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Happy Slaves: A Critique of Consent Theory

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HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY. By *Don Herzog*. Chicago: University of Chicago Press. 1989. Pp. xv, 293. Cloth, \$45; paper, \$12.95.

Introduction: Definitions and Foundations

Don Herzog's¹ *Happy Slaves: A Critique of Consent Theory* seeks to provide a historically and sociologically grounded account of consent theory.² Herzog defines consent theory as "any political, moral, legal, or social theory that casts society as a collection of free individuals and then seeks to explain or justify outcomes by appealing to their voluntary actions, especially choice and consent."³ Herzog describes his project in the preface:

I want to pursue difficulties facing consent theorists — not from the outside, as a utilitarian or as a champion of some other view, but from the inside, as someone committed to consent. (The "critique" of my subtitle, then, is in Kant's sense: an exploration of the problems and limits of consent theory, but also an account of its strengths and, in the end, a vindication more than a rejection.) [pp. ix-x]

Herzog also explores and defends liberalism, a doctrine closely related to consent theory which holds that individuals should be free to pursue their own chosen values and goals so long as the pursuit of these goals and values is compatible with the rights and safety of other

1. Associate Professor of Political Science, University of Michigan. Professor Herzog is the author of *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* (1985); *As Many As Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609 (1987) (criticizing the way liberalism is characterized by members of the Critical Legal Studies movement); and *Some Questions for Republicans*, 14 POL. THEORY 473 (1986).

2. The literature on consent theory is voluminous. A good introductory discussion, with bibliography, is Weale, *Consent*, in *THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT* 95 (D. Miller, J. Coleman, W. Connolly, A. Ryan eds. 1987); see also Pitkin, *Obligation and Consent*, in *PHILOSOPHY, POLITICS AND SOCIETY* (P. Laslett, W. Runciman & Q. Skinner eds. 1972).

3. P. 1. The book's title refers to a problem confronting consent theory: consent theory is formal in the sense that it stipulates the basis for obligations — consent — without setting forth substantive criteria for determining what obligations merit consent. Thus, if one consents to being a slave, consent theory does not provide the resources for criticizing that choice. Indeed, since consent theory validates the obligations and states of affairs to which the individual consents, consent theory could, in principle, validate slavery. This is an embarrassment to consent theorists. Pp. 179-81. The happy slave is the slave who consents to enslavement. Herzog says that defenders of slavery in the antebellum south sometimes argued that their slaves were happy. P. ix. The veracity of this claim aside, the happy slave can serve as a hypothetical to be used in exploring consent theory: if we came upon a happy slave, would his happiness — his consenting to his condition — validate slavery? Is there a way, consistent with consent theory, to tell the happy slave that slavery is repugnant and that he should not be a slave? It is important to note that Herzog devotes only about fifteen pages to the problem of happy slaves. Pp. ix-xii, 59, 237-47. He prefers to explore the implications of historical incidents and episodes, rather than reason from hypothetical examples. P. xii.

members of society. Government, according to most liberals, should be limited to protecting the security of citizens and promoting the conditions necessary for the individual's pursuit of her chosen ends. Herzog provides a good description of the liberal state:

The liberal state doesn't tell us how to lead our lives. It doesn't insist that we be devoted to any one religion; indeed it is indifferent to whether we're religious at all. It doesn't instruct us on the merits of competing life plans, on whether it's better to pursue fame, money, or a nondescript happiness. Provided we don't harm others, the liberal state allows us to pursue our proudest aspirations — or to bask mindlessly in cathode rays emanating from our television sets. It is silent on a host of issues. [p. 148]

Herzog also uses his accounts of consent theory and liberalism to argue for and illustrate a method of interpreting political theory that focuses on historical and sociological context. A political theory, in Herzog's view, is a historical artifact which emerges at a particular place and time in response to specific historical and sociological developments. The historical and sociological developments to which consent theory and liberalism responded include the practices of politics and law in Tudor and Stuart England, the breakdown of a hierarchical traditional social order, and a preoccupation with the threat to traditional bases of social order presented by the phenomenon of the "masterless man."⁴

Political theories, according to Herzog, are "maps" of social reality — maps that are both descriptive and normative. These maps "both chart what actually goes on in the world and provide critical standards and ideals for appraising what happens" (p. 24). Herzog asserts that the impetus behind drawing and redrawing such maps is the realization that political beliefs and attitudes have become unsatisfactory guides to understanding and evaluating the social and political world.

Herzog calls his approach "sensible pragmatism" (pp. 22-23). Such an orientation focuses on political theories as responses to anomalies in existing webs of beliefs and practices. When beliefs about social order are rendered incoherent by social conditions or practices, revisions of political theories can be viewed as redrawings (either in whole or, more usually, in part) of the conceptual and theoretical "maps" of the social and political world. It is by use of such maps that people understand and evaluate the meaning of action and roles in the world.

Based upon this understanding of political and social theory,

4. "Masterless men," according to Herzog, were defined in seventeenth-century England as "all sorts of disorderly types not under the thumb of some authority." P. 45. Herzog points out that women too could be masterless and that the masterless, disobedient woman was viewed as a "source of disorder." P. 46. However, seventeenth-century writers refer only to "masterless men," so that is the locution Herzog adopts.

Herzog argues that consent theory arose in response to new social conditions and to a new set of political practices. These new conditions and practices rendered previous conceptions of the social world based on such hierarchical models as the great chain of being⁵ unhelpful in interpreting relations and conduct in that world. Consent theory, according to Herzog, was "posed as a superior alternative for understanding and appraising the social world" (p. 24).

But consent theory, in turn, produced its own dilemmas because it mapped a world in which individuals chose their own obligations and roles. Such a world seemed utterly to lack any basis for social order, especially to the seventeenth-century mind that habitually thought in terms of structured hierarchies that bound all members of society in complex webs of deference and authority. What was needed was an explanation of how a society of unbound individuals — masterless men — who created their own obligations, and could therefore decline to create and observe such obligations, could be peaceful and orderly. In a world mapped by consent theory how could there be liberty without license, freedom without anarchy? The solution, according to Herzog, was liberalism (pp. 161-62, 179-81).

Liberalism, and the vision of society it advocated and depended upon, provided the basis for social order. Just how it did so Herzog does not make clear. Nor does he very thoroughly explore the interrelations among the key concepts he discusses — consent theory, masterless men, liberalism, and social differentiation.⁶

I. AN OVERVIEW OF *HAPPY SLAVES*

Herzog begins the book with a methodological chapter in which he sets out his approach to political theory. He uses historical episodes from the English Civil War to discuss such issues as the relation of ideas to action (pp. 12-18), the interpretation of texts and the importance of authorial intent (pp. 25-27), the importance of pluralistic approaches to explanation in social theory (pp. 19-22), historicism (pp. 22-33) (replete with quotes that illustrate historicist sensibilities from

5. Pp. 40-42. Herzog explains the conception of the great chain of being:

The whole cosmos is animated by order, an order conceived of as a unified hierarchy. A great chain of being connects everything: God, the angels, the ether, man, animals, plants, and so on. Everything in the cosmos has its rightful place and must defer to its superior; so too in human society, where individuals belong to orders or estates of a clearly demarcated hierarchy. Place and degree emerge as central categories in this view.

P. 40.

On the great chain of being and other hierarchical models of order, see A. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1936); E. TILLYARD, *THE ELIZABETHAN WORLD PICTURE* (1943).

6. "Social differentiation" refers to a society in which the individual may occupy a number of roles, each of which is treated, for many purposes, as distinct. In a socially differentiated society, institutions also maintain a degree of distinctness: each has different concerns and, often, different norms. Pp. 165-68.

figures as diverse as Shakespeare, Adam Smith, and E.P. Thompson), and frameworks of political thought available in Tudor and Stuart England (pp. 33-38). The chapter also includes an interesting digression about pretexts.⁷

In the second chapter, Herzog discusses the rise of masterless men⁸ and explains the perception in Tudor and Stuart England that there were more of them roaming about than there had been before. While he does not say that the perception of increasing numbers of masterless individuals was accurate (p. 40), he does argue that economic dislocation associated with the enclosure movement, inflation, bad harvests, and an increase in population created large numbers of wage laborers and vagrants (pp. 48-49). He also shows why masterlessness was viewed as a problem: the prevailing social theories viewed society as a unified hierarchy in which each individual was understood to have a place in a structure of obedience and authority.⁹ Masterless men do not fit on this "map" of society.

In Chapter 3, Herzog offers an interesting interpretation of Hobbes' political theory. Herzog views Hobbes as attempting to reconstitute social order along hierarchical lines (p. 109). Herzog's reading of Hobbes is subtle and insightful. Hobbes, says Herzog, was responding to the rise of masterless men and asking how political order could be achieved if consent were the basis of authority and law. Hobbes saw "masterless men just as his predecessors always did: as a profound threat to order" (p. 80).

The explanatory problem [that Hobbes faced]: how can a population of masterless men hold together as a society? If people aren't caught up in ascriptive roles, condemned by birth to social hierarchy, how can they cooperate and live together peacefully? The justificatory problem: why should these individuals go along with schemes imposed by authority? Why should they obey the law? Why should they keep their agreements? Earlier societies entertained similar questions But the questions are transformed, they take on a special urgency, with the eradication of what one historian calls "the ties of dependence" that so obviously marked feudal society. [p. 79]

Hobbes' solution, according to Herzog, was to redefine key appraisive concepts, like justice, so that they could no longer be used for criticizing authority (pp. 104-05, 109). This authority would, Hobbes hoped, preside over a "unified hierarchy" (p. 109).

Although the chapter on Hobbes is fascinating, Herzog does not always alert the reader to how the discussion bears on the central themes of the book. Herzog's failure to connect adequately and

7. Pp. 15-18. The book is full of interesting digressions that, unfortunately, blur Herzog's arguments.

8. *See supra* note 4.

9. *See supra* note 5.

clearly the book's various themes is a weakness that blunts the force of his argument.

This failure appears again in Chapter 4, where Herzog discusses whether, and in what ways, law is political. This chapter shifts the book's focus to a discussion of liberalism and the kind of social order which liberalism promotes and presupposes. But the reader is not told how the interesting discussions of the rule of law and the relationship between law and politics bear upon consent and masterlessness. Nor is the reader given any transitions to aid her in moving from the emphasis on consent in the earlier chapters to the focus on liberalism and social differentiation in the middle chapters of the book.

Herzog's focus on liberalism continues in Chapter 5, appropriately titled "Liberal Neutrality." This chapter features a perceptive reading of Locke's *Letter Concerning Toleration*.¹⁰ Once again Herzog's skills as a subtle, perceptive, and sensitive interpreter of works of political theory shine forth. Herzog shows that when Locke seemed to describe the existing political and moral landscape he was really prescribing how it would be best for people to think about social roles and rules. According to Herzog, Locke's argument in the *Letter* can be viewed as an attempt to create a self-fulfilling prophecy: even though religious conflict had long been a source of political turmoil in England, if people would only treat religion as essentially private, and thus politically inconsequential, it would *become* private and inconsequential (pp. 165-66, 178).

In this chapter Herzog indicates that liberalism and social differentiation are related. Locke, according to Herzog, is trying to exploit and promote an emerging social differentiation (p. 168). In a socially differentiated society the individual occupies a number of roles. She may be a citizen, a member of a family, an employee, a member of a club, a worshipper at a church, and a student. These roles are separate; they are differentiated. The institutions in which she plays these roles — the state, the family, the business enterprise, the club, the church, and the university — are separate also; each has its own norms, purposes, and jurisdiction over its members. In liberal society, Herzog says, the separateness of the roles and the distinctiveness of institutions should be maintained so that an individual's occupation of one role will not affect her treatment in another role. Additionally, institutions should respect the boundaries of their authority. Thus, as Locke's *Letter* argues, government should not dictate religious beliefs, nor should it base its treatment of individuals upon their religious beliefs.

Herzog does not specify who dictates these boundaries or how they should be defined. There are a variety of ways of establishing the juris-

10. J. LOCKE, A LETTER CONCERNING TOLERATION (J. Tully ed. 1983).

dictional boundaries of institutional authority. History and traditional social practices are important, though perhaps rationally suspect, ways of doing so. One could also argue that such boundaries should be functionally defined. A functional approach would look to the functions of the institution and would argue that the scope of the institution's authority should be confined to the purposes for which it exists. This approach would, for instance, posit the function of government as regulating the public, or political, interactions of the community's members. Herzog seems to embrace such an approach (p. 167).

The problem with the functional approach, however, is that it is question-begging because it defines the scope of an institution's authority by reference to concepts — in this example the “public” or the “political” — that are themselves (at least in part) defined by reference to beliefs about the proper scope of institutional authority. Any definition of what *is* public, or political, is intimately tied to an understanding of what is the proper reach of public, or political, authority — that is, the scope of governmental authority. The public things just *are* the things over which public authority — government — rightfully extends.

Herzog is not troubled by the dilemmas posed by such foundational issues. He believes that our definitions of institutions, authorities, and practices are determined contextually. We can only evaluate and interpret them “from an internal stance” (p. 167). Thus he relies on “our” intuitions about the functions and scope of the authority of various institutions.¹¹ His approach, then, is simply to insist that, for instance, government should not extend its authority over areas beyond its jurisdiction. These are perplexing issues. Perhaps Herzog should have dealt with them more directly and elaborately in *Happy Slaves*.

In Chapter 6, Herzog argues that the legitimacy of government is a function of its responsiveness to the wishes of its citizens. “Given the conditions of modern society, I suggest, any plausible account of legitimacy and obligation must center on whether the state is for the most part responsive to the people” (p. 205). He also argues that the consent of the governed “isn't central to consent theory at all” (p. 182).

Chapter 7, the final chapter of *Happy Slaves*, deals with some conceptual problems raised by consent theory. Herzog explores the limits of the theory as a map of social practices both in Tudor and Stuart England and in contemporary western society. The chapter considers how “obstacles to autonomy” (p. 220) limit the voluntariness of

11. For Herzog's argument that we argue from within a set of social practices — as participants in those practices, see *infra* note 13. Herzog frequently relies upon characterizations of what “we” believe to justify his normative arguments. This is problematic. See *infra* text accompanying notes 13-15.

choice. These obstacles include societally imposed definitions of appropriate conduct, limitations on options available to individuals (pp. 225-32), and aspects of individual identity over which the individual has no control, such as, for instance, who her parents are, where and when she was born, and what her genetic makeup is (p. 234). Since consent theory explains moral obligations by specifying what the individual has voluntarily chosen, these obstacles to voluntary choice, if inexorable, will compromise the usefulness of consent theory as a descriptive map and normative guide.

Herzog does not think that we should abandon consent theory, however, even if the individual's choices are often not wholly voluntary, but are, in part, the products of such things as the limited options she has, her genetic makeup, when and where she happened to be born, and her being socialized to believe and desire certain things. Herzog believes that we should be aware of these limits on voluntariness and thus be aware that consent theory oversimplifies the normative world it maps. But he insists that despite these problems, consent theory does present a useful descriptive and normative guide to contemporary social life. "It is, on the whole, a reliable map, an admirable guide" (p. 247).

II. UNCLEAR RELATIONSHIPS AND OPEN QUESTIONS

Herzog does not adequately explain the relationships between the theories and the sociological phenomena that are the central themes of the book. While his argument that consent theory and liberalism emerged in response to seventeenth-century British politics and religious conflict, as well as newly emerging social actors and structures, is suggestive and illuminating,¹² it leaves the reader uncertain about a number of central issues. Specifically, Herzog does not explain (1) the relationship between the two sociological trends of masterless men and social differentiation, or (2) the relationship between liberalism and consent theory on the one hand and the sociological trends (masterless men and differentiation) on the other.

These issues are important because the social world that Herzog describes as emerging in the sixteenth and seventeenth centuries, a world of social differentiation inhabited by masterless people, is, at least with respect to those features, a world that we inhabit today.

12. This view of liberalism as a response to political and religious discord is neither new nor especially controversial. See e.g., J. DEWEY, *LIBERALISM AND SOCIAL ACTION*, 4-6 (1935); Stout, *Virtue Among the Ruins: An Essay on MacIntyre*, in 26 *NEUE ZEITSCHRIFT FÜR SYSTEMATISCHE THEOLOGIE UND RELIGIONSPHILOSOPHIE* 256, 267-71 (1984). (A revised version of Stout's essay appears in J. STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* ch. 9 (1988).) Herzog's focus on emerging social actors (the masterless men, see *supra* note 4) and social structure (a socially differentiated society, see *supra* note 6), however, is important even if not completely novel. See e.g., Holmes, *Aristippus in and out of Athens*, 73 *AM. POL. SCI. REV.* 113 (1979).

Consent theory and liberalism are important ideological and theoretical features of the contemporary world; they are used to explain, justify, and criticize current political and social arrangements. Herzog's account, while suggesting a relationship between these issues, does not explain with sufficient clarity what that relationship is.

A. *Masterless Men and Social Differentiation*

How did the presence of masterless men in English society relate to the process of social differentiation? It is tempting, on a cursory reading of Herzog's account, to conflate the two, and, historically, perhaps masterlessness and social differentiation were aspects of the same process of social change (although Herzog does not establish this). But *conceptually* one does not necessarily imply the other, as Herzog himself notes (p. 179), and it is unclear how Herzog does view their relation.

Herzog first discusses social differentiation in the context of his admirable analysis of the separation of law and politics (p. 112). "In a highly differentiated society," he explains, "each individual occupies a number of different roles." He notes that "the concerns of each role differ. . . . The norms for appropriate behavior in each role differ too. . . ." (p. 166). Institutions are also differentiated: they have "distinct identities" with "different concerns" as well as different "norms and resources" (p. 167). Differentiated societies are also marked by disapproval of what Herzog calls "leakage" across boundaries: "Individuals should be selectively forgetful in their different roles and attend only to considerations that are contextually defined as relevant" (p. 166).

However, Herzog does not explain the relationship between the presence of masterless people in society and social differentiation. It seems possible to conceive of a highly differentiated society in which people are *not* masterless, in which each separate institution is governed by a highly efficient authority whose jurisdiction extends over only that particular institution. Thus we might imagine a functionally federated society. In this society, the individual as a student would be subject to school authorities, as a religious believer to religious authorities, as an employee to her employer, as a family member to the matriarch or patriarch, and as a citizen to her governors. The roles and institutions would be separate. Leakage would be nonexistent (if that is a necessary feature of social differentiation), but the individuals who constitute the society would not be masterless. Indeed, they would be subject to numerous masters. In such a society, custom and, perhaps, comity might maintain the jurisdictional boundaries separating and sustaining the different authorities.

Such a society might not ever have existed, and Herzog might argue that such a society would be most unlikely ever to come into be-

ing. Herzog *might* make such an argument, but he does not. He simply does not clarify the relation between masterlessness and social differentiation. Moreover, when he does briefly note the possibility of a differentiated, yet authoritarian social order like the one described here, his response is puzzling: "We wouldn't call such a world liberal, I take it. A liberal world must be, in part, a world of consent theory; the contingent but deep fact that the two grew up together is reflected in our ordinary usages" (p. 179). It is not clear what this means or how it responds to the problem. We have, therefore, an account of the emergence of consent theory and liberal theory that hinges on two sociological phenomena, the relationship between which remains obscure.

B. *Liberalism's Relationship to Social Differentiation*

Herzog's explanations of how consent theory relates to liberal theory and how the theories relate to the sociological phenomena (masterlessness and social differentiation) are puzzling because he does not attempt a sustained account of their connections with one another. It is clear that he thinks that they are related and that they are to be explained in terms of each other, but the reader is left to construct the explanations for herself.

Although Herzog is not able to offer a precise explanation of the relationship between consent theory and liberal theory, he sees the need to try. As a result the reader can at least see the complexity of the relationship. Of the relationship between consent theory and liberalism Herzog writes:

Liberalism provides an account of social order that makes consent theory an attractive view of society, instead of a threat. It explains how masterless men can live together peacefully instead of toppling all social order. . . . Liberalism includes a focus on a particular set of familiar political practices, though of course it's an open question how those should be characterized and defended Consent theory includes purely descriptive projects in social theory . . . that aren't liberal in any straightforward sense. So the two are by no means coextensive.

Still, there is a large area of overlap between the two. [p. 179]

Herzog might have done more to explain *how* liberalism met the threat to social order posed by masterless people. The answer seems to be that liberal neutrality and role differentiation can keep some issues, like religion, from becoming politicized. The liberalism that Herzog describes limits the reach of the government, and so restricts anyone's use of state power for certain kinds of ends.

Liberalism and social differentiation, as Herzog describes them, also make one's activities in one role irrelevant to one's activities in another role. Thus my religion should be irrelevant to my business practices. This means that my customers' religions are also irrelevant, so I will not discriminate against any for religious reasons. This would

reduce social conflict. But it is not clear that this account of liberalism answers all the questions that were raised about a world of masterless men. For instance, why should the individual bind herself to any obligations at all, and why should she honor the obligations to which she did bind herself?

Herzog also does not thoroughly define the relationship between the theories and the social and historical phenomena that he discusses. When he does attempt some characterization of the relationship he is both pithy in the extreme and, seemingly, studiously vague. The reader is left uncertain about which, if any, of several imaginable ways of characterizing the relationships between the theories (liberalism and consent theory) and the sociological features (masterlessness and social differentiation) would gain Herzog's assent. Perhaps the theories and the sociological phenomena arise together, deeply and mutually implicated in the same social "logic." One category might come into being because of the other. For instance, the theories might arise to justify the social phenomena or to explain them, or perhaps as some sort of theoretical "reflex" of them. But Herzog does not do more than hint at his view of these possibilities.

He claims that by showing the "deep connections" between liberal values like individuality, autonomy, and freedom on the one hand, and social differentiation on the other, and by "explaining how a studied liberal neutrality *helps underwrite and protect* that differentiation," one justifies social differentiation (p. 175; emphasis added). Yet it is unclear what Herzog means by to "underwrite and protect."

In his narrative he notes that "role differentiation is at the heart of liberalism" (p. 147). He notes that Locke's views about social differentiation were not yet descriptively accurate when Locke was writing, but that Locke and other liberals created a "self-fulfilling prophecy" (pp. 165-66, 178): by learning to think of the world as if it were socially differentiated, people created a socially differentiated world. But Herzog's account also hints that social differentiation was not just a creation of liberal political theory: Locke, we are told, in "urging the merits of social differentiation" was "opportunistically extending a happy trend" (p. 168). This suggests an independent basis for the existence of social differentiation. Further, Herzog notes that in arguing for social differentiation, liberals are upholding the social order "that makes [liberal] pursuits possible" (p. 180). Thus, Herzog is not suggesting simply that liberalism produced social differentiation.

These are difficult issues. The analysis thus far shows that Herzog probably would reject both an argument that liberalism is conceptually and sociologically dependent upon social differentiation, and an argument that social differentiation is conceptually and sociologically dependent upon liberalism. In *Happy Slaves*, liberalism and social differentiation appear to be in a complex relationship: rather than one

being dependent upon the other, they are co-dependent. Liberalism justifies the differentiated society, and it depends upon that society for its force. This may be what Herzog means to suggest when he states that "liberalism *hangs* on a certain account of social order," but he could be clearer (p. 180; emphasis added).

Herzog is more illuminating about the relationship between consent theory and masterless men. He argues that consent theory provides a way of conceptualizing social order in the wake of the increasing irrelevance of older hierarchical conceptions of social order — an irrelevance produced by increasing concern about masterless men (pp. 39-45).

How consent theory relates to social differentiation, however, is unclear, in part because when Herzog discusses social differentiation he usually confines his discussion to liberalism. However, consent theory obviously is needed to help "map" a society that promotes autonomy, freedom, and individuality, and that offers the individual "a range of significant options" — that is, a liberal, socially differentiated society (p. 173). Since such a society promotes choice, consent theory, which focuses on consent and choice, will be a useful explanatory guide.

C. *Explaining and Justifying Social Differentiation*

Part of the reason for the difficulty that Herzog has in establishing the relationship between social differentiation and consent theory is that the nature of social differentiation is itself unclear. His presentation suggests that social differentiation is more than just a descriptive sociological concept. His discussion implies that social differentiation has a logic which is normative and which suggests how society should be structured and how individuals should behave. This is consistent with his view that concepts and categories in social and political theory may be both normative and descriptive (p. 24).

"It's characteristic of such role differentiation that we not allow the concerns of one role to intrude on action within another role" (p. 112). Herzog calls such intrusion "leakage," and repeatedly indicates that it should be proscribed (pp. 167-68, 172). It is not clear from Herzog's presentation where this moral judgment comes from. In other words, it is not clear how the fact of social differentiation (if it is a fact) implies the value judgment that leakages are bad.

Herzog resorts to a number of strategies to try to bridge this gap in the presentation. One involves the claim that *irrelevant* factors should be forgotten or ignored in social action (p. 166). Thus Herzog asserts that leakage should not be permitted because leakage involves considering one of a person's roles to determine how to treat that individual when she is occupying another role. Herzog insists that a person's

other roles are irrelevant for considering what should be done to that person in any particular role (p. 166).

This approach is problematic. The determination of what is relevant involves a normative judgment that itself needs to be justified because irrelevant seems to mean "*should not* be taken into account." Thus Herzog is justifying a normative judgment against leakage with a normative judgment about relevance. All his strategy does is thrust our question about what justifies the normative judgment against leakage back one level: If leakage is bad because it involves the use of irrelevant considerations, we might ask what justifies the judgment that a given consideration is irrelevant?

Herzog recognizes this problem and resorts to three strategies, the first two of which are functionally equivalent. He first argues that determinations of relevance, and the judgments about leakage which are derived from these determinations, are "contextual" (p. 167); they are based on our interpretation of "our own social practices . . . from an internal stance, committed to improving or even radically altering them" (p. 167).

But this approach also raises questions. Where does this commitment come from? What justifies it? What guides the judgments we make about what constitutes improvement? And what justifies our imposing the costs of these improvements on fellow participants in these social practices? Moreover, Herzog's argument appears to be somewhat circular: the social practice of assessing normative relevance is being justified according to criteria specified by a web of social practices that contains the social practice under scrutiny.¹³

Herzog's second strategy is to resort to intuitions that "we" (his audience) supposedly share (p. 168). He criticizes such appeals early in the book, noting that political theorists who make them often underestimate the diversity of the audience for whom they write, and thus the likelihood that members of that audience will not share the beliefs the theorist says "we" have (p. xii). Nevertheless, Herzog repeatedly makes just such appeals. For example, when discussing the values of security and fairness, which Herzog says a liberal, nonpolitical legal system preserves, he writes, "[W]e are deeply committed to them, and it would take an interesting account to show us why we shouldn't be" (p. 134; emphasis added). On preventing leakage be-

13. Herzog might reply that although these beliefs are part of, and constituted by, a web of beliefs, we have no choice but to argue from within the context of *some* web of beliefs because criticisms of values and practices do not make sense unless there is some background "story" that gives the criticism of, and the proffered alternatives to, those values some "point." D. HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 231 (1985). On this view, perhaps, we can rationally examine a part of our web of beliefs, evaluating that part from the perspective of the entire web. See *id.* at 231-35. This response does not answer the other problems the text raises about contextual justification nor does it respond to questions about the identity of, and consensus among, the audience that supposedly shares the internal perspective to which Herzog appeals. See *infra* text accompanying note 14.

tween roles in a socially differentiated society, Herzog writes, "And again leakage generally ought to be resisted. *We* don't want the state to meddle in religion or army leaders to roll in the tanks and overturn political decisions or nepotism to strangle the market" (pp. 167-68; emphasis added). Finally, he says "*We* don't refuse Catholics political standing; *we* don't exclude metics and base merchants . . ." (p. 172; emphasis added).

It is not that Herzog's views about what "we" believe are outlandish. Certainly, he sensibly notes that it would take an interesting argument to show that security, fairness, autonomy, liberty, and orderly dispute resolution (which liberal, socially differentiated arrangements supposedly secure) are not valuable (pp. 134, 173-75). But the resort to what "we" believe ignores the diversity of the audience. And more importantly, to invoke security, fairness, autonomy, liberty, and orderly dispute resolution as values that "we" share without defining what these values mean and entail is to ignore their complexity. What security, fairness, autonomy, liberty, and orderly dispute resolution mean is at least contingently contestable. And the trade-offs involved in obtaining these values are not as simplistic as Herzog's bland assertions would indicate.¹⁴ For while these values are obviously good, they are, until defined and elaborated upon, also empty. To defend a practice by merely invoking one or several of these values involves more rhetoric than argument.

14. On the contestability of political concepts, see T. BALL, *TRANSFORMING POLITICAL DISCOURSE: POLITICAL THEORY AND CRITICAL CONCEPTUAL HISTORY* 13-14 (1988); W. CONNOLLY, *TERMS OF POLITICAL DISCOURSE* (2d ed. 1983).

Herzog is rather flippant in dealing with those who have qualms about the trade-offs involved in embracing liberal practices. For example, in the space of one page, he dispatches both Alasdair MacIntyre (author of the widely discussed book, *After Virtue*) and Michael Sandel (author of an influential critique of John Rawls and contemporary liberalism, *Liberalism and the Limits of Justice*), both by the sovereign determination of the royal "we." P. 236.

Herzog's description of MacIntyre's views is not very clear. He seems to say that MacIntyre claims that moral agency is destroyed because the modern individual occupies numerous roles. Since she is not identified with a single role, the modern individual can distance herself from each of her roles. This, MacIntyre argues, creates conflicts of duty that are not resolvable by any independent criteria. Lacking criteria for resolving these conflicting demands, the individual cannot make moral choices. All that is left for her to make are "blind commitments." P. 236. Herzog's answer to this argument is that some premodern individuals faced similar conflicts of duty and role. Additionally some modern individuals do not face such conflicts because they are confined to a single role. Modern individuals who are confined to a single role include inmates of jails and asylums. From this Herzog concludes, "But surely *we* don't want to say that only inmates of total institutions, of jails and asylums, are true moral agents. . . . Hamlet's endless deliberations may be maudlin . . . but would *we* recognize him as a moral agent if he automatically went ahead with the murder?" P. 236; emphasis added. So much for MacIntyre.

Sandel argues that the liberal conception of the self is impoverished and incorrect because liberals believe the individual is capable of taking a detached view of her goals and values, but, in reality, this is not possible because the individual self is *constituted* by its commitments. To this argument, Herzog blithely replies, "[*We*] do want to secure for individuals the right to distance themselves however they can from their previous identities. More bluntly yet, *we* don't want courts to refuse to let, say, Amish adolescents depart from their communities on the grounds that they misunderstand their identities when they do." P. 236; emphasis added. This is not an argument. It is a series of assertions about what *we* believe.

It seems unsatisfactory to prescribe particular forms of social differentiation and condemn leakage by invoking values "we" hold without defining those values and subjecting them to a process of reasoned elaboration. Moreover, it is not clear why it is justifiable for "our" judgments against leakage to be predicated upon the fact (if it is a fact) that ours is a socially differentiated society. Finally, this approach suffers from the same drawback as the contextual strategy: "we" who are making the judgments are constituted by the web of social practices that contain the social practices under scrutiny.¹⁵

Herzog's third approach is to argue that strictures against leakage are characteristic of liberalism (p. 112). Thus, judgments about social differentiation, leakage, and what characteristics and roles should be taken into account in political, social, and legal decisionmaking are justified by their consonance with liberalism. This approach forces us to search for the justification of liberalism and then to assess what judgments liberalism, in turn, justifies. Since Herzog's account suggests both that the weight given to liberal values (such as freedom, autonomy, and individuality (pp. 173-75)) and the way these values are defined may depend on the context of a socially differentiated society (pp. 173-75), we have come full circle. Somehow social differentiation, liberalism, and a set of values, which, arguably at least, are desirable, are mutually implicated.

CONCLUSION

Herzog does not resolve these questions. The book, however, would be valuable even if it only suggested them. Fortunately, the book does a good deal more. It contains interesting and illuminating discussions of political thinkers, historical episodes, and current conceptual puzzles.

Happy Slaves, however, would have been better if Herzog had more frequently explained to his reader the direction of his argument and how any given section relates to the broader themes of the book. Additionally, Herzog cannot resist digressing whenever the fancy strikes him. The book is loaded with side trips. These excursions are usually very interesting, but they interrupt the flow and argument of the book. The result is that the reader is like a traveler being led by a guide who wants to show him what is behind each tree in the forest. Ultimately the traveler becomes exhausted and frustrated; he can no longer remember where the main path is or where he is being led. This is unfortunate because whether or not the reader agrees with him, Herzog has a great deal to offer. He is a congenial tour guide, and for

15. See *supra* note 11 and accompanying text.

the traveler less concerned with the destination and more concerned with the journey, the trip is worth taking.

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