

Continuums¹

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ABSTRACT

There are continuum problems in political economy. There are no objective non-debatable solutions to any of them. All answers to them are arbitrary. Responding to these challenges are, ideally, the responsibility of courts, juries, etc.

I. Introduction

There is a plethora of problems arising in the analysis of law and political economy having in common with each other that their challenge arises from the fact that they can be placed upon a continuum. We argue that there is no real solution to this continuum problem, at least not in terms of distance, or time, or any other objective criterion. We consider physical invasions in section II. Section III is devoted to an exploration of continuums in age related issues and IV to homesteading. We conclude in section V.

II. Physical invasion

A. Crime

First consider in the regard the garden-variety issue of the (threatened) punch in the nose. If A shakes his fist right under B's nose (3 inches away from making contact) while yelling at him, in the context where this can be construed as a real threat e.g., late at night in a restaurant known for its bar-room brawls, or in a dark alley, then there is no doubt that B would be justified in taking all reasonable violent actions aimed at protecting himself.

¹ We would like to thank Gary Herbert for help on an earlier draft of this paper. All remaining errors and infelicities are our own responsibility.

Were B to punch A first, or kick him in the crotch, or even stab or shoot him, any reasonable jury would characterize this as a defensive act, even though the first use of violent force emanated from B. That is, A's act would be considered enough of an immediate threat, a "clear and present danger," such that B's response would constitute not an invasion of another person, but rather a defense of himself.

Now suppose that the threatening fist-shaking took place not 3 inches away from its intended victim, but rather 3 miles away. Everything else remains the same (we stipulate that B has super good eyesight² and can perceive this threatened action). Would B be justified in resorting to deadly force in order to ward off this "threat"? Not at all.³ Even the meanest intelligence would know that this is not a real threat.

If the same action is a threat at 3 inches but not at 3 miles it follows ineffectably that at some point in between these two distances its very nature changes from the one to the other. Suppose, as a first crack at this problem we pick some such point, say, 30 yards. This means, if it means anything, that at 29 yards 11 inches it is permissible to reply to this act of fist shaking with dangerous, even deadly, force, while if it occurs at a distance of 30 yards and 1 inch, then all bets are off: if B responds physically in this situation, then it is he, B, not A, the fist shaker, who is guilty of engaging in criminal behavior.

One problem with this answer is that the dividing line is so narrow: two inches in our example. Of course, mathematically, lines are not at all as wide as that; indeed, their width approaches zero. But no matter how wide, no solutions are in sight. If narrow, then there doesn't seem to be much difference between either of the end points; if very wide, e.g., in the extreme, three miles minus three inches, we arrive back at the very problem we are attempting to solve.

Another problem is that no matter what division between licit and illicit activities we choose, it is always possible to ask, "Well, if we move a small amount in one or the other of the two directions, how can that possibly make

² We are indebted to Nozick (1974) for blazing the trail with regard to imaginary inventions, abilities, situations and innovations that help shed light on philosophical puzzles.

³ Barnett, 1998 discusses a death threat uttered in the context where it can only be actualized in the future, and correctly maintains that it would still be justified in killing the threatener, even though the element of clear and *present* danger is lacking. E.g., the case of the Fatwa issued against Salman Rushdie, the Indian British novelist. The difference between the two cases is that it is not clear what the man is doing who waves his fist at the "nose" of someone else from three miles away, whereas the implication of the Fatwa is all too clear. For a critical review of Barnett, 1998, see Kinsella, 1998.

a difference.” That is, in our case, if 30 yards is where the line is drawn in the sand, then why not 25 or 35 yards?; why not 29 or 31, for that matter.⁴

How, then, can we solve the problem of whether or not a response or retaliation against a threat is justified or not, given the conditions as depicted above? The only answer is that there is no answer, at least not one that admits of geographical extension. That is, no single cut off point will be both reasonable and non arbitrary.

What, then? The answer forthcoming from this quarter is to utilize the “reasonable man”⁵ (Rothbard, 1990) standard.⁶ Under ideal conditions, were a jury shown a film of exactly what happened, guilt or innocence on the part of B for retaliating or engaging in a “first strike” against A would be based upon the evaluation of the danger B faced as evaluated by 12 disinterested⁷

⁴ There are some issues in libertarian crime theory that do admit of precision. For example, that punishment shall consist of “two teeth for a tooth,” and not 1.9 or 2.1 “teeth.” See on this: Block, 2002-2003, 2003, 2004a, 2004b, forthcoming; Block, Barnett and Callahan, forthcoming; Olson, 1979; Rothbard, 1998, 88; Whitehead and Block, 2003.

⁵ Some feminists have put forth a “reasonable woman” standard as an alternative (*Ellison v Brady*, 199, cited in McElroy, 2001, p. 38). The present authors use the word “man” in the traditional sense, to include both men and women. If women on balance are more fearful than the average human being, and men less so, then our standard would be pegged midpoint on this continuum. That of the feminists would be skewed in favor of those on the risk avoider side of the fence.

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<http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=19/194efb4cb63ca323ab32d9ae9418265e>: “A fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance, or fact is used as an objective standard by which to measure or determine something (as the existence of negligence). Merriam-Webster’s Dictionary of Law (1996).

⁷ Disinterested is defined by the dictionary of English (<http://www.tiscali.co.uk/reference/dictionaries/english/data/d0081934.html>) as follows “If you are *disinterested* in something you are impartial and do not take sides: *A disinterested observer of the scene would have wondered what all the fuss was about.* If you are *uninterested* you have no interest at all: *The player was uninterested in the public reaction to his remark.* *Disinterested* is often used instead of *uninterested* to mean lacking interest. This use is widely regarded as incorrect and should be avoided, especially in formal writing.”

persons.⁸ This does not have at all the precision of a distance criterion, but, for all that, we maintain that it is far more satisfactory.⁹

B. *International Relations*

When the U.S. entered Viet Nam, the “hawks” claimed that this was only a defensive maneuver, in that the communists were intent upon conquering us, and would do so country by country, until they were poised at our jugular, having taken over every other nation in the world. Why wait until they could invade us from their bases in Mexico and Canada? Why not fight the enemy while they are still some distance away? Theirs was the “Domino Theory”: once allow the enemy to gain a foothold, or, worse, to increase it, then like dominos all lined up, one falling would trigger all the others until we were undone.

The “doves,” in contrast, took the position that this was arrant nonsense. The fate of a small country 10,000 miles from our borders was irrelevant to our own national security. In the event, history seems to have proven the isolationists correct. The communist north overran the non-communist southern part of the country, and, instead of the dominos leading to the demise of the U.S., the ostensible beneficiary of this theory, the U.S.S.R. ended instead.

Where, then, should the U.S. draw a “line in the sand,” stating so far but no further, if it is to maintain the distinction between and offensive and a defensive foreign policy? The Monroe Doctrine attempted to draw this line at the borders of North and South America. Were this criterion employed, then a take-over by the armies of Cuba or Nicaragua would be seen as serious indeed, while what goes on in Viet Nam, or on the Korean Peninsula, or between the Arabs and the Israelis would be interpreted as outside of our sphere of interests.

One difficulty with the hawkish interpretation is that any unrest, anywhere in the world, serves as a trip wire for the U.S., involving us in countries the only benefit of which is that we learn the spelling and location of out of

⁸ We choose the number 12 for illustrative purposes only because most juries in the U.S. are composed of this many people. Were the number, instead, 9 or 25, this would not change our point in the text.

⁹ But not perfectly so, since it is so subjective. We anxiously await an improved criterion. It cannot be denied, as a critic of ours stated, that “jurors’ beliefs are influenced by their personal experiences, cultural, religious, political backgrounds.” But this applies to *everyone*, without exception.

obscure cities. Then, too, it is difficult to generalize this position. E.g., if it is really only “defensive” for the U.S. to act in such a manner, and defense is the proper prerogative of *all* nations, then countries, hundreds of them, will be continually tripping over each other in very far corners of the globe.

On the other hand, it would take a rather pacifist kind of government in the U.S. to look with equanimity at a hostile take over of the two countries which are our immediate neighbors, to our north and south, respectively.¹⁰

The international analogue to the “reasonable man” standard in the case of domestic crime would appear to be to adopt a reasonable Martian or Venusian standard. Suppose that an inhabitant of one of these planets were looking down upon us through a telescope powerful enough to register to movement of armies, but was disinterested enough in earthly events to be able to adopt a judicial attitude with regard to them. Would he characterize the U.S. as a world bully in the last half of the 20th century? Based only on the fact that we had stationed troops all over the third planet, and that no other country had emulated us in this regard, it is difficult to resist this notion.¹¹

Consider the following argument, regarding the above: “... maybe if the Venusians or Martians saw what the Communists and the terrorists did to their civilian populations, maybe they would agree that somebody had to do something to prevent such crimes. If someone saw a woman being raped, would he intervene or would he ask a reasonable man what he would do before intervening?”

We do not accept this perspective. In our view it is simply not the job of the U.S. government to be the world’s policeman. Nowhere in the Constitution of the U.S. (<http://www.law.cornell.edu/constitution/constitution.overview.html>) is any such role articulated.¹² Of course, all men of good will would try to stop a

¹⁰ However, it would be hard to deny that much of Soviet foreign policy was dedicated to the establishment of a cordon sanitaire around its own borders. What is sauce for the goose would not appear to be so for the gander, at least in some circles.

¹¹ For the view that there is a sharp disanalogy between individuals on the one hand and national governments on the other, see Rothbard (1984).

¹² Not that this should be definitive. See on this Spooner. [1870] 1966: “It is true that the theory of our Constitution is that all taxes are paid voluntarily; that our government is a mutual insurance company, voluntarily entered into by the people with each other; that each man makes a free and purely voluntary contract with all others who are parties to the Constitution, to pay so much money for so much protection, the same as he does with any other insurance company; and that he is just as free not to be protected, and not to pay tax, as he is to pay a tax, and be protected. But this theory of our government is wholly different from the practical fact. The fact is that the government, like a highway-

rape in progress. But there is a disanalogy here. Suppose A hires B to be his bodyguard, and B, instead of protecting A, rushes off to stop a rape in progress across the street, leaving in danger the person he is contractually obligated¹³ to protect. Would this bodyguard be justified in running off, even, stipulating, for a good purpose, to this end? Of course not. The point is, if the bodyguard wants to stop rapes on his own time, we can all applaud him for that. But, if he does so in direction contravention to his obligations, that conclusion cannot be justified.

How does this translate into international relations? If this critic and others like him wish to stop “rapes” abroad, let them do just that. But they are not justified in bringing in the U.S. government for that role, for just as in the case of the bodyguard, this organization has an entirely different task. Let this critic and his ilk follow the path of the International Brigades, including the Abraham Lincoln Battalion aka “the Lincoln Brigade” (<http://search.eb.com/eb/article-9042576>) that fought in the Spanish Civil War of 1936-1939. We agree that “*somebody* had to do something to prevent such crimes.” We disagree that it had to be the U.S. government.

Now consider the following point that could be made by a critic: “The authors of this paper are correct in implicitly pointing that the U.S. facing terrorists attacks may be due to past “bad” invasive foreign policy. However, one might argue that it is in the past, it's a sunk cost and nothing can be done to change the past.”

Not so, not so. Of course, the critic is correct in his view that nothing can be done to rectify past mistakes. But, assume our *thesis* is correct. That means that *every* unnecessary and illicit action of the U.S. government¹⁴ over and above the limited role assigned to it by the Constitution creates problems. Yes, it applies to past events, about which nothing can now be done. But, it *also* holds true for present and future such acts, which are not yet “sunk costs.” That is, improper invasions *now* undertaken by the government will have negative repercussions in the future, and these can *at present* be obviated.¹⁵

man, says to a man: ‘Your money, or your life.’ And many, if not most, taxes are paid under the compulsion of that threat.”

¹³ Apologies to Spooner, here.

¹⁴ This applies to *all* governments, not only that of the U.S. In our view, they *all* ought to be limited in scope.

¹⁵ Ferguson (2000) argued in part that Britain's entry into what had been a European conflict between Germany and France escalated the conflict into The Great War (We owe this point to Bill Butos). See also Powell, 2005 (We owe this cite to Tom DiLorenzo) and Taylor (1972, 1996).

III. *Age of maturity*

When does a child become an adult, for legal purposes? For some religions, confirmation can come as early as 9-13, which is, presumably, the number of years required before a person can make an informed decision on such matters. In many states of the union, a youngster can obtain a license to operate a motor vehicle when he is 14-16 years old. School leaving ages, and the age before which a work permit can be issued, are of similar vintage. The military draft kicks in at 18, the drinking age and that for sexual consent varies between 18-21, the latter of which is required for voting. No one may take the office of congressman before reaching age 30, nor may a president of the U.S. be sworn in before reaching 35.¹⁶

So which is it? When does a child become an adult? As with all continuum problems, the solution does not lie in objective numbers. For no matter what age is selected, it is always possible to be critical, and reasonably so, on the ground that an age one day older or younger would also be justified. It is always possible to point to those under this age who are more mature than some who exceed it. Surely, there are some if only a few 12 year olds who act in a more adult manner than some who have reached the age of 21.

Other criteria must instead be employed if the continuum problem is to be finessed. One such is offered by Rothbard (1998). Here, the criterion is not calendar years, but rather the type of human action, or homesteading, which is indicative of maturity. The child becomes an adult in effect when he seizes control over himself by setting up his own household. This might have to be done under the approval of a judge, but in this manner a modicum of common sense is inculcated into what would otherwise be a sterile objective criterion. States Rothbard (1998, p. 103) in this regard:

“But when are we to say that this parental trustee jurisdiction over children shall come to an end? Surely any particular age (21, 18, or whatever) can only be completely arbitrary. The clue to the solution of this thorny question lies in the parental property rights in their home. For the child has his *full* rights of self-ownership *when he demonstrates that he has them in nature*—in short, when he leaves or “runs away” from home. Regardless of his age, we must grant to every child the absolute right to runaway and to find

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http://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm

new foster parents who will voluntarily adopt him, or to try to exist on his own. Parents may try to persuade the runaway child to return, but it is totally impermissible enslavement and an aggression upon his right of self-ownership for them to use force to compel him to return. The absolute right to run away is the child's ultimate expression of his right of self-ownership, regardless of age."

Age plays if anything an even more dramatic role in debates involving the earliest inception of the human being. To wit, when does a fetus become a person? The pro-choice movement argues for the time of birth. The pro life faction locates the proper date at conception: the fertilized egg is a human being, since if not interfered with, that is the natural processes will result in that eventuality. This debate is so highly documented and discussed it needs no further elucidation here.¹⁷

In contrast, those who advocate the eviction theory in the abortion controversy (Block, 1978, 2001, 2004c, unpublished; Block and Whitehead, 2005) offer an alternative answer to this continuum problem: whenever the fetus is viable outside of the womb, it becomes invested with the rights accorded human beings. This date would of course change as medical technology advances (McElroy, 2005). A century ago, this perspective would have given the answer offered by the pro-choice advocates: since the fetus was not viable outside of the womb until birth, it achieves human rights only at that time. A century hence, medically technology will presumably be so far advanced such that, according to this theory, the fetus at any stage of development will be invested with the same rights accorded all human beings. At these rates of improvement, each decade, at present, will subtract a few days from this point; that is, every ten years or so from now, enough advances will have made such that a fetus of, say, a week younger will be able to be supported outside the placenta, in a test tube or host mother, or some such. Thus, we arrive at a date for human life that is continually changing, and is not based upon any particular point on this continuum.

A similar situation applies to the age at which statutory rape applies. That there must be such a law is clear; females below some cut off age point are simply incapable of engaging in consensual sexual relations. But at what level should this apply. Twelve seems far too young, and 21 too old. So is the correct age 14, 16, 18? Whichever age is picked, there will be girls younger than that who are more mature than others who are older. And what of the

¹⁷ For other libertarian theories pertaining to abortion, see Cobin, 1998; Long, 1993; McElroy, 2005; Rothbard, 1983.

age of the male involved? Surely, there is a difference in physical relations between a girl who is 16 and a boy who is 17, or a man who is 45. Cut off points of this sort simply cannot be derived in any straightforward manner from the law of non-aggression. There is a need for private competing courts¹⁸ and juries to decide such matters.

IV. *Homesteading*

According to libertarian theorists (Block, 1990; Hoppe, 1993; Locke, 1948; Rothbard, 1973, 32; Rozeff, 2005) virgin territory is initially brought into a state of ownership through homesteading.¹⁹ One mixes one's labor with the land, and in that manner comes to own it.

There are two margins for continua presented in such a scenario. On the one hand, for *how long* does the homesteading have to occur before it can be said to be completed? For one minute? Hour? Day? Week? Month? Year? The Homestead Act of 1862 required farmers to gather crops for five years²⁰ in a row before title devolved upon them.²¹

One principled, no continuum way to solve this issue is to hark back to agricultural rhythms. That is, the homesteading must occur for at least one growing season, in the case of farmland. After all, the goal in clearing land for this purpose is to get in a crop. If sowing alone occurs, but not reaping, it can be said that the homesteading process is not complete.

A second margin concerns the intensiveness or extensiveness of the farming that takes place, for however long it took. E.g., does there need to be one wheat plant per square inch? Foot? Yard? Acre? Mile? Indeed, stretch the extensiveness of the planting sufficiently, and homesteading devolves into claim theory, where the owner plants a flag at a point, and claims "as far as the eye can see" at the very least, on and up to an entire continent at the extreme.²²

¹⁸ See on this: Anderson and Hill (1979), Benson (1989, 1990), Fielding (1978), Friedman (1989), Hoppe (1993, 2001), Long (2004), Murphy (2002, 2005), Rothbard (1973, 1978, 1982), Sneed (1977), Stringham, Edward (1998-1999), Tannehills (1984), Woolridge (1970).

¹⁹ Property titles are subsequently justified on the basis of any and all voluntary commercial and non-commercial interaction: sales, gifts, gambling, etc. See on this Nozick, 1974.

²⁰ http://www.nps.gov/home/homestead_act.html

²¹ See Anderson and Hill, 1979, 15, for a discussion of land claims regarding gold mining.

²² In the interplanetary context, one could claim an entire planet, or moon, merely by mixing one's labor with a very small part of it, provided that homesteading was interpreted in an extensive enough manner.

There is a way to address this problem that does not rely upon some necessarily arbitrary point along the continuum: it is to resort to common (economically efficient) practice. For example, most farming east of the Mississippi is done relatively intensively. Compared to what lies in the western part of the country, this land is irrigated, which supports intensive agriculture. West of the Mississippi, in contrast, acreage is dryer. Vegetables, bushes and trees, etc., cannot be planted as close together; it takes more pasture to support a single cow. These considerations cannot make fine distinctions, e.g., as to whether, in Iowa, the proper margin for corn is every one, two or three feet, but we can say, that whatever it is, it is more intensive than in the desert areas of Utah.²³

V. On Buchanan and Rawls

These two authors are far from favorites of ours. We regard the former's rejection of anarchism as logically flawed, and what we consider his characterization of government as in effect a market participant as grievously mistaken.²⁴ As to the latter, we see his "veil of ignorance" as highly problematic, in that it focuses only on the forced transfer of money from rich to poor, and ignores such more important attributes as intelligence, beauty, sense of humor, number of hair follicles, disposition toward happiness, etc. Why not transfer these from those who have "too much" of them, and to those who have too little? Also, even with regard to money, Rawls focuses solely on the U.S. Why not include the poor from the entire world in his calculation? This would, we contend, make his redistributionist schemes far less palatable.²⁵

Yet, whatever misgivings we have about the overall oeuvre of these two authors, it cannot be denied that we may learn from Rawls (1971) and Buchanan (1976, 2000) in the present context, with regard to continuums. Take

²³ The homesteading concerns in this section, and the question of human ownership in the previous one, are not totally unrelated. This is because people attain ownership over themselves through a process that might be described as quasi homesteading. At birth, the baby has no control over itself. Its arm and leg motions are seemingly random. After a few months, through a gradual process, growth changes occur in this regard. At this age, the parents can kiss the infant at will. But around the age of two the infant learns the word "No," and can refuse to be kissed. It is in this manner that we assert ownership over ourselves through a process of homesteading (e.g., using) our bodies.

²⁴ For support of these contentions, see DiLorenzo, 1990; Block and DiLorenzo, 2000, 2001; DiLorenzo and Block, 2001; Rothbard, 1989, 1997.

²⁵ For an utter, total and complete evisceration of the views of Rawls on these matters, see Nozick (1974, 183-231).

Rawls first. The “veil of ignorance” is a technique employed by this author in order to place some objectivity into discussions of fairness or justice. We have rejected the implications he draws from this for income distribution. But we take the position that this can nevertheless shed light on continuums. For example, if one does not know, in advance, whether one will be shaking his fist at someone else, or, have his face subjected to the fist shaking of someone else, it may well be that a better line of demarcation between justified and unjustified fist shaking will be drawn than if one considers only one side of this issue. Or consider age of consent laws. Child molesters and parents of young children will obviously have different takes on this issue. But, if one does not know what role one will have in society, one is more likely to take a more reasonable position on the matter. Indeed, we see this as part and parcel of, and buttress for, our comments on the “reasonable man” criterion employed above. That is, the veil of ignorance can be employed to increase the “reasonableness” of man.

Buchanan’s work, too, can shed light on the conundrums we have addressed in this paper.²⁶ One could conceivably interpret his contribution to political economy as an attempt to bridge the gap between, the centripetal forces of anarchism, as he sees them, on the one hand, and on the other hand the centrifugal forces of statism on the other. In one direction lies the Scylla of excessive individualism; anarchy is chaos, for Buchanan. In another lies the Caribides of unwarranted centralization; if the government is too powerful, who guards us from the Leviathans? Buchanan sees the range between these two extremes as a continuum. His solution to this problem is a constitution. We need not agree with him on this to acknowledge that his analysis of continuums is not unrelated to our own.

VI. Conclusion

We have attempted to make that case that there are continuum problems²⁷ that beset libertarian theory. It is impossible to non-arbitrarily set precise limits in terms of age of majority, homesteading, salvage, and other important aspects of libertarian law. We conclude from this not any shortcoming in

²⁶ See also Brubaker, 1975; Buchanan and Tullock, 1962.

²⁷ For other treatments of this phenomenon, see Graff, 2002; Sainsbury and Williamson, 1997; Sorensen, 2001; Varzi, 2003.

the principles of non aggression but rather the importance of private institutions in the law industry.

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