societies, well-defined property rights help increase the predictability of unknown agents, while also increasing the possibility of creating relationships of trust between thousands of unconsciously interacting individuals. Both these concerns are related to the importance of control in property. Property gives us knowledge of particular situations and provides a certain access to restricted resources, which allows us to predict and control our environment. Thus, one of the important aspects of property is that it gives us some amount of control over external resources, and having some control over what happens to oneself is the core of liberty.

The growth of private property in human societies appears to approach most closely that hypothesized by Smith and Hayek. Instead of some mystical contract, we find property rights growing gradually out of the natural needs of species, becoming more and more specified by customary practices and the particular needs of particular groups, finally to become further defined by positive law. One would predict then that we will find many different arrangements of property among human societies, and this is precisely what we find. However, amidst the variation, we will find certain universal tendencies. Humans will desire to own property individually, and they will desire to pass that property onto those closest to them. Acquisition and inheritance, two of the primary
enemies of socialist thought, seem to be deeply rooted in human nature. Not only are they deeply rooted, but they continue to serve important biological, economic, and social ends of survival, reproduction, alleviating scarcity, and promoting knowledge and stability, which seems to ensure that they will not be easily eradicated even if we wanted to.

Pipes's discussion, as well as Arnhart's (2005), seems to support the ideas laid out by Smith and Hayek regarding the origin and benefits of property rights. Smith and Hayek argue that property and civil government support one another in a mutual fashion, that property leads the wealthy to spread out their wealth, that it supports division of labor, that it is indispensable for trade, that it is a barrier to the negative effects of nepotism, that it is a way of reducing coercion, that it helps provide goods that the market cannot provide, and that it fosters personal responsibility. These benefits range from the psychological to the economic to the societal, and they cover many facets of human life, from that of the individual, to the family, to the commercial society as a whole.

Property is most beneficial in supporting freedom. A free society is one in which individuals are free within a rule of law to make decisions about their own lives. These decisions, made at the individual level, help alleviate the problem of knowledge that confronts any attempt to centrally control the actions of many individuals. Further, a free society consists in the cooperation of many individuals, helped along by institutions that create trust between unknown actors. Finally, a free society limits the coercion of individuals, whether by the government or by individuals.

Property rights are integral to all these goods, and the relationship is, in many ways, a natural relationship. Property rights serve an epistemological purpose, providing
individuals with the ability to predict the actions of others, with knowledge of the environment, and with some limited knowledge of the future. Property rights promote cooperation by supporting the creation of interacting systems of transfer like the price system that allows for unknown individuals to cooperate with one another in relative security. Finally, private property forms the nucleus of the private sphere. It creates a central core of goods that are outside the control of government or other individuals, and therefore it creates a sphere of control and security within which the individual can act. The epistemological limits of human understanding, the limits of face-to-face trust, as well as the dual desires for freedom and control that make free government difficult to achieve are all natural aspects of the human condition. Property rights are a natural response to these natural facets of human nature.

While there are many features of a free society, there is little doubt about why property rights have been central to those devoted to freedom from Locke to Hume to Smith to Hayek. Without property rights, a free society would crumble. There can be no private sphere without property, and therefore no sphere in which the individual is free from the control of the government.
CHAPTER 6: EVOLUTION AND THE PRIVATE SPHERE

In this chapter I explore the connection between human nature and the private sphere. The private sphere is related to private property and the rule of law. The three are interconnected, and in many ways understanding the private sphere shows how these two institutions fit together.

I will look at Smith and Hayek's formulations of the private sphere. I will show how evolutionary theory and evidence from human nature supports a private sphere. Finally, I will reveal the connection between rule of law, private property and the private sphere. Throughout these varied discussions, I will discuss the idea of rights as a way of formalizing a private sphere, while bringing to light some of the difficulties inherent in rights language, and laying out a definition of rights that is consistent with classical liberalism and which takes its bearing from the "natural conventionalism" that runs throughout classical liberal thought.

The liberals in general, including Locke, Hobbes, Burke, and others, believe that the government should require as little as possible from people, as least as far as their formal obligations to the state are concerned. Most liberals think that other than force or fraud, most individual actions ought to be outside the purview of governmental scrutiny. Creating a sphere of private conduct into which the government cannot intrude is at the
heart of classical liberal thought. At least on this understanding, the institutions of rule
of law and private property are merely barriers around or preservatives of this private
sphere. Locke describes property as a fence to our self-preservation (1988), and in the
larger scheme of things, property and rule of law are actually ways to preserve the
privacy of individuals and the corresponding freedom from governmental interference.

From these desires to create a private, protected sphere comes the notion of rights.
Most of the rights we take for granted, including the right to privacy, the right to
property, the right of association and religious expression are merely ways of formalizing
precisely what this private sphere ought to contain. Rights have taken on a new meaning
in recent years. Instead of merely defining areas of human life into which government
may not intrude except to prevent force or fraud, rights have come to mean things which
the government ought to provide. This movement is a dangerous one, since the
government cannot both provide certain goods and refrain from interfering with those
goods at the same time. The understanding of rights that I will use throughout the rest of
this chapter is one in which rights are defined as goods which the government cannot
meddle with except to prevent force and fraud. There are difficulties and exceptions to
this general rule, but for the moment I will be ignoring those. These rights are supported
by rule of law when that rule of law consists of a general framework in which individuals
understand what is included in the protected sphere, and are therefore able to better plan
for the future with the resources at their disposal.

The private sphere is then fundamentally connected with the idea of rights. The
private sphere may be said to consist in various rights that provide the individual with
freedom from interference in relation to various goods and activities. These rights can be
based either in nature, custom, or positive law. In the following I will lay out Hayek's
and Smith's formulations of rights. Smith argues for some kinds of natural rights, while
Hayek argues for customary rights. In the section on evolutionary support for a private
sphere, I will lay out the support for rights that we get from nature, though I am hesitant
to use the term natural rights, primarily because the use of the term "rights" has become
loaded and confusing, and ultimately it seems safest to say that rights are human
constructs that nevertheless are founded on and supported by the nature of man. They
are therefore neither relativistic nor merely conventional. It is this idea of rights as
rooted in nature but formalized by convention that is meant by the phrase "natural
conventionalism" that I will use throughout the following chapter.

Smith's Private Sphere

Smith does not use the term "private sphere" in any of his works, nor does he use
the term "rights" in either TMS or WN. His discussion of rights is exclusively contained
in his LJ, which is again that work where he makes the connection between TMS and WN
most obvious. It is also the work most particularly concerned with law and government,
and therefore the discussion of rights fits well, though their absence from his other works
is worth pondering. His discussion of rights in LJ is extensive. He deals with five main
types of rights including acquired rights, natural rights, perfect rights, personal rights,
and real rights. The latter two are merely types of acquired rights, and have to do with
the right to pursue grievances or reclaim property.

He follows Hutchinson and Puffendorf when he argues, "Perfect rights are those
which we have a title to demand and if refused to compel an other to perform. What they call imperfect rights are those which correspond to those duties which ought to be performed to us by others but which we have no title to compel them to perform” (9). Smith uses the example of a beggar, who has an imperfect right to our charity. We ought to help him, but we cannot be coerced into doing so. “Imperfect rights,” according to Smith, “refer to distributive justice” (9). While imperfect rights may be related to things that are moral, natural, and good, it is not government's job to enforce these actions. Perfect rights have to do with commutative justice, and it is these which we will be focusing on, since they are the basis for all law. These perfect rights are those rights which we can defend using the coercive force of government. These perfect rights also make up a large part of the private sphere properly understood. The private sphere according to Smith's formulation can be said to consist in those perfect rights that we have the right to defend with coercive force.

Smith discusses natural rights as a form of perfect rights, though there does not seem to be any reason that there might be natural yet imperfect rights. In fact, Smith's discussion of the moral sentiments and the role of benevolence (1982a, 235-237) would seem to support the idea that there are many natural yet imperfect rights. However, government has a role only in perfect rights, and thus these perfect rights are Smith's primary concern. He opens his discussion arguing, “Now we may observe that the original of the greatest part of what are called natural rights {or those which are competent to a man merely as a man} need not be explained. That a man has received an injury when he is wounded or hurt any way is evident to reason....” (1982b, 13). He further argues that “The object of Justice is the security from injury, and it is the
foundation of civil government” (1982b, 398). If rights are based on ways in which we can be injured in our body or our reputation, and prevention of such injury is the basis for civil government, then we see the integral connection between the existence of rights and the existence of government. We must have some kind of rights if government is to wield the coercive power necessary to prevent injury to those rights. If we do not have a right to our body, for example, then there can be no basis other than mere whim for a government to use coercive force to protect our bodies from other people. Thus, rights are at the root of legitimate civil government for Smith.

Smith's formulation of rights is useful in that he distinguishes between the rights of man as man and the rights of man as a member of various groups. The rights of man as man can be called natural rights, and Smith uses this language often. But, these rights can also include so-called acquired rights like that of property that, while natural, are not connected integrally to man. Thus, there can be imperfect natural rights, and perfect acquired rights. In his use of the term natural rights, Smith distinguishes himself from other classical liberals like Burke and Hayek, both of whom avoid using the phrase natural rights, in large part due to the misuse of the phrase by the French revolutionaries and socialist thinkers. The rights of man as a member of a group include rights of members of families, and those conferred on citizens of a particular country, such as the right to vote. The latter rights are conventional, though one might argue that even these rights are rooted in human desires (the desire for participation in the political process, for example). The former rights, those of man as man, are the foundational rights that we are concerned with, and it is generally these rights which are at the heart of the private sphere (though the private sphere can be expanded to include the rights of men as a
member of a group and often is, as in the case of the family). Smith describes the rights of man as man in *LJ*: “We shall consider in the first place those rights that belong to a man as a man, as they are generally most simple and easily understood, and generally can be considered without respect to any other condition. A man merely as a man may be injured in three respects, either 1st, in his person; or 2dly, in his reputation; or 3dly, in his estate” (1982b, 8). Smith moves on to expand each of these three categories. The natural rights concerning man's body include “the right to free commerce, and the right to freedom in marriage,” and infringements on these rights are, according to Smith, “evidently incroachments on the right one has to the free use of his person and in a word to do what he has a mind when it does not prove detrimental to any other person” (8). This formulation is similar to Mill's later discussion of the harm principle (Mill, 1975). These natural rights are the natural basis for Smith's arguments for free markets. Men should be generally free to dispose of the goods of his body as he sees fit. The only limits on these generalized rights seem to be to prevent harm to others. Obviously, the question then becomes how we define detriment to another person, which question Smith ignores for the moment.

Smith argues that “These rights which a man has to the preservation of his body and reputation from injury are called natural” (399). It is interesting that while property is a right of man as man, Smith does not define it as a natural right. The right to property is an acquired right, but one that is so foundational as to make it almost natural in origin. The right to property is the first obvious case of natural conventionalism in Smith's rights argument. The right to property, presumably because it does not relate to something inherently connected to man (such as his person or his reputation), cannot be a natural
right. Property, however, is so foundational a right, as we saw in Smith's discussion in the chapter above on property, that it is necessary for the foundation of government. In fact, property might be called a naturally acquired right, in that the right naturally grows as civilization becomes more and more complex. We have already discussed the five ways in which Smith sees the right to property as being acquired, and all of these seem to come from natural relations of man to the objects he uses or come from natural properties of the objects themselves, and it is therefore natural that government should formalize the rules relating to these natural relations and properties over time. Property as acquired is thus not to be understood as merely conventional. It is acquired only insofar as it is not present in man from birth. The very acquisition of property itself is a natural phenomenon.

As would be expected, there is an important relationship between law and rights. For Smith, crimes are defined as infringements on natural or acquired rights. Rights limit the criminal laws that are passed, since if one does not have a right to something there can be no infringement on it (1982b, 105). “Crimes are of two sorts, either 1st, such as are an infringement of our natural rights, and affect either our person in killing, maiming, beating, or mutilating our body... Or, 2dly, they affect our acquired rights, and are an attack upon our property, by robbery, theft, larceny, etc.” (ibid.). Criminal law is related to the rights we have which are, in turn, related back to natural desires.

Punishment for crimes, which are all infringements on natural or acquired rights, comes from our natural moral sentiments, primarily resentment (1982b, 105). The severity of a punishment depends on the resentment the observers feel toward the perpetrator. As Smith points out, murder, being the worst crime possible, attaches to it
the greatest resentment of the spectator (1982, 476). Thus, those who murder are punished with the most severe punishments, which is in accordance to our natural moral sentiments.

For Smith, the rights we have seem to be defined in a backward manner. Our rights are linked to sentiments of mankind. We feel resentment when someone is injured. The strength of this resentment forms the basis for punishment of those who injure others. That we desire to punish offenders leads to the formalizing of a right to self-protection or freedom from attack of others. We do not feel resentment because our rights have been injured. We have rights because we feel resentment when we are injured.

This justification for rights is close to what evolutionary theory predicts. The only difference is that from evolutionary theory we can predict what the moral sentiments will be (and what is ultimately at the root of those sentiments) and how they will affect our understanding of what rights make up the private sphere. If the moral sentiments are ultimately rooted in survival and reproduction, offenses that threaten survival and reproduction will create more resentment than other kinds of offenses. Smith takes his cues solely from the moral sentiments, and the kinds of resentment we feel toward particular injuries to our person or property. He is thus in the realm of greater speculation and uncertainty, since these sentiments are somewhat variable and may be corrupted. Evolutionary theory allows us to understand the logic behind the moral sentiments which places us on more solid ground in our attempt to determine the relationship between those sentiments and rights.
Hayek's Private Sphere

Hayek is both more clear than Smith on precisely how the private sphere operates and its general utility in a system of liberty, and also less clear about the foundations of the rights that make up that protected sphere. Hayek's major concern, as usual, is the creation of a general framework for action. The private sphere is integral to a basic framework for actions where individuals fill in the blanks according to their circumstances. The creation of a general framework for action is related again to the epistemological concerns that are at the heart of Hayek's overall theories. His discussion of the role of the lawmaker makes this explicit: “In most circumstances, however, it will better serve his purposes if he gives merely general instructions about the kinds of actions to be performed or the ends to be achieved at certain times, and leaves it to the different individuals to fill in the details according to circumstances” (1960, 150). In the creation of a general framework, the legislator will necessarily leave out a great many areas of life that then become an area of protected action for individuals. Government needs to only to prohibit force or fraud. Generally, however, the classical liberal ideal is that what is not explicitly illegal becomes part of the extended protected sphere of individual action.

As pointed out above, the general rules which create the negative space that becomes the private sphere serve an important epistemological function for individuals.
Hayek argues, "The chief function of rules of just conduct is thus to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him" (1976, 37). All of these are connected in some way to the idea of a private sphere. The rules that one can count upon and the objects one can use for his purposes are connected to rights like property. Hayek makes the connection to the protected private sphere explicit, arguing, "The rules of just conduct thus delimit protected domains not by directly assigning particular things to particular persons, but by making it possible to derive from ascertainable facts to whom particular things belong" (1976, 37). In the case of private property, the government does not say, "this house belongs to Jim." What it does say is that if Jim acquired this house through a certain legitimate range of actions, then he owns that house. A set of if-then rules protects the private sphere of individuals by making many actions possible rather than having to rely on a specific dictate of government. Again, "What rules of just conduct in fact do is to say under what conditions his or that action will be within the range of the permissible; but they leave it to the individuals under these rules to create their own protected domain. Or, in legal terms, the rules do not confer rights on particular persons, but lay down the conditions under which such rights can be acquired" (38).

Individuals need the freedom of a private sphere of protected actions and goods to plan ahead for the future, but they also need that sphere more obviously to protect themselves from the daily assaults of other individuals. Hayek's epistemological argument is linked to his moral argument against coercion. Hayek even defines coercion in terms of data and information, arguing that "Since coercion is the control of the essential data of an individual's action by another, it can be prevented only by enabling
the individual to secure for himself some private sphere where he is protected against such interference” (1960, 139). Thus, the private sphere gives individuals the information they need about their environment to make decisions, while at the same time denying that information to others who would use it to the individual's disadvantage.

Moreover, the very concept of a private sphere or a distinction between public and private (though this distinction is by no means perfect, as is discussed below) is necessary to understanding precisely what coercion is. If we have no understanding of a private good, there can be no way of arguing against the interference of the government in our most private moments. Hayek agrees, arguing, “Coercion not only would exist but would be much more common if no such protected sphere existed. Only in a society that has already attempted to prevent coercion by some demarcation of a protected sphere can a concept like 'arbitrary interference' have a definite meaning” (139). The existence of a private sphere is absolutely necessary if we are to be able to recognize and defend ourselves against interference in our lives.

Hayek resists defining in detail what kinds of rights ought to be included in the private sphere, in part because such a sphere will change subtly depending on the kind of society one is in, but more importantly because defining the protected sphere in too definite terms eradicates the flexibility necessary to protect some rights that may be ill-defined. The founders debated this point when discussing the Bill of Rights, with Hamilton and Madison pointing out that the Constitution is set up in such a way as to create a private sphere, and also that there exists the danger of those rights that are not included in a bill of rights being absorbed back into the public sphere (Hamilton and Madison 1961, 579-581).
Hayek nevertheless attempts to give us a rough sketch of what that private sphere ought to include at the simplest level: “We cannot enumerate here all the rights or protected interests which serve to secure to the legal person a known sphere of unimpeded action... [T]he recognition of a protected individual sphere has in times of freedom normally included a right to privacy and secrecy, the conception that a man's house is his castle and that nobody has a right even to take cognizance of his activities within it” (1960, 142). He acknowledges that due to the nature of the private sphere, it may be necessary to formalize some of these rights, even though an informal system may provide more flexibility. Certainly, enumerating precisely what is to be included in a bill of rights is troublesome.

Part of the problem of enumerating the rights within a private sphere comes back to the problem of knowledge. We do not know enough to fix once and for all the rights that exist within the private sphere. We need to know quite a bit about human nature, how individuals interact within a given society, the kinds of stresses and pressures of commerce and other individual relationships before we determine that such and such a set of rights are to be permanently included or excluded from the private sphere. Such a lack of knowledge tends to support the classical liberal idea that we try to make the sphere as large as possible by limiting individual action only as it includes force and fraud. Hayek makes this point: “Nor would it be desirable to have the particular contents of a man's private sphere fixed once and for all. If people are to make the best use of their knowledge and capacities and foresight, it is desirable that they themselves have some voice in the determination of what will be included in their personal protected sphere” (140). Generally speaking, actions between consenting adults, including
contracts, relationships, and other forms of private behavior, should be generally left alone. This provides the widest arena in which individuals can act using their particular knowledge.

There are, however, limits on how protected the protected sphere actually is. Hayek underscores these limitations by arguing that how other people feel about our actions should not be an adequate reason for interference in one's private affairs. There is a limit to the sphere of privacy. For Hayek, "[the aim of the protected sphere] cannot be to protect people against all actions by other that may be harmful to them but only to keep certain of the data of their actions from the control of others" (145). An offensive comment does not count as an injury to us or an infringement on our rights or protected sphere. As Hayek points out, "In particular, the pleasure or pain that may be caused by the knowledge of other people's actions should never be regarded as a legitimate cause for coercion" (145).

In fact, the success of the private sphere in general means that there will be some overlap between protected spheres, for there are very few if any behaviors or actions that have no effect on other people. Thus, the theory of the private sphere insists that we are protected only against force and fraud, and that we ignore smaller infringements on our rights with the understanding that other people are similarly ignoring irritating things that we do. How we may feel about an individual's actions within his protected sphere is irrelevant to whether or not he has the freedom to do those things, provided of course that he is not engaging in force or fraud.

Moreover, protecting the private sphere does not mean that what we do in our private lives is to be ignored completely by those around us. Protecting the private
sphere merely means that the government cannot step in and prevent us from doing
certain things, nor can our neighbor forcibly prevent us from taking certain actions. This
says nothing about social disapproval. Here Hayek differs from Mill, who argued against
even social disapproval as too great an infringement on our liberty (Mill, 1975). Hayek
and Smith both seem to agree that social disapproval is a necessary part of a free society,
and plays a valuable role in the preservation of the mores and manners that tie a people
together. If I decide to do something that the law does not prohibit, no one can forcibly
make me stop, but my neighbors may have something to say about it, and I may decide
that the brunt of neighborly gossip, scorn, or ostracism is more than I am willing to deal
with. Such disapproval is not an infringement on our protected sphere, but is merely one
more piece of information that we add to the pile when calculating the pros and cons of a
particular action.

Like most of Hayek's philosophy, his discussion of the private sphere is more
factual than it is philosophical. While his defense of the private sphere is excellent, his
argument for the origin of the rights that make up the private sphere is essentially
nonexistent. In fact, his argument for a widely defined private sphere could be construed
as an attempt to deal with the relativism inherent in his doctrine. If we cannot tell what
rights are more important than others, or which might be universally important, we
should define the private sphere as broadly as possible to leave room for all these
uncertainties. Yet, it seems clear, as we see from Smith's account, that some rights are
more important than others. We feel more resentment toward someone who stabs us than
toward someone who steals our pen, and the sentiments of the impartial observer agree
with our own. Hayek would have us treat these two actions as infringements on our
private sphere, and while I am sure that he would argue that the punishment ought to be higher for the stabber than for the thief, he cannot offer any reason why this might be so other than the argument that it has always been this way. Smith at least ties these differences to human nature and the natural moral sentiments that we all share, though he does not tell us where these sentiments come from.

What both Smith and Hayek lack is a comprehensive account of the origin and relative strengths of the rights that make up the private sphere. By focusing on the origins of these rights, and the origins of the sentiments that make us respect these rights and that form the foundation for these rights, we can form a more accurate picture of the private sphere. We can also form a more comprehensive justification of the private sphere. By arguing that these rights are not merely conventional rights but human goods that are important to humans across time and cultures, we provide a stronger defense than mere convention, and make the argument for liberty within rule of law that much stronger.

The Evolutionary Private Sphere

As we can see from Smith and Hayek's understandings of rights and their relation to the private sphere, the latter is essentially an all-encompassing idea that includes ideas of limited government, prevention of force and fraud, and the importance of rule of law. I argue in the next section that a broadly defined private sphere is the best way to satisfy individual desires. Arnhart argues that “the good is the desirable” and that “human ethics is natural insofar as it satisfies natural human desires” (1998, 6, 29). However, as
Arnhart points out, there are many desires contained in human nature, some of which conflict. Prudence is necessary to determine how best to fulfill the most important desires that form the basis for a complete life (1-2). Prudence, simply, is the application of principles to the knowledge of particulars, or the application of theory to practice. This application requires the knowledge of both theory and the particulars of practice in order to create the best outcome. I argue that allowing individuals the freedom to make decisions in most areas of their life allows for the most prudent outcomes, since individuals will be those with the best knowledge of their particular situations, their own desires and the ranking of those desires, as well as their particular talents and aptitudes. Thus, the individual liberty contained in the private sphere allows for the prudential action of individuals, and creates the best system in which humans can attempt to create a complete human life.

As I will argue, the private sphere in evolutionary terms is framed by natural human desires. Arnhart (1998) lists twenty major desires of humans. These desires “direct and limit the social variability of human beings as adapted to diverse ecological circumstances” (36). These desires limit what societies are capable of, and “....every human society must have rules for the proper expression of [these] desire[s]” (31). These desires include a complete life, parental care, sexual identity, sexual mating, familial bonding, friendship, social ranking, justice as reciprocity, political rule, war, health, beauty, wealth, speech, practical habituation, practical reasoning, practical arts, aesthetic pleasure, religious understanding, and intellectual understanding (36). Insofar as these are in fact natural desires that form the basis for individual action, they also, to a certain extent, form the basis for a private sphere. It could be predicted that if these goods are
the most important to human life, and if these goods can be attained most efficiently through individual action rather than through governmental control, that humans will generally desire freedom in these areas of life.

All of these goods are private goods (in that they are the function of an individual rather than a particular group) that have more or less important political impacts. Something like beauty may have little or no real effect on political goods (though of course we are aware of cases where the effect of beauty on world affairs is great) but the rest of these goods all have an effect on politics, from the great impacts of the desire for war to the smaller but more cumulative effects of desires like those for practical habituation or parental care. The intertwining of the private sphere with the public is made clear by Pinker again in his discussion of the basis of different ethical positions. Moral judgments can be framed in three different ways, with reference to the autonomy of the individual, the well-being of the community, or a sense of holiness usually attached to a divinity of some sort. Pinker points out that while different groups tend to highlight one of these viewpoints at the expense of the others, in fact researchers now view these “moral spheres not as arbitrary cultural variants but as universal mental faculties with different evolutionary origins and functions” (272). The anger one feels when one's rights have been violated is an “other-condemning” emotion that has its roots in cheater-detection, while disgust, an other-condemning emotion with roots in the sphere of divinity, “evolved from a system for avoiding biological contaminants like disease and spoilage” (ibid).

Thus, no matter how much Western philosophers try to argue for a strict private sphere, there is really no strict demarcation between the public and the private, at least in
most people's minds. What makes most sense is to take a look at what works best for both the individual and the community, and attempt to protect those goods that benefit both. Family life is such a good, as is private property.

While there is no strict theoretical distinction between the private and the public, it makes sense to delimit a private, albeit permeable sphere that is outside the realm of governmental interference except in cases of force or fraud, but which is not outside the realm of social condemnation. In the following I will take a look at the case of the kibbutz, and demonstrate that where the private sphere is essentially done away with, it is gradually replaced. Where the family is annihilated it will grow back, and with it a private sphere wherein individuals and their close relations make decisions on how to live that impact themselves and the community, which will promote a spontaneous order that supports cooperation between unknown individuals.

Livelihood and the Family

Niles Eldridge argues that "organisms do two – and only two – kinds of things. They (1) engage in matter/energy transfer processes that enable them to differentiate and develop from a fertilized zygote, grow to adulthood and maintain the soma. And they (2) reproduce" (Scher and Rauscher, 2003; 93). Admittedly, humans do these two things in a much more complex way than any other organism. However, in reality, survival and reproduction are at the heart of the evolutionary game, and how well an individual accomplishes both of these tasks will determine what, if any, genetic legacy he or she leaves behind. The relationship between the evolutionary goods of survival and
reproduction and the classical liberal institution of the private sphere may not be as obvious as other connections, such as the human desire for private property. Indeed, it might be argued that the best way to foster survival and reproduction of individuals is to let the state take care of each of these aspects of human life. Some would argue that this is precisely what the welfare state attempts to do.

Yet, when looked at more closely, taking into account the lessons learned from Smith and Hayek, and taking into consideration the predictions and evidence from evolutionary theory and related fields, it seems more and more obvious that in most areas of survival and reproduction, leaving individuals to their own devices is probably best. In the following I have chosen two goods, that of livelihood and that of family life, as goods that are best left to individual choice and actions, and in which the dangers of state interference are obvious. I approach these two goods from the perspective of morality, politics, and epistemology, and such an approach could easily be used on other “evolutionary goods” that we might want to include in the private sphere. I have chosen livelihood and family life because these two aspects of human life are integral to both the survival and reproduction of individual humans.

Livelihood and the Private Sphere

In the case of livelihood, it seems obvious that how an individual earns his living is intimately connected with his survival, as well as with the quality of that survival. Even the phrase “to earn a living” suggests how closely issues of employment and choices of livelihood impact the overall lives and survival of individuals. In the
following I offer some evidence from various fields that the choice of livelihood ought to be left primarily to individuals. I also offer some predictions from evolutionary theory that have yet to be tested and which might be interesting subjects for future research.

I will start with the practical or epistemological arguments for freedom in choice of employment. The basic practical argument is that it is impossible to know what each person needs and wants at any given point in time, as well as impossible to know the talents and aptitudes of each particular person, or what the demands for those talents might be at any particular point in time.

A central authority does not have enough knowledge of time and place, of particular circumstances, to make complete and efficient decisions using resources effectively. This truth about human knowledge is perhaps the most true when it comes to choice of livelihood. In *The Republic*, Socrates argues that each individual soul should be investigated and ranked in terms of bronze, silver, or gold. Such a ranking will determine the individual's place in society and what he or she is best cut out to do. Socrates's very definition of justice in *The Republic* is doing that for which one is most fit (Plato 1968, 433a-b).

Such a ranking system is confronted at the very beginning with an insurmountable problem of knowledge. First, humans are complex, and individuals often have more than one talent in the same way that each has more than one deficiency. Second, how will such an end be determined? What type of test will determine the state of one's soul? Such a test would have to take into account individual temperament, talents, physical strengths and weaknesses, present and future longings and myriad other factors, and then such a test would have to rank these things in order, to determine which
talent should be fostered at the expense of others. Obviously, the individual has more access to this knowledge than anyone else, and is therefore best able to rank his desires and talents in a way most productive for himself and society. Giving the individual power over his future leads to greater efficiency, as each individual makes decisions in accord with what he understands of himself and his surroundings.

Some evolutionary theorists have underscored the importance of human potential or human flourishing as an outgrowth of the complexity of human nature. Arnhart uses the term “desire” (1998), Chisholm uses the term “capabilities” (1999), following Nussbaum, and Wilson (Scher and Rauscher, 2003) uses the term “human potential.” In all these cases, these uses are a way of defining and categorizing the many innate and sometimes conflicting desires in human nature.

Chisholm (1999) discusses human nature in terms of capabilities. Humans as humans have a range of capabilities, all of which should be present in some form for a complete human life to result. The question for political thinkers then becomes whether we should help these capabilities along. Chisholm seems to argue that we should. The question then shifts to a question of how best to provide for and encourage these capabilities. Taking Hayek’s arguments from epistemology seriously, the best and most efficient way to help humans live up to their capabilities is to provide a general sphere of freedom in which wealth is maximized, and where individuals are free to choose their mate, their job, their neighborhood, their habits and hobbies, their religion, and their friends, all while protected against serious accidents and emergencies by a very basic safety net provided by the state. This very basic safety net will be supplemented by the safety nets provided by family and friends, as well as by private philanthropic agencies.
Chisholm himself argues that “Perhaps the most basic of all human capabilities is the freedom to pursue alternative futures” (234), and that “The capability to achieve a good human life includes the freedom to do so” (Chisholm 1999, 238). If human freedom is necessarily connected to the capabilities that make up a complete human life, then we must provide that freedom or risk thwarting those human capabilities.

Arnhart (1998) and other thinkers who take an Aristotelian view of human life appeal to human flourishing to make a similar argument. In Arnhart’s case, prudence or practical wisdom is at the heart of his argument for a “Darwinian natural right.” Arnhart argues that there are natural human desires that limit what we can do; yet, these limitations can be combined more or less effectively by the use of practical reason. Human flourishing then will be the result of knowledge of these eternal facets of human nature, combined with the knowledge of the particular circumstances of an individual human life in which these desires take concrete shape. Practical wisdom results when an individual has made good decisions regarding how to fulfill her various desires in a comprehensive, complete way. This task is impossible for anyone but the individual.

There is not a single evolutionary theorist with whom I am familiar who argues that the complexity of human nature dictates a simplistic, “one size fits all” attitude in any policy arena. Instead, those thinkers who take both human nature and politics seriously tend to emphasize the importance of prudence or practical wisdom in human life. It is no accident that prudence or practical wisdom is at the heart of classical liberal philosophy as well. Thinkers like Burke have even been accused of relativism in their efforts to emphasize the importance of flexible action and prudential foresight in political life. In fact, some have argued that the exercise of practical wisdom is “a human being's
unique excellence,” and that such wisdom is “the virtue that achieves, integrates, and unifies all the other ends that constitute human flourishing” (Rasmussen and Den Uyl 2005, 275). This unification cannot occur through other-directed actions, but must occur within the individual, who has more knowledge (though hardly complete knowledge) of his own internal nature and the external conditions surrounding him. Thus, at least in this area, there is a perfect match-up between the flexible, complex, yet permanent nature discussed by the evolutionary theorist and the prudential reflection and individual action proposed by the classical liberal.

As a result of the problem of knowledge that results from a complex human nature, there are implications for group fitness and adaptation as well. Individual freedom in livelihood allows for faster adaptation of the group and the individual to changing environmental pressures. This adaptation is cultural, not genetic, and has been discussed by thinkers like Hayek (1960), who argues for “The Creative Powers of a Free Civilization” as an advantage of increasing liberty. Giving the individual autonomy in where and when to work allows the individual a greater range of freedom to innovate and circumvent environmental barriers. In societies where humans are becoming more dependent on fewer resources, it is especially important for the fitness of society in general that we allow individuals to experiment freely. The incredible progress of the last hundred years must be attributed largely to allowing individuals free rein to work on a chosen problem of society that they feel uniquely qualified to address. No central authority can make a more accurate match.

In fact, one benefit of the market system is that it gives individuals the necessary information about wages, workdays, and so on, so that they can make decisions that are
in line with their own preferences and situations. Such knowledge, meanwhile, helps in the creation of a spontaneous order, thus controlling the number of individuals in a given profession, for example, without governmental control. Such a system is not only more efficient than centralized control, but is also more compatible with the natural human desire for freedom. As Rubin points out, “The mobility that capitalism created also allows individuals to move within society to find a congenial life style, and geographic mobility within a given political jurisdiction is relatively easy and is apparently becoming easier” (Rubin 2002, 184).

The second important reason for human freedom in livelihood is that whenever one is confronted with a mixed human nature, one is also confronted with the problem of understanding the motives behind those who wish to control the lives of others. Thanks to a complex and variable human nature (Arnhart 1998; Buss 2005; Hrdy 1999; Konner 2002; Rubin 2002), humans have desires for both freedom and domination. The natural human desire for status makes it difficult to trust people. While humans are social, they also have individualistic tendencies that make the socialistic communalism impossible to sustain. Rubin points out the problem of envy in human life, which makes trusting the motives of those who wish to control aspects of our lives dangerous. Human envy stems in part from the problem of relative fitness, which will be discussed in a later chapter. It also stems from the hierarchical tendencies in human nature (Cummins 2005). The desire for status makes us particularly sensitive to the position of others, meaning that we are particularly concerned with those above us. Rubin points out that those who are poor and low-status are at greater risk for a variety of illnesses and early death. Helping the poor escape their poverty seems to be a worthwhile goal. Yet Rubin points out that how
we do it can have different effects on individual liberty.

Rubin argues that we should increase the incomes of the poor, not decrease the incomes of the rich (2002, 111). One of the motivations of income redistribution that Rubin fears is that of envy. In the first place, he points out that “a desire for freedom is an evolutionarily very old characteristic of humans, and throughout most of human existence, most humans (or, at least, most males) have been quite free” (2002, 113). This natural desire for freedom is complicated because humans also have a desire to dominate over other individuals. Individuals desire to be both free and dominant. Obviously, in a group these desires are not compatible. These dual desires, for freedom for oneself and domination over others, makes regimes of freedom particularly vulnerable to gradual erosion. The desire for envy has been a particularly troublesome desire in regimes based on liberty.

The third primary argument for freedom in terms of livelihood is a psychological argument having to do with personal responsibility. The argument is roughly as follows. Humans who have the choice of what they want to do are more likely to choose occupations that are in line with their own natural talents and aptitudes and are thus more likely to be content. Further, because they have chosen their particular job in some way, they are more likely to be responsible for their actions and to feel a personal responsibility for the outcome of their work.

Hayek, in *The Constitution of Liberty*, focuses on individual responsibility as the basis for a free state. From an evolutionary perspective, individual responsibility is not only necessary for a free state, but is also one of the main reasons for a free state as well. Individuals are generally the key unit of selection in natural selection (Sober 1984, 184-
208). While group selection may have been important in particular times and circumstances (and may have played a role in the evolution of altruistic behavior) (Wilson and Sober, 1994) it is generally the individual on whom selection acts. While inclusive fitness, or the fitness of an individual that takes into account those closely related to her, is an important concept, much of the literature in kin selection is devoted to understanding not only how sharing genes leads to cooperation, but also how not sharing enough genes can lead to conflicting desires. From an evolutionary perspective, the individual is the only one with a one-hundred-percent stake in his survival. Even close kin do not feel this pull as strongly, as Robert Wright humorously points out in his discussion of the evolutionary origin of parent-child conflicts of interest (1994).

That the individual is the person primarily concerned in his own survival is not a new concept in political philosophy; classical liberals argue against absolute power with the claim that the individual is the only one with a complete stake in his own survival. This does not mean that individuals will always make the best decisions from an evolutionary perspective. If everyone were equally good at surviving and reproducing, there would be no differential survival and reproduction on which natural selection can act. Natural selection presupposes that there will be differences on which selection forces can act. However, the question from a political perspective is whether to allow those differences to be the result of individual trial and failure, or whether to let the government control the individual's actions, thus taking responsibility for success or failure out of the individual's hands. If there is ignorance about particular human traits and desires, and if the motivations of those who attempt to control our choices in livelihood are at best unclear, and if the individual is ultimately the person most
interested in his own survival and reproduction, it makes sense to allow the individual the freedom and responsibility for his own survival and reproduction.

An evolutionary theory of occupation might shed some light on the failure of particular governmental and societal interventions in employment. Tiger and Shepher's discussion of patterns of employment in the kibbutz is illuminating. While equality between the sexes was an important principle within the kibbutz, the de facto situation continually highlighted sex-differences in the type of work pursued. Men were more likely to hold high ranking posts within the kibbutz, and were seen significantly less often in service positions, such as daycare and nursing. Tiger and Shepher conclude that, “Whatever the personal processes are, they cause a significantly asymmetrical division of labor that fails to manifest the ideology of the kibbutz founders” (116). Evolutionary theory would predict just such a discrepancy. In fact, there has been research done on the effect of sex differences on occupational choice. Barash and Lipton (2001) argue that there are natural differences between the sexes, and that these differences will affect the kinds the occupations men and women choose. If there are stable sex-differences caused by selection pressures, then attempting to control employment in the name of equality seems unlikely to be successful. On the other hand, this is also no argument for forcing people into sex-defined occupations, since Tiger and Shepher's evidence demonstrates that while sex-differentiation in jobs was still high in the kibbutz, some women did find the typically male jobs interesting and satisfying. Ultimately, evidence that shows sex-differentiation in employment should lead to policies that support freedom of choice in employment. Because of individual differences, governmental intervention in employment will tend to make people less satisfied than if they were allowed freedom in
this area, since individuals are the only ones with the knowledge of their particular aptitudes and desires. Sex-differences are simply one of the most obvious causes of the individual differences that influences occupational decisions.

Politically speaking, there is one other, more abstract, reason for allowing freedom in employment. Because of the central nature that occupation plays in most people's lives, it will be strongly linked to other important aspects of individual life. This increases the chances of unintentional side-effects that could occur if government attempts to control too closely what jobs people take. Occupation is linked to numerous other human goods, like mate-choice, status, friendship, political rule, and intellectual and practical reasoning. Controlling occupation thus has the effect of controlling one's status, the people one meets (including potential friends and mates), as well as more abstract goods like intellectual curiosity. Just as we will see the unintentional effects of governmental control over reproduction, there are probably also unintentional effects of governmental control over employment that go beyond mere economic inefficiency.

Perhaps the overarching lesson from evolutionary theory is that individuals are important. Rubin argues that “Humans are individualistic. Because of frequency dependent selection and perhaps for other reasons, we are different from each other and have different preferences. Evolution will not generate the same sets of genes or preferences for everyone. Human individuality is important, and political ideologies or theories that assume everyone to be the same will invariably create much human misery” (2002, 183). If, in fact, individuals are important, and individual lives and potentials are foundational to what it means to be human, then it makes sense to allow those individual lives and potentials to unfold along the lines deemed most fit by those individuals.
themselves. A large part of this freedom will take place in the area of freedom of occupation, since the occupation we choose is at the heart of most human lives.

Evolutionary theory can offer us some predictions for future study of employment as an important part of the private sphere. Some of these predictions follow. Humans will desire more rather than less freedom in cases regarding freedom of livelihood. When humans have more freedom to choose their employment, they will be more satisfied and happier. As job satisfaction increases, humans will have more of a sense of responsibility to their employers, and there will probably be a corresponding increase in productivity. Freedom of choice in employment will speed up economic growth and productivity. Freedom of choice in livelihood will promote the creation of a stable, spontaneous order, with individuals looking to wages and other indicators to make judgments in absence of complex information. A regime in which individuals have freedom from governmental coercion in employment will be more stable than other regimes, since more human desires are satisfied in the former than the latter.

Obviously, there are many barriers to absolute free choice in livelihood. Physical and mental ability, particular talents, economic resources and education, and physical barriers such as distance all prevent some of us from doing what we would ideally like to be doing. There may be ways around some of these barriers, and others may be impassable. I argue only for limiting one particular barrier, that of governmental coercion.
Reproduction and the Private Sphere

The second major area of human life that needs to be included in the private sphere is that of family life. Hayek notes that, “so far as the family is concerned, there exists a curious contrast between the esteem most people profess for the institution and their dislike of the fact that being born into a particular family should confer on a person special advantages” (1960, 89). Utopians attempt to strip family life from human life primarily to equalize opportunities for offspring. The desire to control family life for particular political ends is a desire that we see everywhere from Plato's *Republic* to the present-day kibbutzim. Control of family life by the state is confronted with the same basic problems at the outset as control of livelihood, but these problems are perhaps even stronger because of the foundational nature of the family in human life.

The first problem in controlling the family is the problem of knowledge. Parents as primary care-givers and genetic relatives have more intimate knowledge of the particular circumstances of a child than the state could ever have. Children each have different temperaments, even within the same family, and these differing temperaments mean that parents will have to treat each child uniquely. It is only in this particular circumstance that abstention from a general rule of law will be permitted. Treating every child exactly the same will result in shy children becoming more shy, or dominant children becoming more dominant, or artistic children never getting the chance to experiment with art. Evolutionary theory predicts that parents, with their intimate knowledge of the environment and the temperament of their child, have the capacity to
raise their children in a way the state never could, since the state lacks both knowledge of the child and knowledge of the environment.

Further than simple knowledge of the children involved, individuals have variable desires depending on their time of life, their economic situation, their relationship with kin, their relationship with their spouse and so on. These desires make central control over individual lives extremely difficult to sustain. As Hrdy (1999), Konner (2002), Arnhart (1998), and Pinker (2002) point out, much of what characterizes the human species is an adaptive adaptability. While this adaptability makes it difficult to predict what any given individual will do in any specific situation, we can make general predictions about patterns of behavior across cultures. The problem is that for centralized control we need to be able to predict how individuals will react to particular situations. Those who desire to change human nature through societal control will often be surprised by the unintended consequences of such control. There are natural desires that limit what is possible. Moreover, such natural desires make individual action and choice a better alternative than governmental control. More than this, the desires associated with family and reproduction are so strong that they ought to be left within the private sphere, with governmental action limited to preventing force or fraud between individuals.

The second major problem with state control of reproduction is the problem of the motivations behind such control. While in the case of the kibbutzim, control over child-rearing is handed over to the community voluntarily in the name of equality of the sexes, such control has typically not been handed over voluntarily, and the motives of the individuals involved have often been less than beneficent. Sarah Hrdy (1999) discusses
numerous examples of the control that is often exerted over reproduction, particularly female reproduction. Male control over female reproduction is seen in almost every species of primates, and often takes the form of infanticide by rivals (in langurs and humans, for example). Hrdy speculates that "the behavior of infanticidal men is homologous to that of their primate cousins in only the most general sense. They are motivated to strive for status, to compete for access to females, to avoid investing in unrelated infants, to adopt patterns of behavior more likely to enhance than decrease long-term inclusive fitness. The specific similarities, then, are merely analogous solutions to common problems these variously endowed animals confront" (1999, 244). These behaviors can take the form of fathers protecting and caring for their children, or they can take the form of rape, infanticide, spousal and child abuse, and various more subtle forms of male control over female reproduction that range from foot binding to veils to seclusion. Even in the Oneida community, where individuals were bound by an ideology of equality, the founder, John Noyes, reserved the right to initiate young virgins prior to their marriage (Arnhart 1998, 95).

Even in societies like Oneida that are devoted to equality between the sexes, there will be an incredible interest in controlling reproduction. If the motives for control over female reproduction are so great, and the outcomes often dangerous to female autonomy and the health of females and their children, it certainly seems best to support a system in which women and men are both protected from force and fraud in their reproductive endeavors, while preventing government from interfering in reproduction and family life in general.

Even in the case of kin, the motives for control over reproduction are often not in
the individual's best interest. Hrdy discusses cases in which parental interests differ from
the interests of the child, pointing out that “In the West, such conflicts have tended to be
over education, inheritances, career decisions, social or sexual choices. Parental
preferences rarely place infants in mortal peril. Elsewhere, though, parents literally
sacrifice children to family goals” (318). Hrdy discusses cases of infanticide where the
child is taken from the mother by family members. In one instance, a Pakistani female
twin is separated from her brother and bottle-fed while her sibling is nursed. The female
infant dies shortly after from dysentery and malnutrition (1999, 318-324). Other times,
the control is more subtle, as when the pressure of a husband and his family to bear a son
influences maternal desires. While such familial control over reproduction is dangerous
to female autonomy, the most we can hope to do is to prevent the most egregious acts of
force and fraud and hope that, generally, the interests of the individual are in line with
those of his or her family members. Any further interference by the state runs the risk of
creating unintended consequences and possibly even further eroding the liberty the
government is trying to preserve.

A further reason for freedom in parental care is connected to personal
responsibility. Parents have a stake in their children's lives that the state does not have,
by virtue of sharing genes with them. Parents have a desire to have children and children
have a desire to be taken care of by one or two specific caregivers (Hrdy, 1999). With
parental desire comes immense responsibility, however, and it is difficult to see how the
state could have a greater psychological desire for a child's welfare than a parent could.
The relative rarity of extreme abuse by natural parents is one example of the benefits of
keeping children with parents. Abuse by step-parents and non-related caregivers is more
common, demonstrating that when one lacks the stake in a child's life created by parental desire and responsibility, the results are often dangerous for the children themselves (Daly and Wilson, 1985).

Arnhart argues that the bond between parent and child is the foundational bond for humans. While we expect variation in the particulars of family structure there will be enduring patterns of child-care that are universal across cultures. It is these universals that allow us to determine whether some types of family life are better than others at satisfying the desires of both parents and children (89). If parent-child bonding is indeed the primary natural bond for humans, then we would expect to find this bond at the center of human life, no matter what society we find ourselves in, and we would expect that humans would resist most serious interferences with this bond. Arnhart argues that this is indeed the case: “The evidence from these utopian communes as well as other biological and anthropological evidence suggest that the parent-child bond must hold a central place in the organization of human desires” (89).

Arnhart's discussion of the Oneida community and the Israeli kibbutzim shows the difficulties inherent in radically changing the parent-child bond. While people can be willing to sacrifice many of their natural desires to ideologically driven communities, Arnhart points out that evidence from the kibbutzim and other utopian communities shows us that the sacrifice of these natural desires is painful and requires much devotion to the larger principles for which these desires are sacrificed (1998, 95). Moreover, the experience of both mothers and children in the kibbutzim suggests that in most cases the communal rearing of children will be too painful for mothers and children to bear (Pinker 2002; Tiger and Shepher 1975). Tiger and Shepher argue that the primary reason that the
communal child-rearing was not more devastating was because it occurred within a close-knit, small community with deeply shared values (101). One of the only facts that makes the kibbutz or Oneida situations tolerable is that the eradication of the family takes place within a voluntary community. The individuals who started these communities were able and willing to make great sacrifices for what they saw as a greater good. What becomes problematic is when such communities cease to be voluntary. As is evident from both Tiger and Arnhart's discussions of the kibbutzim and the Oneida community, it is the later generations who decided that the sacrifices were not worth it and who put pressure on the community to change.

Hrdy (1999) also discusses the dangers of unnatural family situations, though her discussion is primarily from the viewpoint of the infant. She argues that “General patterns of attachment were proving consistent over time: insecure infants were more likely to become insecure children, and hence likely to become parents who produce insecure infants. These effects seemed to track separately from inherited differences in temperament and personality traits” (406). In the kibbutz, for example, infants could avoid becoming insecurely attached so long as they had ample access to their mothers. Infants who lacked such access developed the psychological problems associated with insecure attachment. The effects of separating parents from their children can be seen in children long after childhood, and can influence further generations of children. As we can see, family life is not merely a conventional phenomenon. Infants have natural needs that must be met early on. While they are flexible to a certain extent, they need at the very least one primary caregiver who they can attach to and count on. This natural need is necessary for healthy development. Similarly, mothers have natural desires to be with
and care for their children that are extremely painful to give up. These needs eventually forced the kibbutzim to adopt a more lenient policy toward child-care, and were instrumental in the creation of "the hour of love" and other bonding practices (Tiger and Shepher, 1975).

One final reason for avoiding governmental control over family life is that history has shown the often frightening results of state interference with reproduction. Trusting evolutionarily important goods to others is often dangerous. In the eugenics programs of the early 20th century, most famous in the Supreme Court decision in Buck v. Bell, the state argued it had a right to prevent "degenerates" and "imbeciles" from reproducing (Buck v. Bell, 1927). I do not even bother mentioning the atrocities carried out in the name of "good genes" by the Nazis and other ideologically driven groups. If the state has the power to interfere with our most basic naturally-based rights, it may take advantage of that power in the name of the group good. In reality, parental care is natural and works relatively well, producing generally normal adults who are able to interact well with other people. We have yet to see a case of the state raising children on a grand scale, nor have we seen a case where state interference in reproduction on a mass scale has produced any benefits at all, let alone benefits that would make up for the intense pain and suffering caused to individuals by such interference.

The political implications of family life show that the private sphere is not actually private. The stability of any regime depends in part on the stability of the family. Some have argued that this co-dependence makes governmental interference in family affairs necessary. In actuality, the relationship between politics and the family supports an argument for less interference with family affairs. Many argue that welfare
legislation makes it easier for fathers and mothers to split, which in turn leaves children more vulnerable to the effects of outsiders, including stepparents and significant others. As we saw in the case of the kibbutz and the one-child policy in China, there are unintended consequences of legislation, especially in areas concerning reproduction and the family, where natural desires and instincts run deep. In the case of China's one-child policy, parents reacted to legislation limiting their reproductive potential by eliminating daughters. The desire for sons over daughters is a natural desire rooted in reproductive competition and highly contingent on status within society (Hrdy, 1999). Failing to take this preference for sons into account, China is now faced with a serious female shortage that could have far-reaching effects on society and politics. The natural desires of women to see more of their children moderated the ideals of the kibbutz, gradually moving the community away from pure socialistic equality and toward a community where the nuclear family becomes central to the society (Tiger and Shepher, 1972). In each case, community and governmental interference with reproduction leads to unforeseen political consequences that at the very least create tensions within the community and at the worst create instability that can last for generations.

As we see from evidence from evolutionary theory (Pinker 2002; Hrdy 1999; Konner 2002; Chisholm 1999) the parent-child relationship is at the heart of the communal and cooperative relationships that make up the state. Classical liberal philosophers show the same concern for familial relationships. Burke (1987) saw the family as at the heart of the “little platoon” that forms central ties between people in a society (41). Smith points out the dangers of desires for universal benevolence, arguing that there are natural spheres of concern for humans, and that the parent-child bond is at
the center (1982a, 219-227). Evolutionary thinkers like Pinker argue that a respect for the family is at the heart of the tragic vision of human nature that is at the basis of classical liberal ideology.

The centrality of the family to the state has been seen in recent statistics regarding the relationship between monogamous marriage and stability. Hrdy points out that “In industrialized countries, disadvantages to fatherless families include economic hardship, reduced status, and generally declining prospects. Costs to children are measurable in poorer school performance, higher rates of delinquency for boys, and early pregnancies for girls. In foraging societies fatherless children are more likely to die” (1999, 235). Moreover, living with people who are not closely related can be dangerous to children. Hrdy argues that evolution supported a strategy in which individuals pay less attention to children who are unlikely to be kin – “the equivalent of emotional earplugs” (1999, 237). If we are not likely to care as much about the children of other people as we care about our own, shifting the responsibility of childcare over to the community or the state will generally result in less care for a child rather than more. All of this has political implications. I would predict that regimes in which the most natural desires of individuals are threatened or controlled tend to be relatively unstable. In the case of the kibbutzim, we see a gradual shift in ideals. In the case of the Oneida society, the frustration of natural desires was a large part of the ultimate collapse of the society. Thus, societies need to pay close attention to the basic desires of humans, and one of the best ways to make sure that the varied desires within human nature are fulfilled in a comprehensive way is to leave people alone to fulfill those desires for themselves.

While the family and freedom of livelihood are only two of the important rights
that make up the private sphere, the logic that applies to these two goods can be applied to other goods like freedom of religion, freedom of movement, and freedom of commerce. Information from evolutionary theory and the principles behind evolutionary psychology will help define further hypotheses for testing, including human desires for freedom in other realms such as those regarding the basis goods of life such as access to food, water, and other material goods, and self-defense and other evolutionarily obvious goods. It may be possible to come up with empirical support for many different areas of the private sphere that go beyond mere arguments from expediency. In fact, understanding evolutionary psychology or psychology in general will help to further define the private sphere in increasingly more specific terms, though we must remember Hayek's warning to not define the sphere too completely, or too finally. We must maintain the flexibility within the private sphere that will allow for freedom as circumstances change. But at the very least we can use our knowledge of human nature to determine those aspects of human life that are best left out of the realm of governmental interference due to reasons as diverse as practical efficiency or moral theory. We can use our understanding of human nature to determine what ought to be free from governmental interference.

It is important to remember that just as there is a slippery slope once government starts interfering in certain aspects of human life that leads to more interference in other areas, there is a corresponding slippery slope once it comes to arguments for liberty in those areas. An argument for keeping government out of family life, for example, soon extends to those areas that are related to family life, such as employment, inheritance, and so on. Similarly, an argument for freedom in choice of livelihood will naturally
extend into an argument for freedom in investment, mobility, and even association. The trick is to keep these arguments and their justifications clear in our heads during the legislative process, because it is typically not a tendency of government to relinquish control once it has been granted. We need to remember the many different justifications for liberty in various aspects of human life in order to defend ourselves against governmental interference in those areas of life, even when the motive is beneficent.

The Evolutionary Foundations of Rights

One important contribution of evolutionary thinking is in its usefulness in helping to understand the idea of rights. Rights have typically been understood as either conventional or natural, which tends to polarize discussion of rights in dangerous ways. Hayek's dislike of rights language, especially natural rights language, follows Burke, who saw the devastation wrought during the French Revolution in the name of natural rights. The flip side of the coin, however, is that by making rights purely conventional, we have a hard time criticizing governments that do not provide what we see as necessary rights. Further, purely conventional rights are for all practical purposes given by government, and can be, presumably, taken away.

The answer of Burke, and to a certain extent Hayek, is to argue for prescriptive or customary rights that have their basis in centuries of gradual cultural evolution. By this understanding, rights are handed down from one generation to the next and are dependent on the social order itself, but not on government per se. This gradually evolved understanding of rights is an improvement over purely conventional rights, but still
misses some of the force, as well as almost all of the foundation traditionally entailed in natural rights.

Evolutionary theory offers a stronger formulation of Burkean/Hayekian rights that follows Smith closely. Evolutionary theory in fact supports a kind of natural conventionalism of rights, whereby rights are based in nature but formalized through customary and cultural institutions and law. There is, then, no such thing as a purely natural right, since, as Burke pointed out, such rights are meaningless outside the particular customary framework in which they operate. There are, of course, purely customary rights, such as the right of citizens in a republic to vote. Such a right is given by the government and can be taken away for various reasons (some more legitimate than others). The kinds of rights that I am interested in using to define the private sphere are not these customary rights, but the naturally grown rights that develop out of the natural desires of humans. While the formulations of these rights may be customary, their development is natural and probably inevitable given human desires. It is these rights at a minimum that should be protected from the coercion of both government and other individuals. This is not to say, of course, that other rights are not important or do not need to be protected. All these naturally conventional rights give us is the minimum private sphere that should be protected given human nature. Two of these rights are livelihood and family life, and a third, discussed in a previous chapter, is property. A more broad definition of the private sphere is probably best, but at the very least we should try to prevent governmental intervention in livelihood, family life, and private property.

This understanding of rights as arising out of the natural desires of humans helps
to clarify one of the problems liberalism has faced in its use of rights language since Locke. Locke (1988) wants to argue for inalienable rights that all humans share, but he has to base this inalienability on God, because otherwise it is unclear how to determine which desires would lead to inalienable rights and which should be controlled by the state. Hobbes (1996) has a similar problem, though he eschews talk of God for the most part, and bases his desires on the desire for self-preservation. It is unclear from each of these discussions, however, where these desires come from and how they ought to translate into political life.

An evolutionary understanding of rights as based in the shared desires of humans, and as making up a protected sphere that helps humans to reach their diverse (but ultimately shared) potentials is a much more stable formulation of rights than Locke's dubious God, or Hobbes's relativistic passions. These naturally conventional rights help to define the minimum private sphere in a way that is flexible without being relativistic. Perhaps even more importantly, just as we see in Smith the movement from the natural right to one's body to freedom in marriage and commerce, these naturally grown rights can be extrapolated to other, less obvious parts of human life. We see this in Smith's discussion of the gradual growth of property rights; in each case, the more and more formalized property rights are not merely conventional -- they are the outgrowth of natural human desires that develop in ever more complex ways within a spontaneous order.
Defining the Private Sphere

One of the major problems in liberal political philosophy is defining the limit of governmental power. Another way of putting this is to define what exactly should be encompassed by the private sphere of individuals. Do we include material property in this sphere but nothing else? Do we include family life, but exclude private property? Philosophers and theorists typically define the sphere, but in a relatively arbitrary or vague way. In order to determine what to include in the private sphere of individuals, we need to understand what is universally important to humans. Evolutionary liberty defines the sphere in terms of universal human desires and needs. It also offers an ultimate explanation that explains the moral and practical worth of particular types of freedom in relatively specific terms.

An evolutionary way of determining the private sphere is to argue that the state should not exert coercion except to prevent force or fraud in areas that are evolutionarily necessary to individual fitness, like livelihood, reproductive choice, defense, and access to basic needs listed above. Evolutionary theory, by helping us to better understand the natural desires and motivations of individuals, helps us to delineate more accurately the areas of human life that are best left to individual choice and action.

How much coercion is allowed in each area will often depend on the values of the people living in a certain society. Social norms support natural desires while providing society with some control over individual behavior. The social norms that have evolved in specific areas will often be the result of slow evolution of such norms in line with
environmental pressures and natural inclinations. These gradually grown norms will support both natural human desires and the customary institutions that grow out of those desires.

The Growth of the Private Sphere

One last prediction that seems borne out by common sense is that if human desires for freedom in family life and occupation are so foundational to human life, then such desires should be reflected in most societies most of the time. Human nature should, when possible, prevent coercion in these areas by finding outlets for innate human desires. Most societies, for example, provide an outlet for reproductive choice and rearing of offspring, occupation, defense of kin, and other evolutionary goods. I would argue that it is in grown regimes, where the constitution and laws grow naturally out of the desires of the people, that there will be a private sphere, whether formally or informally defined. In fact, it is probably only in ideologically-based regimes, those founded on a particular notion of what is good for humans, that coercion by government in evolutionarily important goods is attempted. As we saw in the kibbutz, the desire for equality led to painful results in both occupation and family life. It is one of the benefits of the kibbutz that it is a voluntary community, where the input of members is taken seriously. The community had enough flexibility to gradually shift its rules and ideals so as to be more in line with human nature. Larger societies that are not based on voluntary membership, and whose laws are not made by a majority of the people, will have much more trouble integrating natural human desires with their own particular ideologies. So
we should scrutinize ideologically driven policies and actions, since these are in general most likely to result in radical shifts and changes that frustrate natural human desires. The struggle in the U.S. between equality and freedom is only one example of the struggle between ideologies.

The evolutionary argument for the private sphere, therefore, also tends to support a political argument for grown over founded regimes. This emphasis on gradual growth of institutions in a trial-and-error way may seem counterintuitive to some. It certainly was counterintuitive to traditional liberals like Locke and Hobbes, who looked to an antisocial state of nature as the basis for their political systems. However, the gradually grown regime has been at the center of classical liberalism's understanding of political life from Burke's support of customary law, to Smith's discussion of the gradual growth of property rights, to Hayek's understanding of the spontaneous order as the gradual evolution of institutions. This gradual growth further supports the natural conventionalism that is important for both evolutionary theory and classical liberalism. If there is a human nature, then that nature will influence the outcome of legislation and governmental policies, and that influence will bear the marks of both nature and custom. Or, to put it another way, the customs of a grown regime are the natural outgrowths of the natural desires of humans working together unconsciously within the framework of a spontaneous order. Both evolutionary theory and classical liberalism support a kind of natural conventionalism in human political and social life. Most people doubt that an indirect, trial-and-error approach to law-making results in less suppression of natural human desires, but that is almost certainly the case.
Conclusions and Summary

The evidence from evolutionary theory and human nature in general tends to support Smith and Hayek's arguments concerning rights and the private sphere while at the same time enhancing their understanding by providing a foundation for those rights in natural human desires. Both Smith and Hayek (but especially Smith) support a kind of natural conventionalism whereby legal rights grow out of the natural desires of humans. Smith's discussion of the natural human desires and their relationship to rights is mirrored by the discussions of Darwinian thinkers who argue for formulating legal and political institutions in accordance with natural human desires. Smith's discussion of the rights of man's body and the relationship to free commerce and freedom in marriage demonstrates how this movement from nature to custom can occur without resorting to complete relativism.

Hayek's argument that general rules of a private sphere serve an epistemological function is supported by evidence from thinkers like Arnhart who argue that prudence in human life requires knowledge of particular circumstances. Evolutionary theory further supports the classical liberal argument that we cannot know and therefore cannot trust the motives of those who would seek to control important aspects of our lives, thanks in part to a complex human nature with desires for both freedom and domination.

Further, evolutionary theory helps us understand the interrelated nature of the private and public spheres while at the same time preserving the argument for the sanctity of the private sphere. According to evolutionary theorists and classical liberals, that sphere should be flexible but with a solid foundation based on the strongest human
desires, such as those for family life. This flexible private sphere still allows for social disapproval as a way of controlling individual actions without resorting to force or fraud, thus fulfilling the human desire for a cohesive group.

Evolutionary theory also supports Smith and Hayek by supplementing their theories, telling us where the emotions that are the foundations for our rights come from, and this gives us the knowledge of human nature to tell us what the minimum private sphere might include. Finally, and most importantly, evolutionary theory predicts that most grown regimes will have some sort of private sphere, usually informally laid out, that prevents governmental meddling. In most societies throughout history, family life has probably been the sole concern of individuals and their kin rather than that of the government. It is probably only in modern, ideologically driven societies that governmental interference in evolutionarily important facets of human life has been proposed and, temporarily at least, accepted. The growth of the private sphere in grown societies again supports the idea of a natural conventionalism in which the conventions of a free society grow naturally out of natural human desires. If this kind of growth does in fact happen as I believe it does, it supports an argument for customary law over positive law, and supports the idea that in general, grown regimes will be more in line with human desires as evolved through natural selection. Thus, the gradual growth of human nature through natural selection is mimicked and influences the gradual growth of human institutions, much as Smith indicated.
CHAPTER 7: EUVOLUTIONARY BARRIERS TO REGIMES BASED ON EQUALITY

I have argued that our evolved nature makes certain kinds of freedom necessary. This nature also contains traits that make certain kinds of regimes difficult to sustain. Regimes based on equality or justice require overcoming natural human desires. Overcoming these natural desires requires coercion, which makes these regimes both painful and inefficient. In the case of regimes based on equality, there are a number of facets of human nature that make human equality impossible. Regimes that attempt to create equality other than equality under the law must overcome human nature. While we may wish it otherwise, the causes of inequality are inherent in our very nature.

Our evolutionary past impedes the pursuit of equality. In the first place, human individual differences are impossible to eradicate. These differences occur between the sexes, between people raised differently, between people with different genetic makeups and so on. In the second place, we desire status and domination, which makes a non-hierarchical society difficult if not impossible to achieve. We are naturally status-oriented, and the importance of relative fitness over absolute fitness means that we will be more likely to think in relative, zero-sum terms than in absolute terms. Third, kin selection and parental care means that we will care differently about different people, and that differences between people will be passed on to their children. Natural selection has
created emotional and instinctual triggers which interfere with the utopian dream of equality or justice.

The Evolutionary Causes of Differences

That people are different is a truism. But it is often denied. Some have traditionally ascribed the causes of difference solely to culture, learning, or upbringing. That people might be different due to biological causes is anathema to those who see equality as a primary goal. Yet, simply because something interferes with one's cherished hopes does not make it any less true. In reality, there are important individual differences between people, and these differences need to be taken seriously.

Figueroedo et al. (2005) postulate that instead of being side-effects or "noise" from other adaptations, personality differences might be adaptive in themselves. They further argues that if these differences are adaptive, then there are only four explanations for individual differences in humans: (1) Personality differences are heritable alternative strategies; (2) personality differences are 'heritable calibrations of psychological mechanisms' arising through fluctuation of optimal strategies over time and place; (3) individual differences are due to situation-dependent adaptive strategies, implying that each human could develop any personality traits or degree of personality traits; and (4) individual differences arise through ontogenetic threshold calibration. (2005, 852)

All of these theories support the idea that variation between individuals (i.e. inequalities or differences) are supported by selection processes and that such differences may have beneficial effects for both the individual and the group. At a very basic level, an individual who is different from other individuals has the ability to occupy an empty niche, thus protecting himself against often costly competition with other individuals.
Thus, differences in individual personality may have been selected by natural selection.

The issue of ranking the desires shared by all humans leads to further individual differences. Arnhart's (1998) discussion of twenty natural desires highlights just this issue. If these desires are ranked differently at different times by different individuals thanks to different circumstances, then we have set the stage for numerous permutations of individual preferences that leads to otherwise similar individuals pursuing different goods at different times. Rubin (2002) argues that individual differences on even just a few dimensions can create incredible variation. He further argues that it is precisely this variation that leads to the desire for freedom, since humans with different desires will desire the freedom to fulfill those desires (14). Even when most individuals share most of the same desires, the differential ranking of those desires can lead to radically different individuals. So even a shared human nature can lead to individual differences that are important to understand and take into consideration when planning our political systems.

Another primary source of differences between individuals is developmental flexibility, which is central to adaptation to specific environments. Evolutionary psychologists emphasize the importance of early plasticity and adaptive sensitivity to context (Bjorklund and Blasi 2005, 832). Offspring of any species need the ability to gauge the environment in which they find themselves, and determine quickly the kinds of resources that are at their disposal. Evolutionary psychologists find that children can change their reactions based on their particular environments, as well as use present environments to create long-term strategies that remain in effect even later in life (833). The general idea is that evolution would have selected for sensitivity to early environment as a way of turning on or off adaptations for particular environments.
Evidence from adolescents shows that childhood environment influences the types of reproductive and survival strategies pursued as an adult. Studies show that "Children reared in high-stress homes with inadequate resources and harsh and rejecting parenting mature at a faster rather than children reared in low-stress, well-resourced homes" (ibid). This faster maturation can result in early menarche and early pregnancy in females, and more aggression in males.

Ridley (2004) discusses a case where genes interact with the environment to produce individuals who respond to early childhood stimuli (267). In the case of aggressive individuals, exposure to violent environments as a child seems to trigger violence as an adult, but only if certain genes are present (in this particular case, the monoamine oxidase A gene). In this case, one needs both the environmental stimulus (childhood violence) and the gene that "reacts" to that stimulus. In this way, individuals can become different based on the interaction between different environments and different genes. One can picture this kind of "switching on and off" of genes to create innumerable differences between individuals.

There are also innate differences between groups that are the result of differing selection pressures on those groups. Men and women have different reproductive strategies, different desires as far as parental care and occupation, and even different spatial, verbal, and quantitative skills (Kurland and Gualin 2005; Silverman and Choi 2005; Rubin 2002, 10; Barash and Lipton 2002). Evolutionary psychologists have done extensive research on differences in male and female jealousy, which is only one example of the emotional differences between the sexes that arises from differing selective pressures each group has been under for eons (Campbell and Ellis 2005, 433-
While men are never entirely certain that a particular child is theirs, women can be absolutely certain. Due to the pressures of child-bearing, women are typically more dependent on the resources provided by their mate than men are. We therefore find differences in jealousy between men and women. Men are more concerned with sexual infidelity, while women are more concerned with emotional infidelity.

As we have seen earlier, there is also evidence that men and women often choose different types of jobs that highlight the different capabilities of each sex. Evolutionary psychologists admit that “Male and female cognitive abilities are likely to be identical in most respects,” but we also expect them “to differ fundamentally in domains such as mating where the sexes have recurrently faced different adaptive problems” (Hagen 2005, 168). While it is impossible to make a judgment on which is better, it is certain that the abilities of both sexes are necessary for a balanced society. Attempting to make women more like men or men more like women is unlikely to succeed, and will result in the loss of important variation within society.

One interesting cause of individual differences in humans is frequency-dependent selection (Figueroedo et al. 2005, 868-871; Rubin 2002, 11). Rubin argues that “There appear to be at least three types [of individuals]: selfish; cooperative; and those willing to incur costs to punish the selfish individuals” (12). Frequency-dependent selection operates off the logic that the most adaptive behavior depends on the frequency of other behaviors or strategies in the population. If everyone is being altruistic, it may make sense to take advantage of that altruism by being a cheater. However, as the number of cheaters increases in a population, the costs of cheating increase as its benefits decrease, creating a selection pressure against cheaters. In some cases, game theory predicts that
we will end up with an evolutionarily stable equilibrium between altruists (or other kinds of non-cheating individuals) and cheaters (Mealey 1995).

Pinker (2002) argues that frequency-dependent selection can produce variable strategies that can be either temporary or permanent (261). This mixture is perhaps best seen in cases of psychopathy. Mealey (1995) postulates two kinds of psychopaths. One type is psychopathic from birth, regardless of environmental influences. The second type consists in a predisposition for psychopathy that only obtains in certain environments (Pinker 2002, 261). Pinker suggests that conditional psychopaths might actually benefit from rehabilitative strategies or social programs that encourage intervention in seriously abusive homes early in a child's life, for example. "Inveterate" psychopaths, on the other hand, probably only respond to immediate threats to their self-interest, such as serious punitive threats (263). Differences between people suggest that the best goal might be a mix of strategies in which preventive measure are taken to protect children from abusive households, while a strong criminal justice system is in place to protect everyone from those who resort to force and fraud as their particular strategy. Either way, there is no one-size-fits-all strategy for dealing with the many different kinds of people out there. People are different, and therefore equality before the law is the only kind that is practically possible (and some could argue morally justified).

Rubin's (2002) discussion of frequency-dependent selection is good, and he concludes that such selection "also explains why human individuality is important, and why political ideologies or theories that assume everyone to be the same are doomed to failure. Humans have different genetic endowments and have different tastes, leading them to choose different strategies, which is an argument for heterogeneity in society.

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These differences explain why individuals want some freedom from social control” (Rubin 2002, 14). One advantage of free societies is that they preserve and actually take advantage of the differences between people. Because people are not restricted by birth or social class from different tasks, people are able to find the employment and lifestyle that best fits their particular interests and inclinations. Rubin points out the truism that liberal, Western societies allow for greater freedom than other societies (184), and it is precisely this freedom that allows these societies to reap the benefits of the myriad differences between individuals while at the same time fulfilling the desires that are universal to us all.

One obvious cause of individual difference is that the self-interest of individuals will differ in different circumstances. We have the capacity to sum up a particular situation and determine what, in this case, is in our best interest. Due to the wide variety of situations in which individuals will find themselves, one would expect there to be a plethora of behaviors. Simple self-interest in different circumstances is enough to create widely different individuals.

**Status and Hierarchies**

The third barrier to an equal or perfectly just society is dominance. Humans naturally fall into dominance hierarchies, as do most primates (Hrdy 1999, 110-112). The trait of desire for dominance varies among humans just as most other personality traits do. Some humans will desire power more than others. Some humans care little for power and are more content to be ruled than to rule.
These differential desires may come in part from differing reproductive strategies. Men with high status and power can have many wives, who can bear them many children. Stories of high status males having hundreds of children are popular in evolutionary literature (Hrdy 1999, 325-327). The flip side of the benefits of high status is that not everyone can have high status. By definition, high status means that there will be some in low-status positions. For those in low-status positions, reproducing at all is the order of the day, and they may be more concerned with simply having a family in the first place than in climbing to the upper echelons of society.

Such natural human dominance is demonstrated by one of the only recognized laws within political science, Michels's Iron Law of Oligarchy (1962), which predicts that in any human society, control will be held by elites. One explanation is no doubt the evolutionary benefits conferred on high-status individuals, but another compatible explanation may be simple efficiency. Fewer people can make faster decisions than many people.

Just as we can deal well or badly with the nepotistic part of human nature, so too can we deal well or badly with the dominance-seeking aspect of human nature. Liberal philosophers have often cited the ambitions of some men as a great danger to the liberty of others (Montesquieu 1989; Locke 1988; Hamilton and Madison 1961). Yet such ambitious individuals have much to offer the state, especially if no one else wants to rule. Society ought not to completely suppress ambition, forcing it to reemerge in more subtle forms, but ought to find ways of making ambition work for society while controlling its harmful effects. The failure to control dominant individuals is evident throughout world history, much to the detriment of the freedom and evolutionary fitness of the rest.
Millions have died in the wake of “World Historical Individuals” (to use Hegel's phrase), and the liberal ideal is devoted to avoiding such unnecessary deaths. The institutional controls of the U.S. Constitution and the attitudes of the founders toward ambition are an example of embracing but controlling what we cannot change about human nature. Ignoring human nature sets the stage for another Stalin, an absolute leader in a supposedly equal society.

The ultimate causes behind the human desire for status and dominance has to do with its relation to survival and reproduction: “The key to understanding the impact of status lies in appreciating its relation to survival and reproductive success both during our evolutionary past and in our present lives. Status (or rank) is most frequently defined as priority of access to resources in competitive situations” (Cummins 2005, 677).

Access to resources does not stop merely at the dominant individual. An individual's family is affected by his or her relative positions in society: “There is a direct relationship between status and inclusive fitness, where fitness is defined as the number of living offspring an individual has that go on to reproduce themselves...” (677). As Hrdy points out in the case of baboons, the daughters of high-status baboons are more likely to survive, and their mother's high status is passed on to them when they reach maturity (1999, 81-82, 334).

The proximate mechanisms behind the human desire for status are the hormones, particularly cortisol and the neuroendocrine system (Mazur 2005). Evolutionary psychologists argue that “Neuroendocrine reactivity... is more than a simple correlative response to events in the social and physical environments. It comprises a signaling system that informs a person (and others) of his or her current relative status” (Cummins
The system is a two-way street, with hormones responding to loss of social status, and the hormones themselves occasioning feelings of loss of status. Evidence shows that "...among healthy White women, perceived social status is consistently and strongly related to a wide constellation of hormone-dependent health indices, including heart rate, sleep latency, body fat distribution, and cortisol habituation to repeated stress; this is true even after the contribution of objective socioeconomic status is partialed out" (679). Among other populations, low socio-economic status is linked to increased cortisol levels, a stress hormone, greater risk of death, greater stress reactions during confrontations, and slower recovery from these reactions (ibid.).

There is a link between the strictness of status hierarchies and lack of freedom. Cummins argues, "The social stability conferred by strict hierarchies... carries a cost in terms of individual freedom. To avoid punishment.... individuals must learn what is permitted, what is forbidden, and what is obligated given their place in the hierarchy, and they must comply with these norms" (681). The "pecking order" of hens, and the strict rules governing primate hierarchies, are two examples of groups in which individual behavior is strictly tailored to the group. Conflict breaks out when hierarchies are threatened, and in many cases it is probably best to obey the status quo and accept the loss of freedom than to challenge the hierarchy and risk death.

Hierarchies also influence people's personal preferences: "People who score high on measures of social dominance tend to prefer hierarchical relationships in society, distribution of resources based on merit, conservative ideology, military programs, and punitive justice policies" (Cummins 2005, 682). Moreover, status differences can be difficult to avoid: "Even in face-to-face interactions between complete strangers, relative
status differences emerge quickly and spontaneously" (Kenrick et al. 2005, 813). Thus, social position influences how we feel about ourselves, the preferences we choose, and our interactions with friends and strangers.

The nature of status-seeking is a dubious one. Evidence that suggests that status has an effect on health and well-being might suggest that we try to change society to a more egalitarian system. However, other evidence suggests that humans will always create some sort of status hierarchy. The question then becomes, what do we do about an aspect of human life that has consequences for health and happiness and that some believe is more harmful than helpful?

Yet again, the advantage of a free society becomes obvious. Societies that value free choice of occupation, freedom of association, and free markets allow more freedom of movement, larger societies, and more freedom to increase one's status. In a classical liberal society, one is not tied to one's place of birth, and the status of one's family is not necessarily passed on to future generations. Because of the large scale made possible by classical liberal societies, we are not restricted by the people with whom we grew up. Individuals have the freedom to make choices that influence their social status. This system seems much better than allowing the government to control everyone's status in the name of well-being. Moreover, it is unclear whether such control would lead to any tangible benefits. Higher status individuals appear in every society, no matter how egalitarian.

Some evolutionary psychologists have gone so far as to argue that we can somehow thwart our nature if we do not like its consequences. Cummins (2005) quotes Richard Dawkins: "'We have the power to defy the selfish genes of our birth'" (692).
This statement is only partially true. We certainly could construct a society in which individuals are made equal, or as Cummins argues, "It is the dominant individuals who must be identified and influenced to create a 'kinder, gentler' social environment because it is they who wield the kind of social power that can effect true and lasting changes" (693). These are nice ideas, and demonstrate the kind motives of the thinkers. The issue, unfortunately, is not quite so simple. Identifying high-status individuals, and then trying to educate those individuals to be kinder and gentler, seems unlikely to produce radical results, partially because status and dominance shift depending on the context one finds oneself in. The high-status male in one situation is the low man on the totem pole in the next. Further, by the time educational advances have limited the cruelty of high-status individuals, we will already have a new set with which to deal.

What makes the most sense is a society in which individual differences are valued, where social mobility is high and where few if any governmental restraints are placed on the individual's ability to move. Freedom of movement, freedom of employment, and the freedom to associate and trade with whom one pleases mean that individuals will be free from the coercive force of other people in determining their status in society. This is not to say that there are no limits on what an individual can accomplish. There are very real limits based on education, natural abilities, and so forth. What matters is that no one is coercively or fraudulently prevented from bettering his condition.

Classical liberal societies are free from strict social hierarchies placed by caste, or property ownership. Moreover, in a complex system like that of most capitalistic, liberal societies, individuals play many roles, those of parent, spouse, employee, boss, neighbor,
friend, volunteer, and so on. With these various relationships we increase the chances that where someone is low-status in one situation, they will have the opportunity to be high-status in the next. Moreover, now that democratic ideals have become widespread, the effects of high-status individuals tend to be somewhat mitigated as the traditional forms of high-status tend to be unacceptable in modern society. Expressions of dominance must be more subtle, and particularly when leaders are chosen democratically, those expressions of dominance will take a kinder, gentler form.

While it seems unlikely that we will radically change the fundamental dynamics of status and dominance-seeking in human life, we can attempt to mitigate the effects. It seems likely that in a free society where no one's status is permanently entrenched by custom or government we have the greatest chance for preventing the psychological effects of status and dominance. Moreover, a representative democracy under rule of law will provide outlets for dominant individuals while minimizing the potential for tyranny. What seems certain, however, is that attempting to eradicate status or preventing dominant individuals from expressing their dominance will require large amounts of coercion and will have dubious returns. Rule of law is necessary in a free society as a defense against dominant individuals and their ambitions. Freedom under rule of law provides the best outlet for ambitious, dominant individuals while preventing their ambitions from becoming dangerous to the system.
Dominance and Relative Fitness

The desire for status and dominance is probably related to the importance of relative fitness in natural selection. Evolutionary success, while often looked at in absolute terms, is only really meaningful in relative terms. How well an individual is doing by evolutionary standards does not depend on how well he is doing relative to some abstract standard, but how well he is doing relative to the rest of his fellows. An individual's three children tells the evolutionary theorist nothing about that individual's success in the evolutionary game, since such success depends on whether those around him are having one child or ten. He is more fit than the former and less fit than the latter. The logic behind this should be obvious by now. After many successive generations, an individual who produces three offspring and whose three offspring produce three offspring each, and so on will be doing substantially worse in the numbers game compared to an individual who is producing ten children who in turn produce ten children each and so on. Ultimately it becomes a numbers game, and fitness is all about how well we reproduce our particular genetic legacy.

If those who are dominant have greater access to evolutionarily important goods, then one would need to be highly aware of differences in status between individuals. Prior to birth control, status had a direct impact on inclusive fitness, and was important enough that it developed with it the host of hormonal responses described above. It makes sense, once we understand the role of relative fitness in evolutionary terms, that humans would be incredibly sensitive to their relative status compared to others. The
phenomenon of conspicuous consumption is probably based on this same sensitivity. Spending on what one cannot afford becomes, in effect, false advertising about one's relative status in society.

Unfortunately for many of us, humans are probably adapted to think in zero-sum terms about the costs and benefits of interactions (Wright 2000; Rubin 2002). Rubin argues that trade is counterintuitive to most people, since in the EEA, a gain in status always meant a corresponding loss of status to someone else, and material gains were generally small (2002, 17). In the EEA, “resources and incomes were probably relatively fixed, with little possibility of value increasing exchange or production.... Therefore, we may not be well adapted to think intuitively in terms of gains from trade” (2002, 21,23). There is, however, substantial evidence from human evolution that trade occurred early on and continued throughout human evolution (Ofek 2001). The natural human desire to trade and barter may be offset in some ways by the pressures of relative fitness and the zero-sum thinking that results.

Smith understood zero-sum thinking when he pointed out in *WN* that the poorest peasant in Europe is better off materially than the richest African king, but because he cannot see his situation in absolute terms, he has a hard time comprehending his good fortune (1982, 23). If humans are predisposed to think of interactions in terms of relative gains and zero-sum terms as evidence suggests (Wright 2000, 26), it may seem to require some wrangling to get free societies going. Certainly, the zero-sum aspects of trade may be counter-intuitive, but judging from the enormous success of commercial societies in the past hundred years or so, it seems likely that the human propensity to see things in zero-sum terms is not impossible to escape or sidestep.
Even if we find it difficult to overcome our propensity to think in zero-sum terms, societies based on free markets can still operate effectively because of their large size and foundation on self-interest. The market does not require that people consciously cooperate with most of the people who affect each other daily. All it requires is that we look to our own self-interest and that of our family and friends, and make decisions that benefit us. We will be sensitive to gains made by others if we think they may have damaged our own interest, but in day-to-day life we rarely see the benefits made by the other person in a transaction. Either way, our proclivity for zero-sum thinking can be overcome in some situations, as is obvious from both Wright's (2000), Rubin's (2002), and Ofek's (2001) analyses.

Inclusive Fitness and Kin Selection

One final, and relatively obvious, barrier to regimes based on equality is the role of kin and the importance of inclusive fitness in human life. It has been argued that “...the behaviorist orthodoxy, particularly its unbending commitment to learning, which informed psychological theory during much of the twentieth century, assumed there is nothing inherent to genetic relatedness that precludes unrelated individuals from developing equally close and demanding ties” (Burnstein 2005, 528). If the attachment to kin and our desire to preferentially help those who are related to us is a barrier to equality, then it will be important to some people to minimize the innateness of these inclinations, and attempt to eradicate these ties. Smith, writing well before the behavioralist revolution, recognized the difficulty which human nature places in the way
of theories of equal benevolence. His argument against universal benevolence closely tracks the ways in which humans care for those around them, starting with kin and moving outward, with concern gradually decreasing as relatedness and immediate relevance (like that of friends and neighbors) decreases (1982a, 219-227).

What Smith recognizes and what proponents of radical equality do not, is that we naturally care about some people more than others. This differential concern leads to different outcomes for different people. This pattern is seen in every primate species, and cultural ethnographies show the same patterns of “discrimination in favor of kin” (Kurland and Gaulin 2005, 459). Even though some dislike of the consequences of kinship ties, kinship is still “one of the central organizing features of human society” (Kurland and Gaulin 2005, 447).

Some people even argue that kin selection may be the departure point for all our altruistic motivations (Hamilton 1963 and 1964). That kinship and kin selection may be the basis for altruistic behaviors in humans should alert us to the reverse tendency: Humans usually need a reason to be kind to strangers. Kinship inspires altruism precisely because we have a genetic incentive in the survival of our close kin. Siblings and parents share around fifty percent of our genes, and we are therefore more concerned about them than we are about an unrelated stranger, because their survival has a direct impact on our own genetic survival.

Obviously, we do not expect kin to cooperate indiscriminately. Some kin are more related than others, and no one is as related to us as ourselves (with the rare exception of identical twins), so we expect some differences of opinion even between kin, and research has borne this out (Burnstein 2005, 528-548; Wright 1994, 165-173).
Siblings fight with each other but defend each other against strangers, and parents and children are in continual conflict regarding resource allocation. Yet even with parent-child and sibling conflict and the numerous ways in which kin make our lives miserable, we still care about their survival, and usually more than we care about anyone else.

Evolutionary theory would predict, and common sense tells us, that individuals make judgments all the time about whose needs take priority. And they decide that the needs of kin are more important than the needs of unrelated individuals and strangers. Nepotistic desires will obviously get in the way of equality in any real sense. More importantly, as Hayek (1960) argues, such desires will find an outlet in some way, and how we provide an outlet for them makes a difference in whether they can be channeled for the good of society or not.

While we can be taught to rank the claims of unrelated friends over those of kin, for example, in most cases the old adage that “blood is thicker than water” tends to hold true. Even if we do not particularly like our kin, we may find it incredibly difficult to cut ties. A society based on extreme equality would have to develop a way of dealing with the nepotistic impulses in human nature. We would have to prevent parents from passing their fortunes on to their children. We would have to somehow prevent parents from passing on their educational attainments and talents to their children. At the extreme, we would have to devise some way of preventing parents from passing their genetic differences onto their children.

That nepotism is natural is obvious. That it is sometimes harmful is also obvious. However, the effect of nepotism on a society is directly determined by how we attempt to deal with it. If we attempt to annihilate it altogether, it will reemerge in a dangerous
form, while dealing with it openly and honestly and controlling its negative effects will reap benefits for all, but not the benefit of equality as the utopians hope. As we saw in the case of the kibbutzim, attempting to equalize people's situations by equalizing parenting created suffering for both parents and children. This was in a voluntary society. Things would be even worse in an involuntary society based on coercion.

One of the ways in which a free society protects kin relations while also protecting society against more dangerous forms of nepotism is by protecting property rights, and with those rights the freedom to pass down one's property by inheritance. An evolutionary analysis of wills found a “declining disbursement with decreasing \( r \) [the coefficient of relatedness]”, that was highly significant. Humans tend to leave their possessions to close kin, and their propensity to leave money to an individual decreased as level of relatedness decreased. In fact, one study shows that “spouses and children received 92% of the average estate, leaving very little for more distant kin or nonrelatives” (Kurland and Gaulin 2005, 462). These conclusions are hardly surprising for most of us. They do, however, tend to irk those who desire a more equal distribution of wealth and who see inherited wealth as an evil that should be eradicated.

Hayek supports freedom of inheritance precisely because it is probably the least dangerous way of allowing people to provide for kin:

It seems certain that among the many ways in which those who have gained power and influence might provide for their children, the bequest of a fortune is socially by far the cheapest. Without this outlet, these men would look for other ways of providing for their children, such as placing them in positions which might bring them the income and the prestige that a fortune would have done; and this would cause a waste of resources and an injustice much greater than is caused by the inheritance of property. (1960, 91)

Hayek's point is clear: the human desire to care for kin more than for other people will
not go away simply because we do not like its consequences. We must carefully weigh the trade-offs between the consequences of a natural human desires and the consequences of thwarting that desire. I argue that in most cases, the latter will be worse than the former.

**Balancing Goods**

Ultimately, the battle over equality versus liberty depends on whether one sees inequality as the real evil, or whether the consequences of inequality are what make inequality undesirable. If inequality is the worst thing for humans, then perhaps we are justified in taking any steps to eradicate it. If, however, it is not inequality per se, but the effects of that inequality that we do not like, it seems to make more sense knowing what we know about human psychology to try to mitigate the consequences. It seems likely that the best regime of which we are aware for the minimizing of these effects is one of freedom. Whether or not people agree with this conclusion, it is certainly true that no matter what, the proponents of equality will have to figure out what to do with human nature.

**The Fundamental Problem of Equality**

Apart from the evolved inclinations of humans that make regimes based on equality difficult if not impossible to create and sustain is a fundamental theoretical problem with the concept of equality itself. The term equality begs the question, “equality of what?” Once we equalize wealth, we might move to equalize education,
which will require equalizing parental influence, which would at the extreme require equalizing genetic influences. As Tocqueville (1969) foresaw, equality presents an ever-expanding horizon that naturally takes on continually evolving form (12, 698). Classical liberal societies stress one type of equality – equality before the law – as the most basic equality necessary for freedom and the one that is related most closely to governmental interference. Other kinds of equality actually require abolishing equality before the law, since other kinds of equality require treating different people differently. Freedom from force or fraud of other people is a much more stable concept.
CHAPTER 8: SPENCER'S ANARCHY, EVOLUTION, AND UTOPIA

For many familiar with the classical liberal tradition, there may appear to be a strange omission in the discussion up to this point. I have been looking at Smith and Hayek as two proponents of classical liberalism who are influenced by evolutionary considerations (broadly construed), and it might be wondered where the most famous thinker who combined these two ideas is. Herbert Spencer is a well-known classical liberal who famously combined the ideas of biological evolution and social evolution, creating a theory that became known as Social Darwinism in later years.

Spencer's work is important because he moves away from the soft despotism of equality. His ultimate argument is for an anarchical social system that exists without government and in which each individual voluntarily conforms to the divinely willed law of equal freedom. He seems to take evolutionary themes into consideration, and seems to deal with the question of human nature, but his treatment of that nature as not only variable but progressive leads him toward a utopianism of liberty that is similar to that of thinkers who base their utopianism on equality or justice.

Considering Spencer allows me to locate my argument as the reasonable mean between two extreme positions – the utopianism of egalitarian socialism on the one hand and the utopianism of Spencer's libertarian anarchism on the other. In the rest of this dissertation I have defended classical liberal institutions, or more succinctly, limited
government. Limited government implies that there is a government. Spencer thought that ultimately we could eradicate government, leaving individuals in a state of perfect liberty. Both Smith and Hayek, more realistically, reject this as a possibility. Both see human nature as at least somewhat fixed, and see the limitations on personal liberty (or more appropriately, license) as being as important to the state of liberty as the areas of life where such limitations are not allowed. Most importantly, liberty under rule of law is deemed the most important, most foundational criteria for the creation of a spontaneous order of cooperating individuals. Spencer argues that this rule of law becomes completely internal, as individuals gradually adapt to their environments, voluntarily obeying the divine law of morality.

I will lay out Spencer's starting assumptions, focusing on how, despite his strange endpoint, he still fits within the classical liberal tradition. I will then move into his treatment of rule of law and property, as examples of his movement away from that tradition. I will then attempt to explain this movement in terms of his misunderstanding of human evolution, as well as his corresponding attachment to axiomatic and scientific certainty. Finally, I will end with a brief discussion of the Hegelianism inherent in his thought. As it turns out, Spencer has more in common with a kind of Cartesian/Baconian Hegelianism than he does with the more moderate, less precise, and more prudent thought of Smith and Hayek. Nevertheless, his arguments are important for understanding why, taking human nature into account, anarchy is not tenable.
Spencerian Assumptions

What makes Spencer so interesting from a classical liberal point of view is that he starts with most of the same assumptions that Smith and Hayek start with in their movement toward limited government. Spencer emphasizes the problem of knowledge that is caused by the complexity of both human nature and environmental circumstances (1995, 7; 1978II, 11). He argues for gradual growth of a spontaneous order rather than governmental interference. His arguments in favor of individual activity rather than positive legislation are some of his most impassioned as he points out time and time again how even benevolently intentioned legislation has an opposite effect from the one intended. He discusses the importance of the moral sense in human life, following Hutchinson and other Scottish enlightenment thinkers who had such a profound influence on Smith. His argument for individual freedom is supported by an apparent concern for the individual as being of distinct worth apart from the group. Overall, his prescriptions for liberty within the existing state are similar to those of Smith and Hayek. Free trade, freedom of association, freedom of belief, and general governmental non-interference in the daily lives of citizens are all important aspects of his philosophy. All of these conclusions seem linked to the problem of complexity. But having postulated complexity as a starting point, Spencer seems willing to ignore this complexity in favor of axiomatic proofs of ethical conduct. The moderate Spencer analyzing the present state becomes transformed into the radical progressive Spencer forseeing the utopian future.

I will lay out this movement from limited government to radical anarchy using
Spencer's treatments of private property in land and rule of law. Spencer's progressive utopianism has strange consequences for the typically sacrosanct classical liberal institutions of rule of law and private property, and in understanding how he treats these two institutions we can better understand how his utopianism develops.

Property Rights

Abandoning the argument for gradual growth that he claims earlier (and that serve Smith and Hayek so well), Spencer turns to a Lockean understanding of property rights as rooted in consent, and ultimately, in the Spencerian moral imperative of equity. While defending other kinds of property rights (like intellectual property) Spencer argues that the property of land is not a real right. He looks to Locke's state of nature and argues that "the circumstances of savage life render the principles of abstract morality inapplicable; for it is impossible, under ante-social conditions, to determine the rightness or wrongness of certain actions.... We must not expect, therefore, that the right of property can be satisfactorily based upon the premises afforded by such a state of existence" (1995, 116).

Spencer criticizes Locke and similar thinkers for looking back to a state of nature "instead of referring forward to an ideal civilization" (1995, 114). For Spencer, ethical premises only apply in a perfect world, or at least are only meaningful in that perfect world. We need to look forward to what the ideal world says about property rather than looking back. The ideal world says, interestingly, that because there is no way for the liberty of one man in acquiring land to not infringe on the liberty of others to that same
land, that property in land is incompatible with equity, or equal freedom. Thus, no one has a right to property in land, however much he may have a property in other things, like ideas, which do not violate this law.

Spencer attempts to alleviate the consequences of such a statement by arguing that land can be leased to individuals, so long as the individuals provide society with part of the produce of the land. The rest of the produce belongs to the individual to dispose of as he pleases (1995, 116). Spencer manages to avoid all the difficulties of the right of first possession by denying that there is any such right. Such a move is philosophically interesting, but probably not lauded by those who saw property in land as, in some ways at least, the foundational expression of private property.

What becomes unclear on Spencer's account is how leasing the land is any better than owning it. Since land is a finite resource, there would come a time when my right to lease the land would infringe on your right to lease the land. Presumably this problem is somewhat mitigated by the fact that because I have to give up some of my produce you are no worse off in resources, though this outcome is certainly not a necessary one. Moreover, we are faced with a problem of knowledge as we attempt to discover precisely how much of the produce of the land an individual must hand over to society. Spencer's idea sounds a lot like traditional taxation, and as such, enters into the same problems of value as those who try to determine a just rate of taxation. It is unclear why the Lockean or Smithian systems might not work as well. In Smith's system, the landowners generally produce more than they can consume and provide this extraneous produce to the society in the form of trade. In this way property ownership is gradually grown, and is at least as compatible with equal liberty as Spencer's own land-leasing system.
This is perhaps as good a place as any to point out the difficulty that arises from Spencer's treatment of the state of nature. While he derides its use by Locke and similar contract thinkers, he himself reverts to the use of a kind of state of nature that is similarly problematic. Spencer uses a kind of state of nature as his starting point in arguing for the perfectibility of man, and again when arguing that evil is caused by not being adapted properly to the "new" environment of social life. Spencer argues that man is not yet adapted for social life because "he yet partially retains the characteristics that adapted him for an antecedent state" (1995, 58). This state is a "predatory" one, and this "primitive circumstances required that he should sacrifice the welfare of other beings to his own" (58). Spencer's predatory state of nature prior to civil society starts sounding a lot like the state of nature proposed by Locke, or perhaps even more so like the brutish state of nature of that friend of absolute sovereignty, Hobbes.

The difference lies in the fact that we do not consent our way out of Spencer's state of nature as we do with Locke and Hobbes. We grow our way out: such movement is inevitable as the gradual growth of the understanding of cause and effect allows us to gradually move toward a higher existence. This growth of the understanding of cause and effect is triggered in part by the natural result of overpopulation. As human populations grow, it becomes impossible to live alone. As we come together we must gradually adapt to society, and part of this adaptation is the increasing understanding that violations of the law of equal liberty result in natural consequences. The end of this adaptation is the eradication of government altogether. While Spencer starts with an anti-social predatory state of nature like Locke and Hobbes, he ends not with limited government or with absolute sovereignty but with social anarchy. The movement from
anti-social anarchy to social anarchy will become more clear as we understand precisely what Spencer does with classical liberal institutions, such as the rule of law.

Rule of Law

Rule of law is at the heart of the classical liberal understanding of liberty. If individuals are to enjoy rights, liberty, and privacy, they must be prevented from taking advantage of each other and infringing on each other's liberty. Moreover, as Hayek points out, a stable rule of law makes individuals more able to make decisions about their lives because the actions and behaviors of other individuals are more predictable. As pointed out above, rule of law provides the framework in which individuals can cooperate.

For Spencer, on the other hand, rule of law becomes internalized. Because individual natures can become better adapted to society over time and therefore perfectible, external rule of law becomes superfluous. All that is left is an internal rule of law whereby individuals voluntarily obey the law of equal liberty.

Prior to this utopian anarchy, however, we do find Spencer arguing for a rule of law in which the government is responsible for preventing force and fraud between citizens. This rule of law, though a temporary one (at least in the long view of things), is still an important aspect of man's social life in the state. Spencer argues that it is the state's function “to protect, to administer the law of equal freedom, to maintain men's rights...” as well as to defend the community from outside assaults (1995, 241). Spencer
defines the state as essentially “the protector,” arguing that “whenever the state begins to exceed its office of protector it begins to lose protective power. Not a single supplementary service can it attempt without producing dissent” (1995, 249). The state's primary role is the minimal one of preventing force and fraud, both internally and externally. This understanding of rule of law makes sense from a Smithian and Hayekian perspective, and while each promotes a larger role for the state than Spencer does, none of the three would be in real disagreement.

Where the argument becomes difficult is when Spencer argues for “the right to ignore the state”: “As a corollary to the proposition that all institutions must be subordinated to the law of equal freedom, we cannot choose but to admit the right of the citizen to adopt a condition of voluntary outlawry” (1995, 185). Specifically, Spencer argues that a citizen can choose not to pay taxes or follow laws provided he does so in such a way as to not infringe on the liberty of others. If a citizen chooses to do so, he “loses all claim to its [government's] good offices and exposes himself to the danger of maltreatment” (1995, 184). While this right seems like it makes sense, at least according to the principle of freedom of association, it nevertheless strikes at the heart of rule of law. Smith and Hayek would recognize the necessary freedom to leave a country whose laws we feel to be unjust, but the right to ignore that country's laws while living in it goes well beyond classical liberal freedom and enters the realm of license. It is rule of law that creates the framework that allows for predictability and voluntary cooperation. The “right” to ignore rule of law leads to its collapse.

Spencer's philosophic justification for disobedience is that the state itself is immoral and is in a difficult position with regard to the perfect law of morality. As
Spencer points out, “the state employs evil weapons to subjugate evil and is alike contaminated by the objects with which it deals and the means by which it works. Morality cannot recognize it, for morality, being simply a statement of the perfect law, can give no countenance to anything growing out of, and living by, breaches of that law” (1995, 186). If legislation by its very nature is not ethical, then no man can be compelled to follow it.

The problem here is one that plagues Spencer from the beginning to the end. He is far too concerned with axiomatic proofs and incontestable laws which, in the uncertain and variable world of human nature, all too often lead him to farcical conclusions. The argument that the law of morality does not apply to the state because the state is necessarily imperfect and the law of morality is by definition perfect is to define morality in such a way as to make it almost meaningless. Certainly, Spencer argues that we should use the law of equity to judge the rightness or wrongness of government's actions, but by claiming that all governmental action is in some way immoral, he blurs the line between proper governmental function and governmental encroachment, which is precisely the line that classical liberals are trying to demarcate more clearly. For Spencer, all government is illegitimate.

Furthermore, if individuals are allowed to “opt out” of government, including those laws that they feel go against the natural law of equity, one sets oneself up for a failure of rule of law as a principle. The ideal behind rule of law and the primary reason for its effectiveness is that it applies to everyone. No one can opt out. Certainly, people can disobey, and civil disobedience has a long history. However, that civil disobedience comes with the understanding that one will be punished for one's disobedience. By
arguing that we have a right to disobey, Spencer makes what is illegal legal and brings
the entire argument for rule of law dangerously close to incoherence. Perhaps Spencer
means we have a natural right to ignore the government that is prior to civil society. It is
unclear what status such a right would have within civil society, or whether such a
concept is even meaningful. As classical liberals like Smith, Burke, and Hayek argue,
the application of natural rights to political life without prudence is an extremely
dangerous task. In Spencer's case, it undermines the very concept of rule of law.

The problem here is that Spencer seems to see government as both natural and
unnatural. He argues that the "legislative authority can never be ethical – must always be
conventional merely" (1995, 186), and yet earlier he argues, "instead of civilization
being artificial, it is a part of nature" (1995, 60). If the state is part and parcel of
civilization, and if progress from asocial anarchy to the state is natural and inevitable, it
is unclear why the legislative authority associated with the state is merely conventional.
It is also unclear why the legislative authority is always unethical, apart from the
argument that coercion is unethical. If governmental coercion is an inevitable part of the
natural progression of man toward perfection, then why is it any less legitimate than the
other steps along the way? Ultimately, Spencer's historicism breaks down, since he
cannot in justice condemn one inevitable step of the process (since it is all a part of the
Divine will) except by condemning it from a future standpoint that has no relevance for
the present.

Nor is it clear what the status of nature is in Spencer's view. If the state is natural,
then it is a part of nature that will be replaced by a better nature in the historical
progression of human life. In that way, the state is conventional, because it is a human
creation, but a conventional part of nature. This takes my natural conventionalism and turns it on its head. Moreover, Spencer's nature is radically variable, which undermines it as any sort of foundation for right or wrong. Whatever the status of government and nature, however, Spencer's attitude toward government is a confused one, and his futuristic concerns create dangers for the limited governments that we might hope to create today.

Ultimately, Spencer takes the classical liberal assumptions of complexity, variability, spontaneous order, and individual liberty and uses them to move away from limited government toward a utopian anarchy in which individuals act as they choose, but in accordance with the divine law of equal liberty. He believes that evil is eradicable, since he takes a kind of Socratic-scientific attitude toward evil, arguing that it is the result of the failure to adapt to present circumstances. The eradication of evil is part and parcel of his Hegelian historical progression from a kind of anti-social state of nature to a radically social anarchical utopia.

The Use and Abuse of Evolution

One of the primary reasons for this seemingly strange movement from classical liberal premises to utopian conclusions is Spencer's inadequate understanding of how evolution actually works. Spencer relies on a Lamarckian evolution as he discusses the gradual adaptation of man to his environment. Spencer argues in “Sins of the Legislators” that “modifications of structure, in one way or other produced, are inheritable” (1982, 99; see also, 1995, 371). The problem is that the inheritability of
modifications of structures depends very much on how those modifications are produced. The modern understanding of genetics would teach us that, if not produced through genetic mutation that occurs in the germline, such modifications cannot and will not be passed on to offspring. This fact of non-Lamarckian evolution is one of the primary reasons for the general stability of human nature.

Contrary to Spencer's claim that human nature is wildly and "indefinitely" variable (1995, 30-36), human nature is actually quite static, in large part because even if an adaptation would help us survive better, we often lack the material, the genetic variability, necessary to so adapt. For a Lamarckian, however, humans can adapt whenever and wherever, because all that is necessary is for some modification to exist, and it will be passed on to offspring. A Lamarckian can afford to be a utopian because under this view, human nature is nothing more than clay in the hands of the benevolent philosopher. A modern Darwinian cannot afford such idealism because she knows that human nature will resist many kinds of change, and that this resistance can cause suffering. Spencer saw suffering as the inevitable outcome of progress, of the continual historical process of adaptation (1982, 108). Modern Darwinians see suffering as the outcome of the suppression of natural, stable human desires. Thus, the primary departure point for Spencer is that he sees human nature as radically variable, while classical liberals see it as a permanent facet of human life.

Spencer's Lamarckianism is not wholly wrong, of course. Cultural evolution can be Lamarckian, to be sure. But cultural evolution is bounded and constricted by biological evolution, at least insofar as cultural evolution is bounded by man's innate desires. Thus, even the Lamarckian aspects of cultural evolution are not enough to fuel
the continual movement toward progress that Spencer so dearly desires. Spencer is still limited by the permanence of a human nature that he refuses to acknowledge.

One further evolutionary confusion is that Spencer misunderstands the nature of adaptation. He sees the process of adaptation as a progressive process that moves continually to an end. "Progress," he argues, "is not an accident, but a necessity" (1995, 60). Once the organism becomes completely adapted to its environment, we have reached the end of history, or the perfection of man and the eradication of the need for government. What Spencer fails to see is that adaptation ends only when environmental change ends. Environmental change ends only when arms races between species and within species end, when climate ceases to change, when we fully understand parasites, and so on. This kind of knowledge is impossible. As a result, we are always somewhat maladapted to our environments. It is precisely this maladaptation that fuels the selective process. This process is slow and is bounded by the available variability in the species, but the fact that change is always occurring in the environment means that we will never be completely adapted to our environments. Thus, even if crime really were the result of failure to adapt to present environments (and, as we saw earlier, the case of psychopaths calls this into question) we would never get rid of it completely (1982, 108).

Spencer's misunderstanding of evolution and adaptation is not the only reason that he ends up at odds with the classical liberal tradition. The second reason has to do with the importance he places on science and the scientific method. Spencer's work is infused with scientific thought, and he pushes this thought to the point of scientific idealism. Spencer sounds Baconian in his discussion of the principles of evolution being used for the relief of man's estate. His use of the principles of evolution to perfect man, leading
eventually to a free utopia, underscores the confidence he expresses in scientific theory and method.

Smith and Hayek lack such conviction in scientific progress. Insofar as science plays a role in their philosophies (which it does not, really), it is seen alongside everything else, as admitting of uncertainty and falling, ultimately, before the specter of complexity. Spencer pays lip-service to complexity, but then shows little compunction in settling down to derive logical proofs of man's nature and future. He ends *Social Statics* arguing that, “in virtue of the law of adaptation, our advance must be toward a state in which this entire satisfaction of every desire, or perfect fulfillment of individual life, becomes possible” (389). Spencer goes further than Bacon, however, in that he combines faith in the principles of science with the Panglossian belief that this is the best of all possible worlds. This combination leads to an optimism thoroughly detached from logical proof or empirical evidence. Spencer can argue that suffering is ultimately in the name of scientific truth which is ultimately in the service of the Divine will, which wills human happiness. Thus, human suffering is in the service of human happiness. Trying to alleviate that suffering only thwarts ultimate human happiness. Thus, instead of the Baconian project of man using science for the relief of man's estate, we have man using the rhetoric of science to excuse man's estate with the argument that it will eventually be relieved by the continual (scientific) progress of adaptation.

Part of the problem with Spencer's argument, apart from its overwhelming optimism in the face of all proof to the contrary, is again related to the problem of understanding adaptation. Spencer discusses the survival of the fittest at one point, wondering that “now that the beneficent working of the survival of the fittest has been so
impressed on them that, much more than people in past times, they might be expected to
hesitate before neutralizing its action — now more than every before in the history of the
world, are they doing all they can to further the survival of the unfittest!” (1982, 109).
The problem with using fitness here is that fitness cannot be defined in abstraction from
the environment. What is fit in one environment is, by definition, that which helps an
organism survive and reproduce in that environment. Fitness is a complicated concept
and cannot be reduced to something like poverty. In fact, by Spencer's own admission,
one thing that really irritates him is that the unfittest are those who are reproducing the
most. His irritation with the fact that the unfit are really the most fit seems to be rooted
in the fact that he wants to define fitness in a way that it simply refuses to be defined. If
fitness is success at the game of survival and reproduction, one has to take a look at why
Spencer's supposedly “unfit” are beating his “fit” at their own game.

Human life is too complex to be reduced to mere definitions. Fitness cannot be
reduced to intelligence, or strength, or creativity, or beauty. Who survives and who does
not is the result of numerous factors both internal and external to the individual. It is
precisely this complexity that dooms Social Darwinism from the beginning. Spencer's
attempt to use fitness as a tool for social change is ultimately foiled by the fact that
evolutionary fitness can only be seen after the fact — after we have determined who has
survived and reproduced and who not — and is therefore all but useless in social planning.
Fitness is a descriptive term, not a moral term. It only tells us about who survives, not
who should survive.

Spencer's movement away from classical liberals like Smith and Hayek is also
related to a second aspect of his scientific worldview, which is his quest for certainty.
Spencer's works are full of axiomatic statements and logical proofs, and his language is full of claims of certitude. He ends his proof for the adaptability of man with the bold statement: “Thus, the ultimate development of the ideal man is logically certain – as certain as any conclusion in which we place the most implicit faith” (1995, 59). This is the conclusion of an argument with six major premises, at least two of which are demonstrably false.

Spencer's logical certainty and love of proofs seems to come in large part from his conviction that the laws of geometry have something to add to the study of man. He points out that “A geometrician requires that the straight lines with which he deals shall be veritably straight and that his circles and ellipses and parabolas shall agree with precise definitions.... So likewise is it with the philosophical moralist. He treats solely of the straight man” (1995, 53). Earlier he argues that “physical laws are characterized by constancy and universality and ...there is every reason to believe the like true of ethical ones” (1995, 48). The philosophical certitude with which Spencer creates unalterable laws of adaptation and natural laws of equity is directly in opposition to statements he makes elsewhere. He echoes Aristotle when he says, “Right regulation of the actions of so complex a being as man, living under conditions so complex as those presented by a society, evidently forms a subject matter unlikely to admit of specific statements throughout its entire range” (1978 II, 11). He even speaks of “judicial balancing of requirements and avoidance of extremes” (ibid.). He then immediately moves on to argue that there are two different overarching rules for adult life and immature life, the latter being that merit has no influence on benefits received, and in the former case, that merit must have an influence on benefits received (1978 II, 22). The reduction of human
life to axiomatic rules of conduct that can generally be reduced to the truism that actions have consequences is simply part and parcel of the Spencerian quest for certainty.

This Cartesian obsession with certainty is at odds with the arguments he makes elsewhere for complexity, and even more at odds with Smith's and Hayek's understandings of human life. Hayek's primary argument for limited government is precisely the fact that certainty is impossible. Human life is characterized first and foremost by a problem of knowledge. We cannot know everything, and it is precisely this lack of knowledge that makes liberty so necessary for both the individual and the society. The strength of the spontaneous order is that it succeeds where human knowledge fails.

Smith makes a similar point. His condemnation of “men of systems” is directed almost completely at those who attempt to oversimplify human behavior, especially human ethical behavior (Smith 1982a, 233-234). Spencer moves from a Smithian understanding of moral sentiments, which Smith argues are necessarily vague and subject to corruption, to the argument that this moral sense “may still be capable of generating a true fundamental intuition, which can be logically unfolded into a scientific morality” (1995, 30). While Smith would agree that we can turn our moral sentiments into general rules after much experience, he would disagree with anything approaching a scientific morality, at least insofar as that implies any level of complete certainty.

Spencer sums up his Cartesian morality by arguing: “On each of these axiomatic truths it must be possible to build a series of theorems immediately bearing upon our daily conduct; or, inverting the thought, every act stands in a certain relationship to these truths, and it must be possible in some way or other to solve the problem.... When such a
series of theorems has been elaborated and solutions have been given to such a series of problems, the task of the moralist is accomplished" (1995, 66, 411). One cannot picture Smith or Hayek making any such a statement. The fact is that the argument for limited government rests on the uncertainty that an imperfect man faces daily. Spencer's rejection of both uncertainty and imperfection allows him to extend himself beyond limited government into an anarchic utopia.

Spencer's Hegelian Utopianism

Spencer's final state (or lack thereof) sounds more like Hegel's than Hayek's or Smith's. In fact, the similarities between Spencer and Hegel are almost spooky at times, especially when the fact that their major works on the historical perfection of man were written within twenty years of each other. While the mechanisms differ, each philosopher's understanding of the historical progression of man as the working out of divine will (or a similar secular process as it becomes in Spencer's later works), reaches an endpoint at which this progression ceases in the perfection of man. Moreover, both Spencer and Hegel end up with a version of perfect man that is essentially the same. Both see the final unfolding of human freedom as consisting in the individual's voluntary obedience to laws of rational (and therefore moral) conduct. The only difference, and at heart it seems a rather minor difference, is that in Hegel's version the state is very much still in evidence, while in Spencer's version the state gradually disappears.

Now is, unfortunately, not the place to delve too deeply into a comparison of Hegel and Spencer. Suffice it to say that Spencer takes the attention given to historical
detail in Smith and Hayek and turns it into a radical progressive historicism that ultimately rejects the realistic reasons for that attention to historical detail. If man is perfectible, we need not pay much attention to what has come before except insofar as it helps us understand the progression toward what will be, which will fundamentally change everything in its path. Smith and Hayek take history in a much more moderate light. They look to the past mistakes and movements of man in order to understand his growth certainly, but also to understand where that growth might lead, since for the classical liberals who understand human nature as imperfect and imperfectible, it is highly unlikely that history will not repeat itself. The role of classical liberal institutions is to guard against the most egregious aspects of that repetition (such as the despotic desire) while preserving individual liberty. This dual role is the primary reason why rule of law, private property and the private sphere are all necessary parts of the classical liberal regime. Evil is not simply the lack of adaptation; evil itself may be the result of adaptation (Mealey 1995; Arnhart 1998) and must be prevented from wreaking havoc.

Spencer's Lamarckian understanding of evolution is ultimately at the root of the problem. Lamarckian evolution seems to be the corollary of Hegel's continual unfolding of the spirit of Reason. If there are no limits on the adaptability of man we can change man and leave government behind. Both Hayek and Smith at least implicitly recognize that human nature is at least as static as it is imperfect and, whether or not they understood the mechanisms, recognized that man is not infinitely adaptable. Man has a nature that is somewhat flexible, but that flexibility occurs within a nature that has a pattern, and this pattern is not radically mutable merely on the basis of individual experience in particular environments.
Questioning Perfection

The last major question revolving around Spencer's thought is the quality of his utopia. A pattern many have noted among utopian societies is that very few are societies in which any rational person would actually want to live. Bacon's Bensalem ends up seeming creepy and authoritarian, Plato's *Republic* has numerous problems of its own, totalitarianism being not the least of its worries, and More's *Utopia* is anything but. The question then arises, apart from the practical considerations of Spencer's ideal, is it actually a worthwhile ideal at all? One would assume that an anarchical utopia would have at its base a liberty that goes beyond that possible under government. What we find instead in Spencer's utopianism is a radical conformity that makes Plato's *Republic* look permissive.

Spencer argues that “there is no safety but in entire obedience” to the ethical laws he has discovered (1995, 48). He argues earlier that “A universal obedience to its [morality’s] precepts implies an ideal society” (1995, 36). This universal obedience is independent of the particulars of time and place and allows for no exceptions. Spencer rejects prudence since, for him, the certainty of the axiomatic laws of ethics derived from the scientific method are beyond question. Moreover, just as the laws of geometry admit of no exceptions, neither should the laws of ethics that Spencer models after them. This rejection of prudence is not only dangerous politically, but is also dangerous to individualism properly understood.

Spencer himself admits that by taking prudential judgments out of the equation,
he annihilates the individual's right to judge based on his own circumstances:

"Neglecting prudential considerations in the endeavor to put society on a purely equitable basis will probably be demurred to as implying an entire abandonment of private judgment. It must be confessed that it does so" (1995, 422). This "entire abandonment" of the individual's ability to judge for himself leads to a radical conformity that seems to contradict any real concern for individual freedom. In effect, Spencer's anarchical, free society becomes nothing more than the freedom implied by blind obedience to the natural law of equity. Spencer links the individual to society to the point where the individual seems to play almost no more role than that of a cell in an organism (1995, 409). By the time we reach the ideal state, the individual clearly plays no real role in society, but only exists because the individual is necessary for society to exist. The individual's happiness is completely inseparable from societal happiness. The individual "must see that his own life can become what it should be only as fast as society becomes what it should be" (ibid.). Interestingly, the final state contradicts Spencer's arguments elsewhere that one's voluntary choice to be coerced has no relevance for the quality of that coercion (1982, 25). It appears that the principles of freedom that hold true in Spencer's present do not apply to his future.

Spencer's perfect society is achieved by "the process during which all desires inconsistent with the most perfect social organization are dying out and other desires corresponding to such an organization are being developed" (1995, 396). He claims that the perfect society allows for the full "unfolding" of individual nature, and this is true insofar as those natures are compatible with the perfect state. Spencer takes humans and turns them into social insects. The individuality he claims to be concerned with is
nothing more than a redefinition of conformity. Spencer perfects man by making him subhuman. The individual is only important for Spencer insofar as he has the right desires.

Smith and Hayek see the individual as inseparable from society only insofar as man is naturally social and needs society. The individual is meaningful apart from society because the individual has a will that is, to a certain extent, separate from society. Part of the importance of the spontaneous order or invisible hand for both Smith and Hayek is that the individual's motivations and interests are assumed to not be identical with those of society, and yet cooperation can still occur because of the flexibility of a free society. Hayek's arguments for customary law and social pressure underscore the creative force of the individual since Hayek feels that the benefit of customary law is that it can be broken by those willing to reap the consequences. Innovation and flouting customary norms of behavior (rather than positive law) allows the individual to exert his individuality. It seems then, in absolute terms, that there is more real freedom for the individual within a free society that is bound by a framework of laws than there is in the radical voluntary conformity of Spencer's anarchy.

Spencer's concern for individuality is further called into question by the role suffering plays in his theory. On the way to Spencer's utopia, much suffering is occasioned and acknowledged as necessary (1995, 288-289, 388). Spencer did not live to see the consequences of theories that allow for the breaking of eggs to make an omelet, but such a theory certainly undermines his professed concern for the individual. In the end, the individual becomes little more than a cog in the historical process that leads, inevitably, to the perfect society. The individual is sacrificed for the species,
which is something no good classical liberal would be willing to allow.

There will always be an uneasy relationship between the individual and society. While the individual should generally not be subordinated to the good of the group, the welfare of the individual is always inextricably tied to the group. The classical liberal ideal is that which best protects both individual and group without sacrificing one to the other. It allows for the uneasy relationship between group and individual, allowing individual actions to spin out into a spontaneous order that creates a society. Because of the freedom involved in the spontaneous order the individual's desires do not need to be sacrificed for the good of the group, and the stability of the group need not be sacrificed for the desires of individuals. Spencer's problem is that he eventually subordinates the individual to the species, and eventually subordinates individualism to the good of the species. The plain fact of the matter is that individual desires are not always good for the species, and sometimes not even good for the individual.

What Spencer Got Right

For all the criticisms of Spencer that I have leveled thus far, his thought is still important for a few reasons. In the first place, understanding how evolutionary theory can be misused is important for all of us who attempt to use evidence from science to support claims about politics and human relationships in general. In the second place, his arguments for liberty in the present are excellent and generally moderate, at least in comparison to his vision of the future state. The Spencer who is concerned with the present is a thoughtful classical liberal whose overarching desire is to increase human
freedom.

In numerous essays Spencer points out the dangers inherent in governmental meddling in human lives. He argues in "The New Toryism" that Liberals have become Tories in that the primary characteristic of importance in government is whether government is increasing or decreasing restrictions on people's lives. The motive of the legislator or the manner in which that legislator is elected are irrelevant concerns (1982, 26). In the same way, the New Tories, or the old Liberals, have taken over the traditional Tory role of expanding governmental power, albeit with the desire to alleviate the sufferings of the many. This motive, laudable as it is, is irrelevant to the larger question of whether people are more or less free at the end of the day to live their lives as they see fit.

Spencer's practical concerns include passionate pleas on behalf of black slaves, the ardent desire to abolish the coercive practices of the East India Company, expanded rights for women and children, and the continual expansion of religious freedom. While his primary concern is a theoretical concern with lessening the coercive force of government, that concern is linked inextricably to the fact that this theoretical concern has real impacts on individual lives. His point is made especially clear when he argues, "Change your idea of a bad law into a definite idea of it as an agency operating on people's lives, and you see that it means so much of pain, so much of illness, so much of mortality" (1982, 81). Governmental interference, whatever the motives, leads to consequences, and usually bad ones, for the individuals on whom that legislation acts.

Spencer's overall point is that paternal government not only fails to accomplish the goals it sets out to do, but also adds to the misery of the individuals under its care.
Paternal government makes men worse off not only physically, but also mentally in that it creates a mass of individuals who are completely separated from responsibility for their actions, since such actions fail to have any real-world consequences. Spencer argues in "The Coming Slavery" that "Each generation is made less familiar with the attainment of desired ends by individual actions or private combinations, and more familiar with the attainment of them by governmental agencies" (1982, 50). The government becomes the benevolent despot, and free society slips into soft despotism.

Ultimately, Spencer's practical "here and now" political thought is perfectly in line with the thinking of Smith and Hayek and of classical liberalism in general. His desire to limit the coercive force of government, to limit taxation so as to allow people to spend their earnings as they wish, and to limit the oppression of individuals by others, as in the case of slavery and the East India Company, are all laudable goals well within the classical liberal framework. He argues for indirect action through the voluntary cooperation of free individuals, which is the ideal of classical liberalism thought in general. As a passionate and thoughtful writer the lessons he teaches are worthwhile for any student of the free society. It is primarily in his prognostications of the future of mankind that he departs from classical liberalism and gradually turns toward radical anarchism.

Spencer's anarchism is ultimately the final reason for finding his thought useful in the context of this dissertation: it represents the libertarian alternative to utopia. I have spoken elsewhere of the biological barriers to regimes of equality, and it makes sense to deal with the other extreme, the anarchical society. Interestingly, one of Spencer's major mistakes is to assume that human nature is radically malleable, which is precisely the
mistake made by other kinds of utopian thinkers. In fact, one of the major contentions of
the rest of this work is that human nature is stable, though flexible. We need government
just as much as we need that government to be limited. Our freedom must be bounded
by general laws that help us understand our world, predict what others will do, and plan
for the future.

As we can see from Spencer's treatment of individual desires in the future state,
there is a sense in which even government can be liberating. A free society allows the
expression of many individual desires without requiring that all those individual desires
become one and the same. And ultimately, the freedom of diverse human desires is what
makes the human experience worthwhile. In the final analysis, Spencer's radical
malleability of man poses a danger for his own thought. If man is really so radically
malleable, and if human nature changes in accordance with the social circumstances in
which it finds itself, then there is no reason other than a theoretical fondness for freedom
not to attempt to create a socialistic state based on equality. If human nature can adapt to
any social system, then the ultimate argument for liberty, that it fulfills human nature in a
fundamental way, is wiped away, leaving no defense against the encroachments of
government. The fact of the matter is that human nature is stable, and it requires both
freedom and law. Forgetting this is to forget the most important justifications for free
society. True freedom requires moderation.
CHAPTER 9: EVOLUTION, LIBERTY, AND HUMAN EXCELLENCE

No one can deny the material advantages provided by a free society, though some question whether those advantages are spread out “fairly.” Yet most people seem to feel that what is materially gained by freedom is accompanied by a corresponding loss, whether in equality, justice, or human excellence. A free society, most argue, is also a capitalistic society, and capitalism leads fundamentally to the loss of higher goals, a conversion of life to nothing more than the pursuit of wealth and comfort. This criticism was leveled against the wealth-getting pursuits of the Athenians by Socrates, against democratic life by Tocqueville (1969), against the “last man” of liberalism by Nietzsche (1996), and against modern liberal capitalism by critics like Fukuyama (2006). Even Hayek and Smith, supposed proponents of the Free Society, have serious reservations, or at least do not make the positive argument that individual and societal excellence of any sort is best achieved in a liberal society.

What seems to be forgotten is that in every regime there will be people of more or less substance, some who choose comfort over greatness and vice versa. The ranking of types of souls is apparent in Plato's Republic, and Nietzsche’s order of rank relies on the fact that there are different levels of humanity. What seems to goad the utopians is that the great are not necessarily those who rule in a liberal society. What the utopians want
is the government (or ruling class or whoever) to set the standards for greatness, decide who is great, and then let those people rule. The liberal alternative is to allow the standards for greatness to be worked out within a spontaneous order, to let individuals decide for themselves their own paths in life, whether to greatness or comfort, and to let the people decide who rules (at least in liberal democracies). The argument against this system is that democracy, corrupted by comfortable self-preservation, chooses those least fit to rule, the demagogues who flatter the many. The argument against the alternative, however, is that even Plato seems unsure about the steps required to create a truly just city. Nietzsche is less uncertain (though more vague), but Nietzsche's reputation, while somewhat undeserved, demonstrates that most people are fundamentally uncomfortable with the Nietzscheian project, and would gladly choose a "low but solid" regime over rule by the Nietzscheian overman.

The problem ultimately seems to be one of theory and practice. Theoretically, we would like to have a regime in which excellence is rewarded, where individuals of courage and justice rule, and where the populace is devoted to high goods like contemplation, the arts and sciences and so on. Yet, as we know from Aristotle's Politics, the best regime is not identical with the best possible regime. The excellence we look to in theory must be compatible with human nature in practice, and there's the rub. Practically, we seem to find that we must either risk the creation of dangerous tyrannies in the name of the philosophers of the future, or we must risk the degradation of humanity into the "last man," one who seeks nothing more than to be led into comfortable safe pastures of plenty.

Realistically, the issue is not quite so stark. I will argue that there are plenty of
opportunities for excellence in a free society, and that in fact what modern critics like Fukuyama criticize about modern liberalism is more the result of its deviation from its classical liberal roots than the result of anything inherent in classical liberalism itself. Moreover, classical liberalism is, in many ways, the only practically possible regime that encourages human excellence, in large part because it is compatible with human nature and the human desires that arise from that nature. It therefore requires less coercion, is more stable, and allows for voluntary obedience and free choice rather than coerced "virtue" (if one can even call coerced virtue virtue at all). I argue then that traditional regimes of excellence require excessive coercion and are for this reason unlikely to be stable, and unlikely to achieve their ultimate purpose. Most of these regimes of excellence have never existed and probably never could, in large part because of their opposition to human nature. I argue further that the ideal liberal regime (properly understood) creates its own type of excellence that is more complete than the Platonic or Nietzschean alternatives. I discuss both individual and societal excellence, attempting to define both of them broadly. In this last section, I will lay out Hayek's and Smith's approaches to the problem, and then discuss why their approaches fail to make the case strong enough. I argue that this is the result of their inattention to human nature.

I will discuss briefly the arguments Smith and Hayek make for excellence within a free society, and I will argue that neither Hayek nor Smith make the case for liberty and excellence as well as it could be made. In this section I will concentrate primarily on moral excellence, understood as altruism and care for one's fellow man, in large part because selfishness is one of the most common complaints leveled at free societies. Smith seems to see a gulf between the natural moral sentiments and the creation of the
great society, and Hayek seems to agree that the great society requires the repression of natural moral sentiments. What neither of them seem to realize is that the free society is in fact that society which best fulfills those natural human desires. Liberalism, properly construed, provides the best outlet for human nature, and human excellence properly understood. Classical liberalism does not require the suppression of aspects of human nature – in fact, it allows for the completion of the potential within a complex human nature in a way that no other regime does. Both Hayek and Smith seem to rely on an improper understanding of human nature; nor do either seem to appreciate (though it is implicit in their teachings) that the reason for the great success of liberalism is that it fulfills some part of human nature that other regimes do not.

The Adam Smith Problem

Smith focuses an inordinate amount of attention on the selfish impulses that are at the heart of capitalistic society. His view of the wealthy is almost entirely one of selfish vanity, people who in their pursuit of baubles accidentally enrich the lives of the less fortunate through the invisible hand. The benefits of capitalism for Smith are almost entirely accidental. He never (that I know of at least) makes an argument that freedom in a capitalistic system makes people better. He argues in *TMS* that “[the rich] consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which the propose from the labours of all the thousands whom they comply, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements”
(1982, 184). The rich are vain, selfish, and rapacious, yet through these vices, they increase the comfort of everyone concerned. Smith's argument, often seen as the primary defense of free trade, may actually end up doing more harm than good, since it completely avoids many of the moral issues raised by freedom and focuses almost entirely on the material advantages offered. Smith's argument seems to be that we cannot be both comfortable and good, so we might as well be comfortable. This is not quite the argument many would choose to demonstrate the benefits of freedom in general and free trade in particular.

Smith's emphasis on the material advantages of freedom is part of what is now called the Adam Smith problem. Smith's version of capitalism seems to offer little to the individual in the way of happiness. Moreover, a free society seems to demand that we go against nature. As he points out in distinguishing justice from beneficence, “Though Nature, therefore, exhorts mankind to acts of beneficence, by the pleasing consciousness of deserved reward, she has not thought it necessary to guard and enforce the practice of it by the terrors of merited punishment in case it should be neglected” (1982, 86). Justice, not beneficence, is the job of government and society in general. What is interesting is that even while Smith sees beneficence as a natural phenomenon, he seems to argue that a free society necessarily corrupts such phenomena. Not only does wealth not increase the moral character of those possessing it, but it actually perverts the moral sentiments, corrupting our natural judgment of right and wrong. “The disposition to admire, and almost to worship, the rich and the powerful... is... the great and most universal cause of the corruption of our moral sentiments” (1982, 61). While the admiration of the rich allows us to maintain the order of society, it also perverts our
judgments, making us more sympathetic to the plight of the great and wealthy, and less so to the weak and poor. Moreover, “wealth and greatness are often regarded with the respect and admiration which are due only to wisdom and virtue” (1982, 62). When people idolize the rich and great rather than those with real abilities and character, the erosion of true excellence takes place, and the beginnings of the democratic cult of wealth and money making begins.

For Smith then, free society requires the perversion of the natural sentiments, particularly the natural instinct for beneficence or altruism. What is interesting is that he too, like Hayek, ignores the natural roots of these desires even while he points them out in other places. Smith argues against universal benevolence, arguing that it is unnatural for man to care universally about those unconnected with him. There is an order of rank by which we care about people, starting with family, moving to friends, and then gradually encapsulating the greater community, but with benevolence becoming less and less powerful as one moves outward (227). He further argues, “To man [as opposed to God] is allotted a much humbler department, but one much more suitable to the weakness of his powers, and to the narrowness of his comprehension; the care of his own happiness, of that of his family, his friends, his country” (237). Free society then simply confirms these natural moral inclinations and allows these inclinations to benefit others inadvertently. While the existence of great wealth may pervert our natural sentiments in one way, it confirms and supports our natural sentiments in other ways. A free society can support altruism at the individual level while promoting group well-being at the larger level of the regime. Smith, however, does not make this connection explicit, and focuses far more on the selfish aspects of commercial society than on the positive. As
we shall see in the Hayek section, this concentration on the selfish aspects of capitalistic society rather than the altruistic is overly simplistic, and does damage to the positive argument that can be made for free society.

The Friedrich Hayek Problem

Hayek makes a similar misstep in emphasizing the selfish aspects of the free society, in large part because he believes that the spontaneous order is purely conventional, not seeing that such conventionality is rooted in the nature of man. Hayek's fear of nature, discussed above in the chapter on rule of law, stems, I believe, from his belief that socialistic desires are the result of our evolutionary past, and that these natural desires are strong enough to uproot the classical liberal desire for freedom. Hayek's argument seems to be that the desire for equality is natural, while the desire for liberty is unnatural and thus needs a lot of help. This treatment then begs the question of why precisely liberty is good. If it truly does require going against our fondest and most natural and deeply rooted desires, what makes liberty good? Again, it seems that we have the Adam Smith problem all over again. Hayek argues that classical liberalism is good because it allows us to live comfortably, but it requires eradicating our altruistic impulses in the name of comfort. This is admittedly overly simplistic, since Hayek does defend in places the importance of liberty for responsibility and the effect of these on both the individual and society. Hayek's argument against altruism is not against altruism writ large, but about a kind of universal or general altruism that implies concern for unknown people with unknown needs, which is similar to Smith's "universal benevolence."
Hayek argues further, "altruism can extend only to the known needs of known other people; it cannot lead to the growth of a society which depends on our serving the needs of people whose very existence we have no idea" (1983, 30). Hayek argues further that there is a conflict between the two different levels of morality, that of learned rules and that of "good instincts" (1983, 31), and that we need to suppress these good instincts in favor of learned rules. Yet Hayek's "natural instincts" are a straw man. Our natural instincts no more dictate general altruism than the learned rules of behavior that are based off of those instincts. Moreover, even general altruism, the giving of money to children in Africa, for example, is not incompatible with a free society. What is incompatible is coercing such altruism, or forcing people to care for unknown people with unknown needs against their will, as, for example, the government does in the welfare state.

There is, in fact, nothing incompatible about our desires for justice or altruism and the classical liberal ideal. The only incompatibility is when we decide that we want the government to take care of redistributive justice or altruism for us. Then we find coercion rearing its head. There is nothing inconsistent about a classical liberal who gives half his income to carefully chosen charities every year. What becomes problematic is when the government chooses those charities for us. One of Tocqueville's comments on the Americans (1969, 68-70) is that they help themselves and their neighbors without requiring governmental assistance. Hayek's fear of our altruistic impulses is understandable given the now-prevalent belief that government exists to give us things, but altruism itself is not dangerous to freedom.

To be fair, Hayek seems to understand this, even while he advises controlling our
natural impulses. In *Individualism and Economic Order*, he points out that true individualism does not require that we follow only selfish motives. Part of property rights, for example, is "the endeavor to make man by the pursuit of his interests contribute as much as possible to the needs of other men..." (1948, 20). Moreover, he points out that true individualism does not concern only the individual, but also that individual's family and friends, community, and the small groups of which every individual is a part (23). After decrying the natural state of man as dangerous to liberal society, he argues that "It is part of the ordinary nature of men (and perhaps still more of women) and one of the main conditions of their happiness that they make the welfare of other people their chief aim" (1960, 78), and that "The freedom to pursue one's own aims is, however, as important for the most altruistic person, in whose scale of values the needs of other people occupy a very high place, as for any egotist" (1960, 78).

Hayek therefore sees freedom as integral to the expression of altruistic feelings, and he sees such feelings as natural, but still manages to argue that "we must, to a large extent, suppress them in order to maintain our type of society" (1983, 30). The key issue that Hayek does not draw out but should is that altruism is not dangerous, nor should it be suppressed, but that it should not be required by the government, nor should the failure to perform altruistic acts be punished by the state. Punishment should be restricted to the informal disapproval of those in our social groups. Even with Hayek's conflicting account of the place of altruistic impulses in a capitalistic society, he still makes a more forceful argument (such as it is) for the benefits of freedom for society than Smith does.

Hayek is also less ambiguous than Smith in his discussion of the importance of
the wealthy. While his argument was laid out in some depth in the chapter on property, I will summarize briefly. He argues (1960, 125) that there are goods in society that are best achieved through the individualistic impulses of wealthy individuals, and that in many cases, neither the market nor the government can provide these goods sufficiently. He points out, “The leadership of individuals or groups who can back their beliefs financially is particularly essential in the field of cultural amenities, in the fine arts, in education and research, in the preservation of natural beauty and historic treasures, and, above all, in the propagation of new ideas in politics, morals, and religion” (125). That individuals be allowed to use their wealth to express their beliefs about what is important is one of the key defenses against a tyranny of the majority, or the eventual abasement of man into the last man.

If by excellence we mean morality, Hayek and Smith are conflicted on the subject. What neither of them seem to realize, however solid their arguments elsewhere, is that altruism itself is not dangerous. Nor do we have to restrict our altruistic impulses to the world of the family, while promoting selfishness in the larger world of the market. Altruism is only dangerous when we allow the government to decide to whom and how we will be altruistic. Companies that make altruistic decisions instead of ruthless economic decisions do no harm to the freedom of individuals in the greater society. What does harm is when the government uses its coercive powers to enforce altruistic goals. Classical liberalism, properly understood, is capable of promoting moral excellence in its people, as well as various other forms of excellence.

The problem for Hayek and Smith is that both seem to argue that the free society goes against natural instincts or sentiments, but then they find it difficult to explain the
enormous success of such societies once established. More particularly relevant for our purposes here, both Smith and Hayek seem to argue that some part of a free society goes against the most moral impulses of human nature. Both seem to ignore the important argument that a free society actually fulfills human nature to a higher degree than any other regime.

The Coercive Force of Regimes of Excellence

Both Plato and Nietzsche's proposals to create regimes of excellence require incredible amounts of coercion to keep people in line, as well as dubious amounts of knowledge about the kinds of souls people have, the way the parts work together, and so on. The Nietzscheian project is somewhat less problematic, since Nietzsche does not lay out in any detail precisely how this regime would be ruled, only pushing for some sort of future in which the philosophers of the future rule in line with the natural order of rank and the will to power. This is admittedly overly simplified, but I am using Nietzsche as more of a template for an excellent regime than attempting to tackle the intricacies of his philosophy. Coercion seems to be absolutely necessary in Nietzsche's understanding. Nietzsche’s desire in Human, All Too Human that individuals be assigned work based on their ability to suffer requires both knowledge of this ability, and the consent of those so assigned. This consent seems improbable at best (1996, 168). More foundationally, the very concept of will to power implies a coercive force. Where the will to power consists mainly in overcoming oneself or external, inanimate obstacles, it could be compatible with a free society. But, insofar as the will to power requires having power over others,
and of forcing one's vision on others, the coercion necessary becomes dangerously great. As has been argued elsewhere, the need for coercion is one sign that the individuals involved do not want to do what is required. The need for large amounts of coercion generally signals that the actions required go against some part of the nature of the people in question. Regimes that conflict with the parts of human nature that are necessary to that nature will be less stable than regimes that are in line with human nature since the latter rely on voluntary obedience. Moreover, regimes that conflict with important aspects of human nature will cause suffering, since the regime will force humans to go against deeply rooted natural desires. The anguish of both mothers and children in the kibbutz is only one example of the suffering caused by societies that conflict with deeply rooted natural desires (Pinker, 2002, Arnhart 1998, Tiger 1975).

Plato's (1968) *Republic*, the quintessential account of the just society, demonstrates the difficulty of creating a just society. Socrates, possibly ironically, recommends that children be taken away from their parents and their souls tested to determine their rank. The amount of coercion required would be incredibly large, and one can only imagine the suffering that would ensue in a society in which even the raising of children is placed in the hands of the government. Nietzsche's regime, while less fleshed out than Plato's, seems to obviously require some sort of force.

The biggest problem with traditional regimes of excellence, however, is that human nature is complex, and regimes of excellence tend to emphasize one facet of human nature alone. Arnhart (1998) points out twenty natural desires of humans. While the Platonic regime might fulfill some understanding of the natural desire for justice, it will inevitably conflict with the desires for parental care, for familial bonding, and so on.
The same argument can be made for the Nietzschean regime. The fact that focusing any given society on one form of human excellence necessarily requires the suppression of another type, means that we will constantly be in an unstable balancing act with human nature warring with itself. While Arnhart's list does not include a desire for freedom, one could argue that freedom is in many ways the meta-desire that is integral to all these other desires. I will go into this argument in more detail in the section on human potential.

How Liberty Creates Its Own Type of Excellence

Individual responsibility is at the heart of what creates excellence within a liberal society. Klein (2006) defines responsibility in two ways, distinguished by whether we are responsible to ourselves or to someone else. These two definitions are interconnected. Morals and policy influence each other, and by making individuals responsible for their actions, we can create responsible individuals (71). One of the primary arguments that political philosophers have made for millenia is that the setup of the regime influences the souls of those living in that regime. Klein's argument is hardly new. By changing governmental policy, we can create personal responsibility for one's actions. When people have to reap the consequences of their actions, they are more likely to be more thoughtful, more careful, and ultimately more aware about the various impacts their actions have on themselves and those closest to them. Hayek makes a similar point throughout his works.

People who reap no consequences for their actions are those who learn to act
randomly, giving little thought to the moral status of their choices, and having little awareness of themselves as conscious, rational beings. This is not surprising, since individuals in these circumstances tend to pay much more attention to the passions than to their reason, in large part because their reason does not provide them with any necessary connection between their actions and the natural consequences of those actions.

Klein points out that liberty and responsibility go hand in hand, and that for libertarians, liberty alone is not enough, but must come accompanied with responsibility for one's actions. The classical liberal ideal of liberty under rule of law is a good example of this connection. Liberty allows individuals to make choices about their lives, while rule of law ensures that those individuals are held responsible for criminal choices they make. Often, as Klein points out, encroachment on liberty corresponds to an encroachment on responsibility, the most obvious example being welfare payments. Redistributive taxation is an encroachment of liberty that is then used, through welfare payments, to further the encroachment on personal responsibility in another set of people. The connection is not a logically necessary one, but the two tend to be connected.

Klein sees a further connection with dignity, arguing, “Let us place dignity then in the footlights along with liberty and responsibility. Dignity measures a certain quality in the behavior of the members of the society. That quality has two aspects: first, the extent to which they guard their own self-respect, or preserve their own dignity, in their social behavior; second, the extent to which they accommodate the self-respect of others, or preserve the dignity of others with whom they interact” (81). A society of free and equal (before the law, that is) individuals is a society in which individuals respect
themselves and therefore know how to respect others. A free society, instead of taking away man's dignity by making him a slave to comfortable self-preservation, in fact gives man back his dignity by giving him back his rationality. It is only when a man uses his reason that he can be fully responsible for his actions, and it is only in a society in which men are held responsible for their actions that they learn to use their reason. The argument may sound circular, but it is at the heart of what it means to have human dignity properly understood. Human dignity is necessarily connected to that which is highest in man, and that highest part is his reason. Thus, while free societies are often seen as linked more to the passions than the reason, they in fact actually promote the use of the reason by emphasizing freedom of choice while at the same time maintaining that there are consequences connected to those choices.

In the same way that individual responsibility is tied to responsibility to the government, so individual excellence is tied to societal excellence. A society of individuals of varying talents, aspirations, and rankings of human desires who nevertheless share a sense of self-respect, responsibility and ownership of their actions, and recognition of both their own dignity and that of others will be an excellent society by almost any standard. It may lack the real heroism of the Spartans, or the imaginary justice of Plato's state, but it will be a society in which individual fulfillment is high, where people help their neighbor, and where people choose to do things for themselves rather than wait for someone else to do it for them. Moreover, even if such people display little great heroism on a day-to-day basis, the minor heroic efforts of day-to-day life prepare them much better for great heroism than those who have things taken care of for them, who reap governmental benefits without feeling that they owe any obligation in
return. Charles Murray, an ardent classical liberal, somewhat misses the point when he asks and answers, “What should the government be permitted to demand of this ordinary person? Very little” (1997, 5). In reality, the government demands quite a lot of the ordinary person in a classical liberal state. That ordinary person is required to take care of himself, to be responsible for his actions, and to make thoughtful decisions about the choices he makes. Obviously, Murray is right in that the government is demanding this by default rather than by positive law. But in reality, the distinction is important. Hayek makes this point when he argues, “The necessity of finding a sphere of usefulness, an appropriate job, ourselves is the hardest discipline that a free society imposes on us” (1960). Classical liberal society demands much from the average person, but fortunately not more than the average person is capable of, once that person has gotten into the habit of being responsible for what he does. Thinking for oneself is only more difficult than doing what one is told if one has never been in the habit of doing it.

This utopian version of the Free Society is what Tocqueville saw in the small towns and rural areas of America. While he was critical of various aspects of democratic life, he saw the biggest danger to be the democratic urge for equality, not the American desire for liberty. The desire for liberty Tocqueville saw as the primary protection against the soft despotism of the coming welfare state. Apart from the arguments for responsibility, dignity, and other psychological benefits that in turn influence the social and political fabric of a regime, I will turn to the argument from human potential, as contained in human nature.

Arnhart's (1998) discussion of the twenty desires in human nature is important to an understanding for why classical liberalism is good, and why it promotes a kind of
excellence. Human nature is variable, complex, and directed toward many ends under different circumstances. These desires are not radically relativistic. Most people will have some of these desires at some point, and some, like the desire for mating, will be practically universal. As has been pointed out above, it is precisely this complexity that makes life so difficult for utopians of the Platonic stripe. Humans care about justice, but they also care about themselves. As Klein (2006) argues, we are in many ways "a ship of selves," but with "a single captain" (76). Sometimes these desires do not conflict. We can love our children and our mate, thus fulfilling the desire for monogamous relationships and the desire for parental care. Other times, these desires do conflict. Either way, a society based on freedom is that "...which makes use of men in all their given variety and complexity, sometimes good and sometimes bad, sometimes intelligent and more often stupid" (Hayek 1948, 12).

In utopian society, this complexity leads to an insoluble problem of knowledge that is at the core of Hayek's arguments against socialism. There is no way for anyone to know what desire is most important to a particular human at a particular time, since the shifting hierarchy of desires never stops shifting. One would have to understand the particular rank of a particular desire, what will happen in a particular person's life and so on. The variables are never-ending, and the ability of anyone to accurately predict what will be the most important desire in a person's life is impossible. So, how do we construct society so as to be in line with human desires if such knowledge is impossible? The response from folks like Hayek is that the greatest accumulation of knowledge of particulars is held by individuals. He argues that "The true basis of his argument is that nobody can know who knows best and that the only way by which we can find out is
through a social process in which everybody is allowed to try and see what he can do’
(1948, 15). The individual is the only one with the necessary knowledge of particulars to
make decisions based on his own particular needs and desires, even if his knowledge is
necessarily incomplete, and even if this knowledge dispersed among many individuals is
never collected and concentrated in a single mind.

The problem of knowledge is only part of the argument. As pointed out above,
one key fault of utopias like the Republic or Nietzsche's regime of the overman is that
such visions rely on a simplistic view of human nature. One version of excellence that
takes its bearings from Aristotle is an understanding of human excellence as the
fulfillment of a telos or potential within human beings. This potential, however, is
complex. Humans have many desires that need to be fulfilled to create a complete life.
The best life then, the most excellent life, might be one where most of the desires that
make us human are fulfilled to some degree and in a way that is compatible with the
particulars of our specific circumstances. One can choose to be a parent, to be active in
one's community, and to live a life devoted to intellectual inquiry. On the most material
level, the only society likely to have enough wealth to support such multitasking is a free
society. On a principled level, the only society that offers enough personal freedom for
people to make these choices will be a free society. The free society then offers a way
for individuals to fulfill their potential (as far as one can with the kind of complex nature
we have) as they see fit, taking into account the knowledge they have of their particular
situation, which includes the knowledge that they will ultimately be held responsible for
the actions they take. The excellence of the liberal society properly understood may then
be the most complete excellence humanity is capable of.
The question then becomes, if we are really interested in creating a regime that fulfills the desires of human nature to the greatest extent, how do we prevent these desires from becoming tyrannical – in effect, how do we prevent individuals from making bad decisions? How can we prevent the individual from being tyrannized over by his desires? The answer is not foolproof, but it relates back to responsibility. Certainly, individuals who have been taught that there are consequences for their actions and who have self-respect and a sense of self-ownership will be less likely to make bad decisions based on passions of the moment. Certainly, people will make bad choices, and they will choose to emphasize “bad” parts of their souls. But in general, people who are responsible and who have the self-respect that responsibility breeds, and who have the freedom to make choices about what kind of life they want to live will make far fewer mistakes than those who are coerced into a particular kind of life, or worse, those who have no responsibility whatsoever for their actions.

Some might argue that how we rank the desires inherent in human life is a fundamental problem for arguments like Arnhart's. However, the issue of rank is related back to the problem of knowledge. The problem with ranking is that many people will have different rankings from their neighbors while at the same time having different rankings at different times of their lives. A child may rank friendship and social ranking quite high while at the same time completely ignoring parental care. This does not mean that being a parent may at some point become more important to that child than social rank, or that the two may not interconnect in important ways. What is important is that “A free society is a pluralistic society without a common hierarchy of particular ends” (1976, 109). As Hayek points out, “It is often made a reproach to the Great Society and
its market order that it lacks an agreed ranking of ends. This, however, is in fact its great merit which makes individual freedom and all its values possible. The Great Society arose through the discovery that men can live together in peace and mutually benefiting each other without agreeing on the particular aims which they severally pursue” (109). Thus, the problems inherent in Arnhart's list of natural desires is the same problem that people point out in regard to the Great Society. What appears to be a flaw, however, is in fact a benefit. No individual has a consistent ranking of ends, so it seems impossible and dangerous to expect a society to have this.

This simply demonstrates the natural basis of freedom yet again. If there are twenty or so natural desires that are common to all humans at some point, the liberty will be the “meta-desire” that holds all these desires together. To fulfill the desire for parental care, one must have the freedom to choose one's mate and decide when and where to have children. To fulfill the desire for social ranking, one must have the freedom to move within society, to try one's hand at various occupations, and mingle with whom one wishes. I could continue, but the point is obvious. In order to fulfill the potential contained within human nature, humans need to the freedom to rank their desires and to seek the ends to fulfill those desires, generally unhindered from outside interference except when they engage in force or fraud. Such freedom is at the heart of the classical liberal ideal, and such freedom is the only political good that can lead to true human excellence properly understood.
I had already planned to defend myself against charges of historicism, violating the fact-value distinction, and ignoring radical variation when, on rereading Strauss's *Natural Right and History*, I realized that he also deals with these primary concerns in his defense of natural right. His natural right is seemingly different from the "Darwinian natural right" (Arnhart, 1998) that I ultimately defend here, but since the objections to both are the same, I will use his discussion to set up the arguments, and to demonstrate how these three objections are intertwined. While Strauss would disagree in important ways with the project set forth here, he would at least recognize in Darwinian natural right a natural right that is in some respects related to his own. My own defense of my argument from these three objections takes cues from Strauss, but also other modern thinkers who have argued for a naturalistic understanding of ethics as opposed to merely conventionalist or historical approaches.

Strauss notes in *Natural Right and History* that "the true reason why Weber insisted on the ethically neutral character of social science as well as of social philosophy was, then, not his belief in the fundamental opposition of the Is and the Ought but his belief that there cannot be any genuine knowledge of the Ought" (41). Weber's denial of the connection between facts and values is due to an implicit relativism. There is an
inherent connection between the fact-value dichotomy and historicism. He argues, "Social science could avoid value judgments only by keeping strictly within the limits of a purely historical or 'interpretive' approach. The social scientist would have to bow without a murmur to the self-interpretation of his subjects" (55). This historicism is further underscored (and perhaps at root caused by) the variety of values with which the social scientist has to deal. The fact that there are various, often conflicting values, and that deriving values from facts often leads to outcomes unacceptable to progressive social scientists, the only option seems to be a radical historicism that denies the ability of the social scientist to understand values as separated from their own particular historical context. Thus, variability, historicism, and the separation of facts and values are linked. In the following I will deal with all three of these arguments in defending an evolutionary understanding of man as a kind of natural right.

In the first place, evolutionary theory is not historical, but offers an enduring standard by which to judge human action. Second, there is no enduring theoretical distinction between facts and values. The two necessarily influence one another. Last, the presence of variation does not lead to unresolvable conflicts of the sort postulated by thinkers like Weber. Variation needs to be understood properly - not as absolute heterogeneity, but as, to use Strauss's terminology, noetic heterogeneity, or variation within an order.

The basic evolutionary argument that I have made here ought to be clear by this point. I argue that humans have a permanent human nature that influences the ways we live our lives, and more importantly, that limits what politics is capable of, and which tends to support free government properly understood. This universal permanent human
nature has evolved over thousands and thousands of years to produce an intelligent, social yet individualistic and therefore predictably variable animal. It is in this predictable variation that we must look for stability. If I am to base some understanding of natural right on evolution, I must demonstrate that the variation is not random, or progressive in that it annihilates what came before.

Strauss has in some ways laid out more clearly the alternatives I am attempting to distinguish here. He argues in *Natural Right and History* that “natural right claims to be a right that is discernible by human reason and is universally acknowledged; but history (including anthropology) teaches us that no such right exists; instead of the supposed uniformity, we find an indefinite variety of notions of right or justice” (9). According to this formulation then, the human nature postulated by evolutionary theory bears more resemblance to Strauss's depiction of natural right than his depiction of historicism.

Historicism has a long and varied history. There have been numerous historical thinkers who place more or less emphasis on history than nature. Burke, for example, understood “prescription” as the inherited rights of a people which seems to rely almost exclusively on history, though hints throughout his work demonstrate that nature may indeed be lurking in the background (1949, 280-281, 295, 528). Montesquieu also focuses on the importance of understanding a people's historical context, though he rejects the later historicist claim that history is progressive, or that history presents us with an inevitable trajectory from which we cannot escape (1989, 4-6, 8, 112-113). Montesquieu and Burke, while walking the line to some extent between natural right and historicism, still fall rather heavily on the side of natural right. Both acknowledge the existence of universal standards, though for various reasons these are not their primary
concerns.

It is with Hegel that we see the fulfillment of the rejection of natural right in that he views history as the inevitable, progressive working out of the dialectic between individual and group will (Hegel 1956; See also Melzer et al. 1995). Not only are the truths of a particular people only true within their own particular historical context, but natural right as a basis for ethical considerations is thrown out. World historical individuals can commit innumerable atrocities, and while they may be condemned by the men of their time, they cannot be condemned from any other standpoint, since they are merely instruments in the working out of the spirit of reason. While this is an admittedly simplistic understanding of Hegel's philosophy, it demonstrates the key differences between natural right (or evolutionary natural right as I will refer to it) and the historical approach. Evolutionary natural right postulates that there are facets of human nature that are essentially permanent across time and which provide us with a standard by which to judge our own actions and the actions of others. Historicism eliminates those standards in favor of historical standards that change from time to time, from society to society. While evolutionary theory provides us with a standard by which we can judge other societies and times, historicism explicitly rejects any such standard.

As we saw above, there are certain aspects of human nature that are, to use Strauss' phrasing, “discernible by reason” and “universally acknowledged.” The desires for parental care, for private property, and for rule of law described above are protected desires in all but the most coercive regimes, and are understood intuitively by humans the world over. The important issue for my purposes is whether evolutionary natural right is stable enough to provide some standard for humans. The fact that evolution occurs very
slowly at the population level, and that we share many of these key traits with our mammalian relatives, demonstrates that these traits are unlikely to change any time soon.

One possible argument against that stability is that human nature is unlikely to stay stable, especially with the advent of technologies like genetic germline enhancement and all the technological changes promoted by the transhumanism movement in general. Transhumanists claim that they would like to overcome human nature for the betterment of mankind and society (see Arnhart 2003 for a discussion of the overall transhumanist project and its critics). The transhumanist argument fails to challenge evolutionary natural right for two reasons. In the first place, even if transhumanists succeed in radically changing human nature, they will not change the underlying logic of the evolutionary natural laws that guide our behavior. Our nature only leads to certain ethical rules if it remains the same kind of nature. More simply, I view natural laws as a set of if-then rules. In the same way that geometry argues that if an object is a square, then it will have four right angles and four equal sides, so too does evolutionary theory give us hypothetical laws. If humans are a social, intelligent species with individualistic tendencies, then we will have a certain predictable set of ethical guidelines. If the object we are speaking of is not a square, the rules for the square do not apply, but that does not annihilate the rule itself. In the same way, even if human nature were radically changed to resemble that of social insects, for example, we do not annihilate or change the natural law, it simply does not apply to what we call humans anymore. However, even though annihilating humanity does not mean that we annihilate the natural laws that govern intelligent social creatures, trying to radically change humanity is effectively species-suicide.
Second, and perhaps more importantly, the transhumanists themselves do not really want to overcome human nature. As Arnhart (2003) has argued persuasively, the most transhumanists really want to do is use technology to better fulfill already existing human desires. Using germline genetic technology to eliminate disease in our offspring or to make “superbabies” does not fundamentally change human nature. In fact, it is nothing more than a new way of parents ensuring that they give their children the best chances for survival and reproduction. If parents decided to use this technology to create the equivalent of sterile workers, we might wonder whether human nature is stable after all. Yet nowhere in the literature on transhumanism with which I am familiar does anyone defend such a use of new technology. Arnhart’s overall conclusion is a good one: “...the biotechnological manipulation of human life will always be limited in its technical means and moral ends by the adaptive complexity of human nature...” (77). The limits on both means and ends of transforming human nature means that, at least into the far foreseeable future, our evolved human nature is a stable grounding for natural right.

Thus, even those who desire to radically change human nature do not pose a danger to natural right because, in the first place, such changes do not change the underlying logic that structure natural laws. Second, even those who claim to desire to radically change human nature do not really want to do any such thing. At least for the foreseeable future, human nature will continue much as it has for eons, and will continue to place restrictions on what we can accomplish politically. A permanent human nature of this sort is antithetical to the historical argument that human nature is tied to a particular historical milieu, and that all values are historically grounded. Values are grounded in the type of animal we are, which is a permanent, albeit conditional, law.
Last, even though evolution is a historical science, it is stable enough to support a naturalistic ethics. The time-frames in which change occurs are extremely large, and the changes that occur over that time are so subtle that they will have very little influence on the moral desires of humans. Moreover, these desires are in large part the result of enduring aspects of the human condition, such as sociality and intelligence, and will therefore not change with the environment since they are linked to environmentally-independent traits that endure over time. Further, most of these traits are shared in some measure by our close relatives in the animal kingdom, and in some cases even in less closely related mammals (Hrdy 1999; Barkow, Cosmides and Tooby 1992; Schubert and Somit 1982). The similarity between human nature and our close relatives points to an endurance of evolutionary natural right that goes far beyond the human life-span, or even the life-span of a particular culture, which tends to be the preferred time-frame of historicists. For all practical purposes then, evolutionary natural right is radically different from historicist views, and its stability has more in common with ancient understandings of natural right than with historically created notions of right.

The next criticism concerning the project I have laid out above is that it violates the naturalistic fallacy or, alternatively, the fact-value distinction. The literature on the fact-value distinction is extensive and would be difficult to summarize in what is simply a brief response. I therefore discuss three different thinkers' responses to the naturalistic fallacy. All of them come to the argument from the perspective of defending a naturalistic ethics, but all of them reject the naturalistic fallacy for different reasons and in different ways. I hope, therefore, that looking at their discussions offers adequate support for my own rejection of the naturalistic fallacy.
One excellent discussion of the is-ought distinction is that of Casebeer in *Natural Ethical Facts*. Casebeer argues that Hume's argument poses a problem for those who attempt to "reason from the empirical to the normative: that in your conclusion you will make reference to an unexplained term (the 'ought' term) that was nowhere present in the (empirical) premises of the argument" (19). Casebeer goes on to discuss the similar argument from G.E. Moore usually called the "naturalistic fallacy," and then uses Dewey and Quine to show that Moore's argument is overly simplistic and in fact relies in large part on a defunct analytic/synthetic distinction.

The distinction between analytic and synthetic splits statements into two categories. Analytic statements are those whose truth does not rely on experience for their proof. Simple mathematical laws are often considered examples of analytic statements. Synthetic statements, on the other hand, are statements that are either made up of two or more analytic statements, or that require some outside experience for proof of their truth. Some have argued that definitional statements, like the statement "all bachelors are unmarried" are analytic truths in the same way that logical or mathematical truths are analytic.

Quine rejects the analytic/synthetic distinction, arguing that the attempt to equate definitional truths with logical truths is problematic, since definitional truths rely on factors outside of logical truths. Further, as Casebeer points out, "we still have no criteria for distinguishing this purportedly analytic statement [concerning bachelors and unmarried men] from a statement that is true but only contingently so" (24). Casebeer's ultimate argument rests on three major critiques: definitional truths are not logical truths, that interchangeability and synonomy (two things meaning the same thing) do not deal
with the distinction between cognitive synonomy and psychological synonomy, and that even logically true statements "lean heavily on the concept of a semantic rule" (25). The gist of most of this critique is that the distinction between analytic facts, or those truths which we can know a priori, without experience and synthetic facts, or facts that we arrive at through experience and the synthesis of other analytic facts, does not hold. It is clear from Casebeer's discussion of Quine that even the most basic logical truths rely somewhat on synthetic information that comes from outside. As Casebeer points out, "if moral truths weren't those that could be known a priori, then we must come to have knowledge of them via experience, which opens the door for a robust empirical/normative interaction" (27). If we cannot know moral truths without some experience of the world, then facts do influence values.

Casebeer moves into the support that Dewey offers those who reject the naturalistic fallacy. Dewey argues that habit allows us to move between means and ends, transforming what were previously only means into ends in themselves. "Ends become means and means become ends. This process of transformation demonstrates that, according to Dewey, we do an injustice to the world if we construe ends as being fixed, permanent, final and out of the reach of a scientific analysis" (31). The importance of Dewey's analysis is that experience in the world, and knowledge of our own biological nature as a species, can provide important information to the moral realm. In Dewey's case, moral imagination allows us to "hold an end in view so as to ascertain the consequences of its pursuit" (30). This trial and error approach exists without the usual costs of actual trial and failure. The moral imagination allows one to move from one different end to another, based on the consequences of pursuit of those
ends in the imagination. Habit then reinforces these choices, turning some means into ends (Casebeer cites the case of exercise as an example), and other ends into means to other, greater ends. This dynamic relationship between means and ends means that there will be constant interaction between the empirical and the normative, or between facts about our environment and values that we hold. From an evolutionary perspective, one of the most obvious facts about our environment consists in the set of natural desires that make up human nature. To say that these ought to have no impact on what we value or what we choose to pursue is simply absurd.

Amhart (1998) agrees in large part with Casebeer in his rejection of the naturalistic fallacy. Amhart denies, however, that Hume ever intended a strict separation between the is and the ought, instead claiming that Hume's understanding is “rooted in the natural social affections of human beings” (72). More important, he points out Capaldi's argument that “moral judgments for Hume have intersubjective objectivity in that they are factual judgments about the species-typical pattern of moral sentiments in specified circumstances” (70). Amhart further argues that “the dichotomy between is and ought falsely attributed to Hume was actually first formulated by Immanuel Kant” (73). Amhart then traces his rejection of the fact-value distinction to Hume, using arguments from Aristotle, Smith, the other Scottish Enlightenment thinkers, and Darwin, as well as contemporary thinkers like Robert McShea, Masters, and James Q. Wilson to demonstrate that morality comes from facts about humans, including their evolutionary past, and cognitive evolution as moral, social animals (75).

Amhart's primary point is that the distinction between is and ought “cannot be maintained in moral practice, because every normative judgment presupposes a factual
judgment about the satisfaction of human desires as a reason for the normative judgment" (82). Further, he points out that “the normative judgments without the factual judgments are empty and unconvincing” (158). Indeed, the implications here are obvious in that humans use values as a way of determining what the good things are to pursue. If we pursue an apparent good that leads to disastrous consequences for the individual, we must take those consequences into account as a way of evaluating our values. As has been discussed in the case of the kibbutzim, ignoring natural human desires led to consequences that were good for neither the group nor the individual. It was only after the consequences were made apparent that members of the kibbutz re-evaluated their values and attempted to moderate them so as to allow the existence of other, equally important values like parental love.

A third response to the naturalistic fallacy comes from Roger Masters. In many ways he approaches the issue from Strauss' perspective, arguing that the divorce of facts from values has been primarily a modern phenomenon, and that the ancients, most notably Aristotle, regarded it as a simple truth that facts about the world influence the good for humans. Masters goes further in arguing that modern natural science can support a return to this ancient naturalism (1993, 118), and that in particular, evidence from neuroscience and other cutting-edge fields provides scientific proof, rather than logical arguments, against separating ought and is. Masters argues that Locke's account of the tabula rasa, in which there are no innate ideas, is simply incorrect. Masters points out that the way we process ideas or learn in the first place is dependent on innate preferences for one stimulus over another. These innate preferences guide how we act in the world and, ultimately, influence how we form value judgments. Moreover, as will be
discussed in the section on variation, this "natural potentiality" interacts with individual experiences and cultural norms, education, and other external factors to produce variation, though that variation will always be limited by the broad framework of natural human desires. Thus there is an interaction between nature and culture that fails to support the usual "cultural construct" argument for the naturalistic fallacy. Cultures create significant variation in human norms and values, but they are always limited by the ultimate source of those values – human nature. In this way, values are constantly interacting with facts from our environments, our cultures, and our nature to produce shifting values that nevertheless maintain broad stability over time. As Masters points out, "Not only are there innate ideas, but.... some of these innate ideas directly concern social behavior, forming the basis of our judgment of the feelings, traits, and leadership of others" (1993, 122). The tabula rasa is therefore incorrect, and the very way we form values relies on a complex interaction between values and facts, both internal and external.

The literature on the naturalistic fallacy is large, and I have not even attempted a broad literature review (see Chisholm, 1999 for an excellent review of the relevant literature). What I hope to demonstrate is that at the very least the routine acceptance of the fallacy is dubious and that naturalistic arguments cannot be simply swept aside in the face of questionable arguments that are often ideologically grounded. I have attempted to lay out the arguments of three different thinkers who all attack the naturalistic fallacy in different ways. It can be attacked from the perspective of the analytic/synthetic distinction, using the logical arguments that usually support the fallacy against it, or it can be attacked from a more commonsense perspective where we simply observe the
obvious influence of facts on values in everyday life, especially those natural values that appear to be innate. Either way, there are good objections to a simplistic rejection of the idea that one can understand values through facts. At the very least, it needs to be replaced with a more open argument that while values cannot be deduced directly from facts, facts do influence values, and the interaction between the two is, in large part, what makes human life as variable, complex, and rich as it is.

That human life is variable is an important segue into the final objection that variation in human life leads one to the conclusion that there are no stable values, but that we are confronted with relativism as a result of the radical heterogeneity exhibited in human values. My response to this should be obvious by now: what appears to be radical heterogeneity is really patterned heterogeneity, and that the variation within human nature occurs in predictable ways and that, if anything, it is generally a variability of means rather than of ends. Just as in the case of the other objections, those who defend a naturalistic ethics have dealt with this objection before. The defense against radical variation is present in Plato and Aristotle, as well as Strauss, and more recently, Masters and Arnhart. I will discuss the latter two authors, since they use a synthesis of ancient thought and modern science to demonstrate that what appears to be radical variation is, in fact, variation limited by natural facts that are true everywhere and always.

Masters's (1993) discussion of the fact-value distinction points to the relation between that distinction and variation. His argument for the interaction between natural facts, custom, and other environmental influences and individual experience demonstrates that we will often find and should expect to find substantial individual variation in perception and value judgments (123). As Masters points out, this variation
is rooted in the innate ideas put in place by natural selection, and which we can observe through experimental research in neuroscience. These innate ideas, as I have argued throughout, place a limit on what values humans can hold. The case of the kibbutz is a good example of the limitations that are placed on human desires (Arnhart 1998; Pinker 2002; Tiger 1975). Even if we decide that equality is good, we do not have complete freedom to determine the means by which we achieve that equality. Raising children apart from their parents will have natural consequences. These natural consequences in turn influence our values as we struggle between maintaining two important but often conflicting values. Thus, part of the variation in human nature comes from the intricate interaction between natural desires and external influences. As was obvious from the numerous discussions of Smith, Hayek, and evolutionary theory in general, variation within human nature is often the result of conflicting desires within human nature that then interact with particular environmental circumstances in predictable ways.

There is also an important way in which variation is an integral part of human nature, in that part of being a social, intelligent creature requires the flexibility to respond to different environments and different collections of other social, intelligent beings. As I discussed in the chapter on rule of law, there are innate moral emotions that guide our behavior. But, as Smith argued in *The Theory of Moral Sentiments*, if these emotions expressed themselves identically in different circumstances, they would be almost useless in helping us navigate our social environment. This is fundamentally the argument behind phenotypic plasticity (Chisholm 1999). Our plasticity comes from many different levels of human life as was argued elsewhere (in the rule of law chapter, for one), and all these levels support a broad range of variation that is nevertheless
Another source of variation comes from our natural desires themselves. As we have seen, there are times when self-preservation comes into conflict with the preservation of, for example, our children. When self-preservation and reproduction conflict individuals will have to decide which is more important. Hrdy's (1999) discussion of infanticide demonstrates that while customs of infanticide vary widely between cultures, the patterns are consistent across cultures, and that the variation can be understood as not radical variation, but as the variation that is the consequence of general principles of human nature attempting to adapt themselves to particular circumstances. Arnhart's discussion (1998) of twenty natural human desires demonstrates that there will be times when these desires conflict with one another. These conflicts require prudence and knowledge of the particulars to reach a resolution. Variation then is caused in large part by the prudence required by the human condition. Prudence, however, is not separate from universal principles, but is guided by them. Instead of radical variability, we have prudential variability, which is not relativistic, or at least only mildly so.

As Buller (2005) points out, variation is part of human nature. He points out the difficulty variation presents for evolutionary explanations, since there is nothing inherent in genetics that allows us to describe something as "normal" other than, perhaps, the statistically most frequent trait (433), which is not quite what those who are concerned with grounding ethics in something other than relativism are looking for. Buller's overall criticism is that it is difficult to demonstrate persuasively that humans are a natural kind with species-typical values, since we call some people humans who lack important "essential" human traits. My response to this question of variation in general is to again
revert to Aristotle (2003). He warns us in the first book of the *Ethics* that it is dangerous to demand more certainty from a discipline than that discipline is capable of supporting. That humans in general know what traits are normal in a kind of intuitive way, demonstrates to me that there is something there that is at least graspable by the human mind, even if it is not capable of strict definition or delineation. Moreover, if the presence of variation is enough to preclude an object from having a stable nature, we would be unable to consistently study geology, politics, economics, anatomy, or any of the other myriad sciences that deal with variable things.

The “I know it when I see it” response may be philosophically unsatisfying, but neither biology nor ethics are fields that can stand up to strict categorization. As in other cases, those cases well within the norm, which obviously benefit society and the individual, will be understood by most people as “normal” traits. It is always in the shady areas around the edges that we must struggle to define a trait as normal or abnormal, or an action or desire as moral or immoral. It is in these shady areas that we require prudence rather than the strict lines that philosophers are so fond of drawing. Most people can tell when variation moves outside of the norm, and trusting these intuitive judgments may be all we need in most cases. In the other cases, prudent deliberation will be important.

Variation is a part of human nature, not proof that it does not exist. The variation is, however, somewhat predictable in that usually it is the result of a stable human nature reacting in different ways to different environments. Moreover, in most cases, humans do not have a difficult time determining the normalcy of traits, just as, most of the time, scientists do not have difficulty categorizing animals, even though the term “species” is
problematic. More important, however, is that the variation within human nature does not lead to a radical relativism. The fact that we do not actually see radical variation supports the idea that there are stable traits within human nature that restrict the amount and type of variation possible. Moreover, people like Brown (see Pinker 2002) and Arnhart (1998) both demonstrate that there are universals that can be found in all societies, thus yet again destroying the argument for radical heterogeneity in human traits.

If we can infer values from facts, and if evolutionary natural right is stable enough across time to support enduring natural human desires, and if variation is not indeed radical but in fact is supported by the existence of an enduring, stable human nature, there seems to be very little in the way of moving carefully toward a naturalistic ethics. The connection between ethics and the project presented in the rest of this dissertation is obvious. Human political systems are the results of human desires. What those desires are will be relatively stable over time, though different stable desires may conflict (such as the desires for equality and liberty) and will therefore need to be reconciled through prudential deliberation. How we construct a political community has serious implications for the happiness and health of those living in those communities. Determining how those communities support the natural desires of humans is, then, an inherently normative concern.

If there were no connection between normative judgments and factual statements, one could not argue about the best regime. If there were no stable human nature, there could be no best regime, only a “best regime for now in these particular circumstances”. If again human nature is nothing but radical variation, there is no limit to what humans

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can do with political systems, and yet no basis on which to judge whether regimes are right or wrong, an extremely dangerous combination. All these alternatives make political theory essentially impossible, insofar as it is concerned with the best regime for humans. I argue ultimately that evolutionary theory, because it provides an understanding of a stable, knowable human nature, supports political philosophy's quest for the best regime.

In conclusion, I have argued that the most obvious objections to the application of evolutionary theory to political philosophy (at least from the standpoint of political philosophy) are at the very least not obvious. I do not know how persuasively I have defended myself against these objections, and there are many more that would be leveled at such a project. But it does seem important, especially as naturalistic arguments for moral judgments gain ground, to reiterate the facts that were known to the ancients, which is that simply because nature is variable does not mean that there is no standard, and that simply because we cannot directly deduce values from facts does not mean that the two do not interact in important ways. Most importantly, this section seemed necessary to me in large part not just to dispel serious objections, which will come in their own time from thoughtful philosophers, scientists, and political philosophers, but to deal directly with those objections that are ideologically driven, coming from both sides of the aisle, that tend toward gut reactions and which have the pernicious tendency to replace thoughtful discourse with overly simplistic arguments. My point throughout the dissertation has been similar to the position taken by Smith and Hayek, which is to mistrust systems which unduly simplify human experience, and to add back in the complexity that makes scientific and political discourse difficult but meaningfully rich.
CHAPTER 11: CONCLUSION

The major themes have been the role of nature in human life, the complexity of that nature, and the corresponding political implications of dealing with an organism that refuses to be neatly categorized. We are both individualistic and social, and it is these tendencies that make political life possible and at the same time difficult. While we are intensely individualistic at times to the point of endangering the group, we can also be pulled together in enormously cooperative endeavors, sometimes with less than charitable motives. Any political regime will need to deal with this variation and complexity. There are at least three alternatives. One is to use the coercive force of the state to keep individual desires in check. Another is to rely on social pressure of close relatives and friends, which requires keeping communities small for self-policing. The last is to foster individual desires, allowing them to express themselves in a variety of situations and environments, while protecting all individuals from coercion by other individuals. The first option is an option chosen by most large-scale societies. The second option probably bears more resemblance to the communities of individuals in which our species evolved. The last option is that of a free society operating under rule of law. It is this last option that has been rare, and when it appears, it is often mixed with
elements of the first. Yet, despite its rarity, it is this option, the free society, that fulfills human nature most completely, and which allows for human flourishing.

I have argued that free societies are natural in that they fulfill natural human desires. The more we find out about human nature, the more we will be able to make the leaps between the biological and social sciences, thus providing a grounding for the social sciences. Whether or not my analysis has been correct, the importance of applying what we know about human nature to the social sciences should be clear. The growth of the field of biopolitics has been slow, and this for many, diverse reasons. But ultimately, scholars, policy makers, and other individuals will need to address the fact that our biological nature places limits on what we can accomplish socially, and these limits need to be understood. If we are to try to put together the myriad theories and disparate research that make up the field of political science, or even attempt to tie together pieces of political philosophy into a coherent whole, we need to understand the larger questions of how humans act and why.

More specifically, rule of law, private property, and a private sphere are institutions that grow out of our nature as social and individualistic animals. These institutions play the dual role of controlling and channeling our individualistic desires while promoting our social desires. The system is not perfect, and I do not want to end up having made an argument for a kind of utopian libertarianism that is as unrealistic as the utopias based on equality or justice. What classical liberal institutions offer is a way of taking the imperfections in human nature and turning them to good ends. The nature of this good may not be the highest kinds of good in many cases (as a Platonist, for example, would point out), but they are goods in that they allow individuals to live
together peacefully while promoting and allowing for the fulfillment of the desires that constitute a complete life.

Relationship Between Private Sphere, Rule of Law, and Private Property

Again, I believe that rule of law, a private sphere, and private property are necessary for a society that has the fulfillment of human desires as its general aim. While I have separated rule of law, private property, and the private sphere into separate chapters, in reality the three are interconnected. Private property is at the center of a private sphere in that it preserves resources for use that protect against total dependence on government. Further, rule of law understood properly as a general framework for action is central to the idea of the private sphere, since law that is little more than a general framework will necessarily leave many facets of life out of government's control. The interconnectedness of these three ideas means that we must be especially careful to avoid encroaching too much on any one of them, since while the interconnectedness of the three operates as a kind of bulwark against some attacks on liberty, encroachments in one area will have effects on the others. The interconnectedness of classical liberal institutions mimics the interconnectedness and complexity of human nature itself. Only a regime that allows for the spontaneous formation of complex institutions and social structures can deal with the similarly complex nature of man.

The foregoing discussion may demonstrate yet again, as Arnhart (1998) and
Masters (1993) have argued, that Aristotle was largely right about human nature, and therefore about politics. Man truly is a political animal, but Aristotle recognized that man's political nature does not require man to be unequivocally cooperative, nor does man's political nature imply that our political nature does not also come with costs. The best government will tame the beast while liberating it, taking advantage of the cooperative instincts of man while at the same time channeling the selfish instincts into paths that are beneficial to the group.

Ultimately, the primary question asked by political philosophers concerning the best life depends in large part on what kind of animal we are to begin with. Evolutionary theory offers precise predictions and scientific evidence pointing to universal traits shared by all humans in diverse environments. Specific knowledge of human nature allows us to make predictions about what kinds of political environments will be good for humans. Overall, governments that support liberty are more successful and require less coercion of individuals than utopian governments based on justice or equality. If human nature is mixed and generally untrustworthy, we ought not place the responsibility for attaining evolutionary goods in the hands of others. As autonomous individuals, selected by natural selection with certain desires and needs, we alone hold the responsibility for our own survival and that of our children. Allowing such responsibility to rest in the hands of another is reckless. Denying to individuals responsibility over their own lives is immoral.
Future Research and Points of Departure

What is presented here is a small foray into interdisciplinary research, and I have brought out more questions than answers. What makes interdisciplinary research of this kind so exciting is the fact that there are so many different unexplored avenues down which to go. In this case, the link between social and biological emergence, or the way natural conventionalism occurs, is a subject primed for further research. How precisely do customary laws and norms grow out of our nature as evolved organisms, and how do different environments impact this growth? The classical liberal emphasis on flexible, grown norms of conduct rather than strict, inflexible laws would allow for faster adaptation, and more comfortable meshing of the natural with the conventional. There is interesting work to be done on the creation and growth of a spontaneous order, as well as the links between biological and social systems.

Arnhart emphasizes that “a Darwinian conservatism can recognize the special capacities of the human soul as manifesting the emergent complexity of life, in which higher levels of organization produce mental abilities that cannot be found at the lower levels. In contrast to the reductionism often associated with modern science, Darwinian conservatism affirms the idea of emergence” (2005, 105). This emergent complexity of life is part of the argument for a free society. What makes the argument all the better is the beautiful interplay between emergent biological and social orders. The spontaneous order of evolution is mirrored in the spontaneous order of the free society, and the latter allows the fullest outgrowth and expression of the former. Evolutionary psychology and other evolutionary sciences do not restrict us to psychologies rooted in the Pleistocene. It
is one of the surprising features of a Darwinian approach to politics that the political system that allows for the maximal fulfillment of human nature is one that is in many ways completely and radically different from the social systems in which we evolved. The capacity for existence in a large, cooperative society made up of strange individuals emerges from psychological adaptations that grew up in small bands of known individuals.

Political Implications of an Evolutionary Understanding of Man

There are admirable and worthy ends that are not possible because they require impossible or immoral means. The interdependence of ends and means, and the intertwining of theory and practice, highlights the importance of prudence in human political life. Both Hayek and Smith understood this and struggled with it. Both recognized that the best theoretical regime is not the same thing as the best possible regime. As a result of this conviction, they have set their sights firmly on the best possible, and some would say they lost sight of the best of all possible worlds altogether.

But, while neither makes the case that a classical liberal regime resembles the best theoretical regime, there are hints in their works, especially Hayek’s, that such a regime, if done right, could come close to fulfilling the best of which humanity is capable. An imperfect man must necessarily construct an imperfect society. There will always be aspects of any society that we wish we could change. Yet, taking man’s nature into
consideration, it seems that Smith and Hayek both feel that the classical liberal ideal is the best of all possible worlds, at least of those worlds in which man is imperfectly constructed.

If we take the idea of natural conventionalism seriously, we find that it supports the grown regimes and gradual evolution of social institutions so favored by thinkers like Hayek and Smith. While gradual growth (or good old fashioned trial and error) may seem foolhardy to many, such an approach has created stable societies the foster freedom and individualism, while helped out along the way by the prudent creation of a framework of general laws.

As we can see around the world, the spontaneous order is not completely spontaneous. It needs some important supports, such as a stable rule of law, and a people who are capable of self-rule, which means at least that they are free from serious factional conflicts. The general framework of freedom within a rule of law needs cultural and political supports, and it is unclear at this point which comes first.

Thus, I offer nothing in the way of advice on how to create and maintain liberal institutions on foreign soil. Part of the problem with liberal institutions is that they must grow from previously existing institutions, and must be a part of the cultural background of a people. Simply because something is natural does not mean that it cannot be thwarted by disease or disorder, and political institutions are no exception. Classical liberalism may best fulfill human nature, but that does not mean that it can simply be exported. The difficulty of growing a free society should make us all the more careful of our own free institutions. As Hayek points out time and time again, there is a continual slippage toward despotism and paternalism, and ultimately all that stands in the
way of that slippage is the love that a people has for its freedom.

If public opinion really is the only thing that prevents the erosion of freedom, those who care about freedom ought to make an effort to defend "negative" liberty as a positive good. I have laid out various arguments for free society, including the psychological benefits, the moral strengths, the political consequences, and the economic advantages of freedom. These arguments stem from the evolutionary argument about human nature that is at the core of this work, but there are other arguments to be made. It seems to be time for those who believe strongly in free institutions to stop focusing primarily on the wealth-generating aspects, but to attempt a comprehensive justification for liberty that goes beyond mere wealth-creation.

The broadest political implication of an evolutionary understanding of man is that a free society will consist in freedom of many types. The spontaneous order has not freed us from our nature. It has freed us to fulfill that nature. If we take the argument made by Arnhart and others seriously, that human flourishing exists and is a goal worthy of our pursuit, we need to understand the myriad parts that make up that flourishing. Unfortunately for ideologues, that flourishing does not consist in one specific part of the human life, not the life devoted to intellectual pursuits, nor the life of pleasure. The flourishing human life will have a bit of everything.

A spontaneous order of individuals does not require human nature to be anything in particular, or to have one primary end toward which all humans must strive. In a spontaneous order, the good and the bad interact indiscriminately, allowing for voluntary cooperation while turning self-interest into unconscious cooperation. By not expecting human nature to be either entirely good or bad, the spontaneous order of a free society
supports all the different aspects of humanity, the altruistic, the nepotistic, the selfish, the self-interested, the dominant and the submissive, the private and the public, the loving and the aggressive, while at the same time preventing any of these desires from coercively or fraudulently infringing on other individuals.

Political philosophers are often enamored of the ideas of ends, and argue for an end or purpose to human life that seems to exist in some perfect ether. This desire for purpose or meaning may be a natural human desire, but simply because humans have a desire does not mean that the object of our desire actually exists. A spontaneous order of individuals eschews ends, or at least eschews all ends except that of liberty, which is, in itself, not really an end of the Platonic or Aristotelian variety. Many people will not like this interpretation. Some people seem to feel that human life needs one particular architechtonic end in order for life to have meaning. But humans cannot have one shared end. In reality they have many shared ends, some of which compete and express themselves at different times, or at different strengths in different individuals. The best way, then, to fulfill all those ends is to avoid ranking them, and to avoid seeking out one that is somehow “highest.” Some would argue that avoiding the ranking of ends means that those ends are not important, or that we have descended into relativism. In fact, I argue just the opposite. Because the ends of human life are so important, it does not make sense to commit the care of those ends to a government which, even if it does have good motives, certainly does not have the knowledge necessary to act successfully on those motives.
So What?: The Eternal Question

Political theorists need to get back to the question of “so what?” Ideas matter because they have real-world consequences, and they have impacts on real people's lives. As an angry George Emerson cries in *A Room With a View*, “That is the man all over – playing tricks on people, on the most sacred form of life that he can find” (Forster 1923, 253). Forster's Cecil is in many ways a man devoted almost entirely to theory, who does not appreciate the fact that philosophy can change individual lives, which may ultimately be of more importance than the ideas that are often placed above them. If we agree with George Emerson that individuals are indeed important, and if individual desires are important, we need to find a way of incorporating those individual desires into the framework of society. The best way found thus far is to let those desires intermingle, creating a spontaneous order of desires and cooperation that supports flourishing of both individuals and groups. Theory without practice is just as empty as practice without theory.

Political theory also needs to align itself with the quest for the truth. It is important to understand the theories and ideas of political philosophers of the past; we also need to critically examine their thought and decide for ourselves whether they are right, and what the implications of their rightness and wrongness are for human life. I have attempted to highlight the work of Smith and Hayek, arguing that their work matters. I have also attempted to, as far as I can, support and supplement their thought with empirical evidence. More than anything, however, I have tried to make an
argument for why the kinds of political institutions we choose matter. Human happiness is an important goal, and how we approach that happiness will determine our success.

Ultimately, the restrictions that complex, variable human nature places on our social institutions supports social institutions that grow slowly out of that nature. These institutions should be changed only after careful, prudent regard for the possible consequences. A complex, variable human nature will lead to a complex, variable system of life that no individual will be able to fully understand. The quest to understand human nature ultimately requires humility, prudence, and moderation, especially in the political sphere.
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