

ENLIGHTENMENT, RIGHTS AND REVOLUTION SERIES

LAW AND ENLIGHTENMENT IN BRITAIN

Tom D Campbell

Series Editors: Zenon Bankowski, Neil MacCormick

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Enlightenment, Rights and Revolution

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This is one of a series of volumes presenting selected papers from the Congress of the International Association for Philosophy of Law and Social Philosophy (President, Professor Alice Erh-Soon Tay, University of Sydney, Australia) organised in Edinburgh, Scotland, in August 1989 on behalf of the UK Association for Legal and Social Philosophy (President, Professor Tom Campbell, University of Glasgow). The Editorial Advisory Committee for these volumes comprises all those who presided over Plenary Group Sessions of the Congress. Its Members are:

Aulis Aarnio, Helsinki; Ake Frändberg, Uppsala; Letizia Gianformaggio, Siena; Elena Gourko, Minsk; Eugene Kamenka, Canberra; Mikail Karlsson, Reykjavik; Roberta Kevelson, Reading, Pa; Jacques Lenoble, Louvain-la-Neuve; Adam Łopatka, Warsaw; Nicolás López Calera, Granada; Alan Milne, Durham; Karl Mollnau, Berlin (E); Enrico Pattaro, Bologna; Hubert Rottleuthner, Berlin (W); Roger Shiner, Edmonton; Ton-Kak Suh, Seoul; Raymond Wacks, Hong Kong; Ota Weinberger, Graz; Elizabeth Wolgast, Hayward, Cal; Mitsukuni Yasaki, Seijo; Marek Zirk-Sadowski, Łódź.

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A further two Volumes of Congress proceedings, on themes concerning human rights are being published as *Beihefte of the Archiv für Rechts- und Sozialphilosophie* for 1990 under the editorship of Werner Maihofer and Gerhard Sprenger.

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General Editors' Foreword

The Fourteenth World Congress of the International Association for Philosophy of Law and Social Philosophy (President: Professor Alice Erh-Soon Tay, University of Sydney, Australia) was held in August 1989. It was organised in Edinburgh, Scotland, in August 1989 on behalf of the UK Association for Legal and Social Philosophy (President: Professor Tom Campbell, University of Glasgow). There were over five hundred participants from some forty countries. It focused prophetically on the theme 'Enlightenment, Rights and Revolution'.

The sessions of the Congress produced a considerable number of papers discussing various aspects of the history of ideas and the theory of rights and of revolutions. Following on the volume of papers produced for the Congress's plenary sessions (*Enlightenment, Rights and Revolution*), it was decided to produce, under our general editorship, a series of volumes of selected papers from the Congress dealing in thematic form with some of the most pressing issues in legal and social philosophy and the history of ideas to emerge from the Congress. The present volume is the nth of this series.

The Editorial Advisory Committee for these volumes comprises all those who presided over Plenary or Group Sessions of the Congress. Its Members are:

Aulis Aarnio, Helsinki; Ake Frändberg, Uppsala; Letizia Gianformaggio, Siena; Elena Gourko, Minsk; Eugene Kamenka, Canberra; Mikail Karlsson, Reykjavik; Roberta Kevelson, Reading, Pa; Jacques Lenoble, Louvain-la-Neuve; Adam Łopatka, Warsaw; Nicolás López Calera, Granada; Alan Milne, Durham; Karl Mollnau, Berlin (E); Enrico Pattaro, Bologna; Hubert Rottleuthner, Berlin (W); Roger Shiner, Edmonton; Ton-Kak Suh, Seoul; Raymond Wacks, Hong Kong; Ota Weinberger, Graz; Elizabeth Wolgast, Hayward, Cal.; Mitsukuni Yasaki, Seijo; Marek Zirk-Sadowski, Łódź.

All of them gave us, immediately after the Congress, their impressions of papers presented in the various sessions, some indeed giving extremely

thorough appraisals and comments. This was of great value, both to the general editors of the series and to the individual editors of particular volumes. We record our warm gratitude to them all, and to other colleagues who helped in the editorial process. Anne Bankowska was an extremely thorough assistant editor. Sheila Macmillan as Congress Secretary, and Elizabeth Mackenzie, who succeeded her as our secretary in the Centre for Criminology and the Social and Philosophical Study of Law, both gave very great help. The series editors (and their helpers) acted with an unfailing promptness and efficiency and kept to a demanding schedule which enabled us to achieve the ambition of having all the texts ready for publication within a year of the Congress itself.

Finally we record particularly warm thanks to Colin Maclean, who has recently retired from his post as Managing Director of Aberdeen University Press. From the earliest stages of Congress planning and preparation he gave us wise advice and kind support. Without his enthusiasm and shrewdness, it would have been impossible to get so much of the proceedings of the Congress so speedily into print.

Zenon Bankowski
Neil MacCormick

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Preface

Tom D Campbell

This selection of papers from the Fourteenth World Congress of the International Association for Philosophy of Law and Social Philosophy derives from the Congress working group on History of Ideas. The papers have been revised, and in some cases extended, but remain essentially in the form and style of their Congress presentation in August 1989.

It is hardly surprising that a Congress on the theme of 'Enlightenment, Rights and Revolution' which was hosted by the UK Association for Legal and Social Philosophy should have attracted many excellent papers dealing with legal aspects of British Enlightenment thought. It is even less surprising, given the Edinburgh venue of the Congress, that so many of these papers are primarily directed to the work of two Scots, David Hume and Adam Smith, whose contributions specifically to legal philosophy are now more widely recognised. Together with the remaining papers on Hobbes, Thomas Reid, Bentham and Mill, the collection reflects the vigour of contemporary philosophical discussion of British Enlightenment thought and the considerable world-wide scholarly interest in this tradition.

Appropriately enough, the first essay in the volume concerns Hobbes, whose powerful individualist system of thought is the pervasive background to British eighteenth-century political philosophy. It is characteristic of this collection that, in his essay, Timo Airaksinen deals with his subject in both a scholarly and a critical manner and addresses the contemporary relevance of historical debates. Airaksinen argues that Hobbes, in explaining the transition from the state of nature in terms of the rational fear of anarchy rather than in terms of the guilt that is felt at having brought this disorder about, provides an analysis of political obligation which is to be preferred to that of Freud. According to Airaksinen, Freud is unable to account for the emergence of feelings of guilt which are firmly enough based to restrain the pursuit of passion outwith the tyrannical controls imposed by the father within the primal horde. Guilt cannot be generated merely by building on the ambivalent emotions of

the sons towards the oppressive father whom they have killed, thereby initiating the Freudian version of the state of nature. On the other hand, the Hobbesian postulates of individual rationality and the natural laws of self-preservation provide the basis for a political morality which is not merely neurotic.

It is a matter of some importance and controversy how far Hume carries on the individualistic social logic of the Hobbesian scheme, and how far he posits a natural concern which modifies the starkness of Hobbes's rational egoism. The next six essays all touch on this question in one way or another. Thus, Marcia Lind argues, on biographical as well as interpretive grounds, that Hume's moral theory is based on his affirmation of the Classical (Greek and Roman) view that virtue is both natural and necessary for human happiness. On Lind's account, in combining these Classical convictions with the 'experimental method' Hume's objective was to show that they apply equally to the 'artificial' virtue of justice, thus saving his theory from complete subjectivism. Since, as Lind notes, Hume regards virtue as a 'steady preference for the general happiness', we may note that this runs counter to a Hobbesian interpretation of Hume. However, this apparently strong contrast is considerably modified by Hume's further claims that reasoning is natural to man and that reason informs us that there is no ultimate conflict between long-term self-interest and the general happiness.

Takao Katsuragi also notes Hume's naturalism but makes the point that Hume adds to the Aristotelian assumption of the naturalness of custom by stressing the naturalness of adopting a sceptical attitude towards custom. This enables Hume to adopt a trial-and-error approach to the phenomenon of social disorder that combines respect for human tradition with a commitment to progressive reform. In the next essay, Wade Robison goes further than this and claims that Hume can be seen as a political 'revolutionary'. Underlining Hume's outright rejection of Cartesian eternal truths and the Lockean deductions from a state of nature, both of which represent standpoints outside of history, Robison argues that Hume invites us to use the natural powers of causal reasoning, which are available to us from within the confines of everyday life, to determine and establish effective political institutions. However, this leaves open the question of the nature of our desired ends.

In a similar vein, Maria Elosegui contends that Hume combines the belief that law is necessary for, and therefore not inimical to human freedom, with the recognition that the right of revolution is a proper response of last resort to tyrannical government. This is clearly, in part at least, another variation on the theme of the coincidence of adherence to justice and pursuit of self-interest, but it is far from clear whether justified rebellion relates to the self-interest of an oppressed minority or more generalised injustice. However, Maria Elosegui notes that, in Hume's scheme, the obligation to obey government does not derive from the obligation to keep promises; rather, both obligations derive from the perception of utility, hence allowing for the possibility of justified rebellion against oppressive government provided that it is directed at the

establishment of a new stable order which more effectively protects human interests in general.

In a wide-ranging treatment of an ostensibly more specific topic, A Wesley Cragg extracts from Hume's writings a theory of punishment that is neither retributivist, because men are not to be blamed for their natures, nor 'welfarist' or rehabilitative, in that Hume does not believe that the threat of force in itself can change individual character or that there is much that can be done by way of deterrence alone to alter human conduct. In other words, according to Hume, people are not, in practice, effective Hobbesian rationalists whose conduct may be controlled by the correct quantum of threatened punishment. Rather, Hume provides us with the basis for seeing punishment as a way of reinforcing those aspects of social learning which enable us to grasp the long-term benefits of justice (in the Humean sense of respect for property). On this view, punishment should be socially educational rather than punitive. It is deduced that offenders ought not to be shut off from human society but require to be brought into situations where the mutual benefits of co-operation can be more readily appreciated. Cragg argues that this 'pragmatic' theory of punishment may—at least if we modify its deterministic aspects—point us in the direction of a theory of punishment more compatible with contemporary findings on the ineffectiveness of modern penal methods. Again, this analysis seems removed from simple Hobbesian egoism.

Páll Ardal's essay on the Davidsonian account of Hume's theory of pride demonstrates the continuing power, not only of Hume's analytical approach to human experience, but also of his specific analyses of the emotions. In this instance, Ardal argues that Hume, contra Donald Davidson, can give an account of pride which is compatible with the fact that pride need not involve belief in self-praiseworthiness, a point which is aptly illustrated by the development of national identity in countries such as Iceland, where increased awareness of the beauty of the scenery and inherited cultural traditions contributed to the individual's pride in his country.

The two essays directed toward the legal and social philosophy of Adam Smith appear to offer contrasting views of Smith's position in the debate about Hobbesian egoism. For, while Robin Malloy focuses on Smith's conception of individual liberty, Kenneth MacKinnon examines Smith's 'impartial spectator', a social construct whose judgements require the moderation of self-interested conduct and restrictions on man's 'natural' freedom. However, the thrust of the first paper is to counter the market individualist interpretation of Smith by pointing to the Smithian role of government in enhancing respect for the individual in a manner which is appropriate to the stage of economic development. Smith's 'natural liberty' (which, like Hume's artificial virtues, is an outcome of social interaction) is a far cry from doctrinaire libertarianism. MacKinnon's discussion takes this one stage further by tracing the affinities between Smith's use of the idea of an impartial spectator as the judge of moral propriety and the common law's conception of the 'reasonable man' as the embodiment of a standard of legitimate conduct. He concludes that Smith's spectator represents an 'inter-subjective' test which takes more account of

ordinary standards of judgement than the more severe 'objective' test of the reasonable or prudent man. However, it might have been noted that Smith, even more than Hume, likes to establish identity of outcome as between following the natural moral sentiments and promoting social utility.

The impartial spectator theme continues in the next essay, in which Stephen Hicks begins his analysis with Adam Smith's idea of sympathy and traces its development into Benthamite 'disinterestedness' as manifested in the nineteenth-century development of the tort of negligence based on the idea of a duty of care assessed by the standard of the reasonable prudent man. In the course of a compact and illuminating historical analysis, Hicks argues that, despite the evident continuity between the theories of Smith and Bentham, something is lost in the development of sympathy into institutionalised disinterestedness, in that disinterestedness (or neutrality) alone are not adequate for social cohesion.

Entering the same sort of debate by way of a rather different topic, José Canel looks behind Robert Park's analysis of 'public opinion' as a collective impulse open to media manipulation and traces its origin to the pioneering social psychology of the Scottish Enlightenment with its emphasis on the significance of individuals' inner reactions to the feelings of others. She notes the affinity of sympathy for virtue and explains its relation to evaluation of conduct as it is expressed in Thomas Reid's account of 'common sense', with its special combination of judgement and feeling. On this basis Canel outlines the parameters of a normative theory of public opinion which presupposes a community of sympathy and hence a community of virtue. She thereby seeks to rescue the concept of public opinion from its connotations of arbitrariness and irrationality.

In the next essay, Raimo Siltala returns us to the topic of punishment, this time as expounded by Bentham. Siltala sees Bentham's passion for his projected prison, the 'Panopticon', as a model of disciplinary technology based on continuous surveillance. Seeing Bentham through the perspective of Michel Foucault must lead, he argues, to a reassessment of the alleged humanitarianism of the Enlightenment. The scheme of corrective sanctions and training is certainly appalling, and Siltala does not spare us the chilling details of Bentham's awesome plan. The echoes of Hobbes and the contrast with A Wesley Cragg's are evident, although Siltala points to the difference between Bentham's disciplinary utopian Purgatory and Hobbes's personified social contract model 'Leviathan'. Siltala's paper can be read as a powerful affirmation of individual rights and the rule of law in contrast to the mechanised manipulations of Bentham rationalism.

L Gordillo Alvarez-Valdes deals with our conflict between freedom and justice in the work of John Stuart Mill. He emphasises the foundational role of feeling in Mill's account of justice, thus rooting it firmly in the tradition of Adam Smith's analysis of reactive resentment and the desire for harmony of sentiments. Freedom is therefore part of justice in that its infringement is a resentment-generating 'harm', although Mill is more prepared to correct the reactive sentiments by direct appeal to calculations of utility. Alvarez-Valdes

argues that this appeal to utility raises in acute form the problem of obligation and suggests that the way forward here is to stress the place of autonomy as the link between explanations of justice and freedom. Autonomy is both the essence of the right to freedom and one of the principal requirements for human happiness.

The volume concludes with a survey and critique of the development of the Enlightenment ideas of Liberty, Equality and Utility by Heta Häyry and Matti Häyry who trace the dialectic of utilitarianism from its classical form in Bentham to its liberal form in J S Mill. They approach their task through a consideration of various responses to the phenomenon of victimisation in the general interest, and deal in particular with the sort of solution proposed by Gordillo Alvarez-Valdes when he contends that, for Mill at least, autonomy is fundamental to happiness, or, in Heta and Matti Häyry's terms, that self-determination may be considered a human need which is more basic than the pursuit of pleasure but not so fundamental as the need to survive. This, however, puts liberty in danger from any policy designed to improve mortality rates. We are then taken on to J S Mill's attempt to remove self-regarding behaviour altogether from the realm of public policy, but this has the drawback that it denies any right to the active assistance of others. The authors suggest that it is therefore necessary to count as other-regarding any behaviour which frustrates the need satisfaction of other people without being directed at a more basic need of the agent in question. This carefully formulated principle is presented as a development of the thought of Bentham and Mill in a direction which meets the requirements of modern society.

In this brief introduction I have sought to highlight some of the recurring themes and contrasts which are to be found in this remarkably homogeneous collection of essays. I have not been able to do justice to their full richness and variety. Together the authors fully vindicate the value of the considerable scholarly attention which continues to be devoted to the legal and social philosophy of the British Enlightenment.

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CHAPTER 1

Hobbes, Freud, Conflict, Fear, Guilt

Timo Airaksinen

I

Hobbes is famous for his view of the egoist nature of man and the war in the state of nature. However, Hobbes scholars challenge the popular view and argue that Hobbes' man is not an 'arrant wolf', and that the state of nature, or its chaotic fighting, never existed.¹ A person has his moral and even altruistic capabilities from the beginning. Moreover, the war in the state of nature is merely a hypothetical construct which is realised to a varying degree whenever the legal social order is overthrown, so that people must rely on their private judgements and uncertain expectations. Their altruistic motives cannot repel the forces of destruction when the external circumstances are not right.

This is an important scholarly debate. I shall present an example of the historical influences of Hobbes, Sigmund Freud, and then evaluate the Hobbesian view of the original man and conflict in relation to Freud. Such a research strategy may reveal several interesting areas: first, Hobbes' view of man may itself be illuminated; second, the emergence of morality in human affairs studied; and third, psychological and philosophical approaches to the human condition compared. Of course, this is too much to be studied in any thorough manner. I try, therefore, to give a clear account of Freud's view of the original conflict in the state of nature, and show that this initially Hobbesian picture yields some strange results concerning the anthropological origin and nature of morality, because the key Hobbesian lessons are forgotten. I refer mainly to the idea of the law of nature, which is a problematic component in any empirical, psychological, vision of man: moral ideas are not merely psychological. But morality needs an explanation, too. Therefore, I shall refer to Hobbes' account of virtue, power and honour.