

Liberty in the Balance

A Cafeteria Libertarian says, "I'm libertarian, except for X." A person who picks and chooses some from column A, some from column B; a part-time libertarian, or a LINO – libertarian in name only. Like Lord Acton, I assert that liberty is the highest political end. To sacrifice liberty for other ends is to subvert it in practice.

Why am I a libertarian, and not some other political persuasion? Different people have different reasons; I'm not a good enough philosopher to weigh in on which approach is best, but I have chosen one for me.

To begin with, I borrow an idea from Thomas Jefferson – natural aristocracy versus artificial aristocracy. By natural aristocracy, he meant something like this: we vary in different attributes. Some of us are taller, or wittier, or more well-versed, or better leaders, or more industrious, more adept along many different scales. Some of us, by nature and inclination, will tend to be naturally respected by many. These may be described as "natural aristocrats." They may become opinion leaders, movers and shakers.

Others, by virtue of birth or position, demand deference, not because of their own abilities, not because of their own actions, but because of their unearned status. This is an artificial aristocracy; in Jefferson's day, there were many such legal distinctions in Europe, between aristocrats and others. The law set one class above another.

Now, I do not mean to imply that there is some single scale along which all people may be ranked. Before saying that "A is better than B," one must ask "better at what?" You would not ask me to shoot hoops; any number of basketball players would be better. But you might ask me, rather than Michael Jordan, to write about libertarian ideas; or to develop computer software. We each have different strengths, which enable us to contribute different things to different endeavors.

I abhor artificial distinctions, wherever they may be found. I abhor the notion that one man may own another, or that one category of people are inherently inferior or superior to another. In particular, I abhor the notion that people who work for the government are "sovereign" with respect to the rest of us. We are generally allowed to sue the government, or a government official, only with permission of the government; yet they do not seek our permission, before bringing suit against us.

I assert that the law should make no distinctions between us. It should not elevate one above another. To bring this back to the "cafeteria libertarians," I know many actual libertarians who object to certain kinds of behavior. Some never drink alcohol; some never drink caffeine; some never smoke marijuana; some never have sex with people of the

same gender. And so forth and so on. But, being libertarian, they do not want laws to enforce or prevent such behavior; they (and I) wish you to be able to make your own choices.

Some will leap from the examples given, and ask if I mean that there should be no laws against rape, murder, and theft. But there is a clear distinction between what are called *malum in se*, and *malum prohibitum*. The first is “wrong in and of itself.” The second is wrong because a legislature has prohibited it.

To comprehend the distinction, imagine a jury voting on the law itself. Twelve people, randomly chosen, are asked “should we have a law against murder?” Arguably, every single one would vote “yes.” Ask them instead “should we have a law against marijuana smoking?” and at least one – possibly half – would say no. And it takes only one of the twelve to refuse to bring a guilty verdict.

Malum in se are the things which earn universal opprobrium. *Malum prohibitum* are clearly debatable. Another way to categorize them: direct harm by A against B, without B’s consent would be *malum in se*. If you have to come up with a long-winded description of hypothetical harms – your drinking might cause you to become ill, which might cause you to seek health care at my expense – that’s more likely to be “*malum prohibitum*.” The same for many other issues, such as a hot one today: your crossing a “national border” is not a harm in and of itself. It was not considered a “crime” until late in the 19th century. It should not be a crime today.

There are people who derive “rules” from biblical grounds. Others derive rules from a concept called “natural law.” I am uncomfortable with both approaches. I think my approach might best be described as “rule utilitarianism.”

Readers might be familiar with Rawls’s “veil of ignorance.” He uses it for other purposes; I think it is a good thought experiment for a rule-utilitarian exposition of libertarian ideas. Suppose you do not know what your race is, your gender, your religion, your political affiliation, your social status. Under such conditions, what kind of rule set would you choose?

I would choose a rule set which prohibits rape, theft, murder, fraud. I’d like to live in a world where my person and my possessions are not at risk; where I can normally trust most people to do what they say they will. I’d also like to be in a world which does not make artificial distinctions; does not permit people of group A to take from group B, nor permit A to harm B – under the Rawlsian conditions that I don’t know whether I am in group A or group B. This criteria might be described as “fairness of treatment” or “equality with the law.”

I say “equality with the law,” rather than “before the law” because I wish to emphasize a

point which is uniquely libertarian: the creators of law, the interpreters of law, the enforcers of law, are coequal with the rest of us, not “sovereign” over us. This is not the normal practice today. I believe it to be the essence of libertarianism; others might disagree.

To focus on this: consider the “comply or die” mentality. In this view, the law is superior to all – or so they claim. But in reality, the law is superior to everyone who is not part of an artificial aristocracy. A policeman says “you are under arrest,” and the comply-or-die crowd says “submit at once.”

I say “Why are you so special? Just because you have a badge and uniform?” If you wish to advise me of the law, do so. But that does not confer on you a right to kill me. In ancient Roman times, a citizen could not even be handcuffed until *after* sentencing. Today, our police have the cart well in advance of the horse, treating us as convicted criminals long before we are even charged with an offense, much less convicted of a crime.

If we truly wish to live in a free country, we need to carefully think about what, if anything, the government ought to be allowed to do. I suggest that we think about this, as Rawls would, while imagining that we might not be in the driver’s seat. We might not be favored by the law. In such a case, would we not prefer an even-handed set of rules which, while not giving us any particular advantage, also do not give particular advantages to those who do not like us very much? Let the law stick to the *malum in se* things which we have nearly universal agreement, and leave us free to make our own choices about things which are often *malum prohibitum*, merely the oft ill-informed and biased whims of legislators.