

Letters to the Editor

Re: Student Power, Relevance and the Academy by John Bunzel, and **David Glasner's review of *Man Versus the Welfare State*** by Henry Hazlitt. Vol. 7, No. 4.

I enjoyed the Spring 1971 issue of *The Intercollegiate Review*. I share Bunzel's wish that the word "relevant" could be excised from the language. When I hear it used, I equate it with barbarism. A man who is concerned with nothing but his own immediate affairs is barbarous—in fact, I think that gives us the most fundamental definition of the word. A society with this outlook will soon end up with no interests except warfare and enough primitive agriculture to keep itself alive—as happened to our ancestors in the Dark Ages.

I was concerned with your review of Hazlitt (pages 187-188), though I have not read the book. I think that it is a mistake to regard the excessive wage demands by labour unions as the root of the trouble. A number of economists who have examined the matter carefully (particularly Sultan, *Review of Economics and Statistics*, 1954) have come to the striking conclusion that the strength of labour unions makes little if any difference to the rate of increase of money wages. And close scrutiny of the situation also indicates that money wages and money profits tend to rise together, both driven by forces which have not yet been fully analysed. Excessive money supply only plays a limited part.

I am against this presentation, not only because I think that it is misleading in itself, but also because it has the effect of diverting attention from the most important cause of the trouble, which is excessive government expenditure. This mostly arises from the pursuit of the welfare state (to which the farm programme could be regarded as a minor adjunct). We must face a certain

amount of unpopularity in condemning the welfare state, in all its aspects.

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Re: W. B. Durrette's review of Gottfried Dietze's *American Political Dilemma*, Vol. 7, No. 4.

Professor Dietze's *American Political Dilemma* is an enigma to liberal scholars because of the rational character it lends to defending the elements of democracy as it speaks to America's waning experiment in free government. The study is so explicitly at variance with liberal ideology that it dares to challenge Judicial Review and Abraham Lincoln—those institutions that Americans have long been programmed to accept as *sanctum sanctorum*. To this end the work is a classic treatise.

Inherent in nearly all liberal discourse is the inability of liberals to disassociate emotion from the rule of law. And Wyatt B. Durrette succumbs to the same snare. Gottfried Dietze has distinctly conveyed the message that if free government is to survive in the United States, Americans must recognize that property rights are a prerequisite of a free society. To modify it as by plebiscitary rule breathes contempt into the rule of law and the Declaration of Independence. As Dietze declares, "The Declaration of Independence denounces [the] British violations of property rights as much as infringements upon life and liberty." He continues with "The American Revolution is distinguished . . . [in its] abolition of monarchy . . . [as well as] its protection of the individual from popular government."

Practically all scholars at one time or an-

other have difficulty disjoining the academic from the actual. The academic is the world of the philosopher. The actual is the dominion of the king. Durette speaks as an academic legitimizing Lincoln's war-time actions. Dietze however speaks on a higher plane. He courageously queries the inconsistency of Lincoln's sentiments and actions. Lincoln pleaded for the strict "obedience to the law," yet later unconstitutionally captured the nation, all under the guise of unification by "popular demand."

In sum, this subjective exposition should be digested by the conservative as his Machiavellian manual and by the liberal as a disclosure of clay feet on the left.

Bertram T. Lloyd
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Re: National Priorities in the Decade Ahead
by Roger A. Freeman, Vol. 8, Nos. 1-2.

Dr. Freeman has done an excellent job of debunking the notion that government should "reorder priorities" from defense to social services. The defense cuts under Nixon have been especially striking: From 1968 to 1973 the defense budget was reduced from \$103 billion to \$74.6 billion (in 1973 dollars), or from 9.4 to 6.4 per cent of GNP. Of course some \$20 billion of this almost McGovernesque reduction was due to winding-down Vietnam, but this is partly offset by a \$10 billion increase in manpower costs—despite a reduction of 1.5 million in the number of defense personnel employed.

From the point of view of public finance theory, many of the activities the government is now engaged in are more appropriately handled through the market system, with the government providing selective subsidies or taxes to make prices reflect social costs and benefits. Defense against internal and external violence, on the other hand, is the primary function of government, and the function most obviously in need of some attention. It is indeed, as Dr. Freeman so persuasively demonstrates, past time to reorder priorities—to return to the

tax-poor citizens the money used to pay for their "benefits," and to spend some of the remainder in protecting life, liberty and property.

Alan Reynolds
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Editorial Note: We have received several queries concerning comparability of Dr. Freeman's statistics for the 1952 and 1972 budget figures. Published below is a reply by Dr. Freeman clarifying this point.

The 1952 figures were taken from the *National Income and Product Accounts* which are comprehensive and include social security transactions, as do the 1972 figures. The heading of my column specifies *Calendar year 1952* which should make it obvious that these could not stem from the administrative budget (which uses fiscal year data) but from the national economic accounts, which are published on a calendar year basis. If you will check the Department of Commerce source I quoted in the table, you will find that it includes social security, as do the data for 1972.

You are entirely wrong in saying that "in 1968 President Johnson introduced the so-called 'consolidated cash budget' that includes all actual transactions, including trust accounts."

The consolidated cash statement has been prepared and published ever since 1940 and differs substantially from the administrative budget. What President Johnson introduced in 1968 is the *Unified Budget* which is not comparable to the formerly used Administrative Budget but differs only in minor respects from the Consolidated Cash Statement and from Government Expenditures in the National Income Accounts.

I used the Unified Budget for Fiscal Year 1972 because it offers the *only* source for 1972 data available at this time. National Income Accounts statistics for 1972 will become available in July 1973. But the FY 1972 Unified Budget data are very close and comparable with Calendar Year 1952 data,

except as to minor details. To set the record straight: both include the transactions of the social security and other trust accounts.

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Re: Moral Rights and the Law: A Response to Dworkin, by Ernest van den Haag, Vol. 8, No. 1-2.

Professor van den Haag's remarks on Ronald Dworkin's essay concerning civil disobedience seem to me to obscure an important issue. I believe that this is a consequence of considering in the same breath whether there are any natural, human rights and whether the laws of the state may ever be broken up into two distinct parts, one dealing with whether any kind of justification for breaking the laws of the state exists and whether a legal justification exists.

I would like to address myself to (a) whether there are any natural rights, (b) whether any kind of justification for breaking the state's laws exists, and (c) whether a legal justification for breaking such laws exists.

What might natural rights be, anyway? The idea of a natural right emerges from the belief that everything is a thing of a certain kind; that is, for any given thing there are certain essential characteristics that render it the kind of thing it is. The nature of some being is that which it is essentially. Man, too, is something essentially and each human being has the characteristics that are essential to any human being.

A natural right is a condition within a community of human beings (society) that each human being requires to be able to exist in a fashion that is suited to human beings essentially. Something that is naturally right for a man is something that he must have by virtue of his being a member of the class of human beings. These conditions, whatever they may be, are right for people by their very nature, simply because they are human beings.

Whether there are natural rights depends,

then, only on whether man has a nature *i.e.*, whether the class of human beings is distinguishable, definite. Arguments have gone back and forth throughout history concerning this matter. I won't go into them in detail, but then neither does van den Haag. He simply rejects the idea that there are human rights, rights that are ours simply because we are human beings, not dependent upon any legislative fiat. He says simply that "Rights are granted by rights-granting authority," thereby rejecting that there are rights that have "force superior to law, and are, therefore, more than (moral) claims." Yet, it seems to me quite odd to deny that there are no natural rights, just as the suggestion that there are such rights "strikes van den Haag as very odd," because there certainly are fairly clear specifications we can offer for what qualifies someone for some being as a member of the human species. Indeed, I would want to argue that man's capacity for rationality and his freedom of choice are the features which distinguish him from other animal species. The nature of man is that he is capable of rationality and choice. And he has certain rights simply by virtue of this fact. It is, to wit, right that he ought to be free to exercise his choice and to use his capacity to reason. It is wrong to stop him from doing this even when some legal edicts permit some people to do that. But more about this later. Suffice it to make clear that the idea that men have natural rights is not so obviously odd as van den Haag believes.

Now to the second point. Surely someone may have a moral justification to break a law. Under certain circumstances even the best laws ought to be broken. For instance, trespassing seems to me to be a violation of a perfectly good law, namely that which protects the property of some person. But if his house is burning down or the one behind his house is on fire, I ought to trespass if, for instance, my children are in there. Any other idea would seem absurd to me. And it would also be absurd to expect the legal system to specify all of the conditions under which laws may be broken. So one must take matters into one's own hand but, of course, this

does not absolve him from legal responsibility. And sometimes the law may be interpreted so that what he did because he saw the matter morally justifiable will be judged to have been unjustified. Still, he had the moral justification even if he lacked the legal justification to act as he did. That seems to me to be just plain true.

Finally, could there be a legal justification for breaking the state's laws? Sometimes. This is evident from the fact that the law evolves and prior judgments are overruled and the action which was at one time considered illegal gets redefined as legal. But in addition to this, the U.S. Constitution embodies a provision which explicitly justifies the breaking of certain laws of any state or even the general code, namely the 9th Amendment. It states that:

The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

If, as van den Haag claims, all of the rights are *granted* (not recognized or acknowledged which are very different since they presuppose the prior existence of what is recognized or acknowledged) by rights granting authorities, how are we to make sense of the 9th amendment?

Surely, those "others," namely other rights, that are "retained by the people" must have been there before the existence of the rights granting authorities even came into being otherwise how do we make sense of the use of the idea of "retain" in this context?

It appears, then, that van den Haag's rejection of natural, human rights is unfounded; his equivocation between all kinds of justifications is unjustified, and his thesis that no justification for breaking legally enacted laws exists is unsupported, especially in the case of the U.S. Code.

I do believe, however, that van den Haag has a point against Dworkin. This is that the specifically moral justification for breaking a law of the state cannot be simply that the law goes contrary to one's conscience. For this omits the issue of when *is* it morally appropriate to abide by laws. And this is a

very important moral issue, something each person ought to consider in his deliberations about matters like civil disobedience. It is not even morally sufficient to say simply: "I sincerely don't like the law, therefore, I may break the law." That issue must be decided in the light of the complex moral considerations of a person's life in a given legal system. I cannot deal with it to any measure of completeness. It does bear noting, however, that Dworkin's flippancy about what is a moral justification for breaking laws easily evokes the van den Haag response: nothing. But, Founding Fathers, refugees from Nazism and Communism, etc. can rest at ease: sometimes a man may break the law; and sometimes the law would be better if it acknowledged the righteousness of its violation.

But none of this justifies flippancy about civil disobedience.

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Re: Moral Rights and the Law, by Ernest van den Haag, Vol. 8, Nos. 1-2.

Professor van den Haag's interesting response to Professor Dworkin in his article on morals and the law raised the question in my mind why an intermediate approach to the problem was not discussed. The article gave me the impression that the conflict between law and morals was an "either-or" situation, with no middle ground. Either the law should give way to individual morals or it should not. Unexpressed was the fact, as both parties know, that the courts are only one step in the legal process. Courts neither institute the cases they hear, nor do they execute their own judgments. They have nothing directly to say about the former, and little to do with the latter.

There is at least one middle ground between the enlightened positivism of Professor van den Haag and what appears to be the personalized natural law view of Pro-

fessor Dworkin. I refer to the similar although not identical problem of one who breaks the law because of what he thinks is necessity—the necessity of hunger or of personal safety. When one steals to ward off starvation has he committed a crime? When one, without legal excuse, kills another person in order to save his own life has he committed murder?

Immanuel Kant, almost two centuries ago, answered the second question by stating that "An act of violent self-preservation, then, ought not to be considered as altogether beyond condemnation; it is only to be adjudged as exempt from punishment." "Yet," he pointed out, "this subjective condition of impunity, by a strange confusion of ideas, has been regarded by [continental] jurists as objective lawfulness. . . ." The English House of Lords, considering the same question in 1884, concluded that "There is no safe path for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitutions has entrusted to the hands fittest to dispense it."

That "prerogative of mercy" can be exercised at two different points by the executive arm of government. The executive may not choose to bring a prosecution at all, in which case no court hears the matter. Or the executive may prosecute, in which case the court should apply existing law. This, however, may be followed by executive clemency, which can remit the penalty in part or in full.

These devices would not, I assume, fully satisfy those who want to have their personal moral views adopted as law in individual cases. Nor would it satisfy those who wish all transgressions of the law to be punished. It is, however, a means by which the symmetry of the law can be maintained, while fostering individual justice. It provides for instances in which general law is unjust as applied to particular cases. The right to define "unjust," of course, resides in the executive, not in the defendant. But even

under the view of Professor Dworkin, the defendant should not himself decide what is meant by a "moral" issue. If he were to do so he would not only supply the "law," but would then be, in effect, his own judge.

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THE AUTHOR REPLIES:

Professor Machan argues (c) that, since "the law evolves," and "the action which was at one time considered illegal gets redefined as legal . . . sometimes [there is] a legal justification for breaking the laws." *Non sequitur*: that the law changes can not be "a legal justification for breaking the law" as it stands at any time. Professor Machan gives no other reasons for his assertion which implies that all laws can be legally broken at all times. Perhaps he means that what one court regards as a law violation, another, or later court, will hold lawful. In which case there was no violation to be justified, unless one confuses a rejected interpretation of the law with an authoritative interpretation.

Machan also feels that the 9th Amendment, which states that the enumeration of constitutional rights is not meant to deny other rights "retained by the people" make sense only if these other rights are natural rights. Not so. These other rights which the fathers of the Constitution did not mean to invalidate are obviously derived from other sources than the Constitution—e.g. common law, state law, custom etc. But "nature" is not needed; it is not the only alternative source of rights. The fathers of the Constitution themselves mostly believed in natural rights as does Professor Machan. But this no more proves the existence of natural rights (or their naturalness) than the belief in God proves His existence. (The ontological fallacy now is more often used to prove the existence of natural rights than of God. *Tempora mutantur et nos mutamur in illis.*)

(b) Prof. Machan is quite right: there is sometimes a moral (as distinguished from

legal) justification for breaking the law. (Incidentally, the examples he gives are confusing because irrelevant to civil disobedience.) I said no less, and discussed when, why, etc. more fully in my *Political Violence & Civil Disobedience* (Harper & Row, N.Y. 1972) referred to for this purpose. My rejection of Dworkin's arguments did not mean that all arguments for civil disobedience are fallacious.

Prof. Machan argues finally (a) that natural rights flow from what "each human being requires to be able to exist as a human being"—what he must have "by virtue of being a human being" as well as from his capacities (e.g., rationality). This argument strikes me as odd because

1) There is no chance of agreement on what is "suited to human beings essentially." Gandhi, Hitler, Prof. Machan, Billy Graham, Mao Tse Tung, Ayn Rand and I would not agree. Nor do we have a method or experiment to settle our disagreement. Is it more "natural" to fight "for one's country" as the government requires, or to refuse? Can nature make such moral decisions for us? Isn't it that nature gives us the choice—for us to make?

2) Prof. Machan confuses "rights" with natural impulses, needs, or whatever it is that each human being requires or has. The combination of "natural" with "right" abets this confusion. Yet, that we have a "natural" impulse to slay our enemies does not itself give us a right to do so, anymore than the fact that we have a desire, or a distinctive human ability, or need to drink, or be merry, or to be rational, or to wear glasses gives us a right to take what is necessary to fulfill these "needs" or to do what we are able to do. Society, not nature, decides which desires and abilities we have a right to indulge, when etc. The rights and duties which come from society may be based on feelings about natural or divine requirements, but these feelings must be socially (and not naturally) transformed into rights—else they are claims.

I am not aware, finally, that Prof. Dworkin

is flippant. He is ponderously wrong. Nor am I flippant—just (less ponderously) right.

Prof. Kempin is quite right in pointing out that impunity and lawfulness are not the same. He is equally right to point out that when law and morality seem in conflict, e.g., when generally just rules produce an unjust result in particular cases (unjust in the opinion not only of the defendants) non-prosecution, or executive leniency (and some other devices) can and should be used. I do not disagree nor do I find anything in my essay that could be interpreted to disagree with Prof. Kempin's point. But Prof. Kempin's last three lines attribute to Prof. Dworkin a common sense which I find lacking in his essays on which I commented. It is precisely because Prof. Dworkin's view would enable defendants to supersede the law that I opposed him. I believe I showed why Prof. Dworkin's views could produce no less—whether or not he knows it.

Re: Sorokin, Popper, and the Philosophy of History, by R. F. Baum, Vol. 8, Nos. 1-2.

Your article has impressed me as sound and exciting. I completely agree with you on the fact that Sorokin's thinking has often-times been distorted and misinterpreted. I believe that the nexus of interdependence between the elements of the cultural supersystems is suprarational and supraempirical in any case. This gives to the supersystems an "organic life" different from that of the mere systems, which are rationalizations of the basic premises and therefore logically or aesthetically coherent. That organic life is embedded in the biopsychical structure of human beings, as careful factor-analytic study could show. I think that this has been an object of one of the most conspicuous distortions with regards to his theories, having motivated erroneous reproaches of "idealism," "emanationism" etc.

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