NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 8
Issue 1 *VOLUME VIII Fall 1990 Part One*

Article 10

1990

Happy Slaves: A Critique of Consent Theory (Book Review)

Lisa C. Ikemoto

BOOK REVIEW

HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY. By Don Herzog. Chicago and London: The University of Chicago Press, 1989. Pp. xv, 247. $12.95.

Reviewed by Lisa C. Ikemoto*

Don Herzog uses "methodological pluralism" to explain the origins and contents of consent theory.[1] That is, Professor Herzog uses political philosophy, social history, narrative techniques and whatever else seems to work to account for the sixteenth and seventeenth century rise of what he defines 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."[2] This multi-pronged method works; it makes for a rich and textured account of the rise of consent theory in Tudor and Stuart England. Professor Herzog describes the shift from the view of society as a pre-existing unified hierarchy to the view of society as an arrangement arising from the voluntary consent of masterless men.

Professor Herzog poses consent theory as "a creative response, a proposed solution, to strains created by arguments and social change."[3] In Chapter 2, entitled "Masterless Men," Herzog illustrates this point very well, and he makes it fun. He describes the arguments and social changes as they occurred in day-to-day Tudor and Stuart life. Among other facets of everyday life, Herzog addresses "Apparel and Identity." In a very orderly hierarchical society, one's dress identifies one's specific social rank.[4] In a society where the organizing principle of status was losing its force, however, an oatmeal maker could dare to assert himself by

---

* Assistant Professor, Indiana University School of Law - Indianapolis. B.A. 1984, U.C. Los Angeles; J.D. 1987, U.C. Davis, King Hall School of Law; LL.M. 1989, Columbia University.

1. D. HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 19 (1989) [hereinafter HAPPY SLAVES]; *see also* A. BICKEL, THE MORALITY OF CONSENT (1975); M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

2. HAPPY SLAVES, *supra* note 1, at 1.

3. *Id.* at 24.

4. *Id.* at 52 ("Only some ranks could wear wool; only some velvet . . . ; and on and on.").

refusing to take off his hat to bishops.[5] Professor Herzog's examples are not silly. He makes his point clearly. It was not just that the mastered began to feel free enough to act out their disrespect, to assert themselves as masterless men. There had always been masterless men in English society, but in Tudor and Stuart England, there were new masterless men. There seemed to be more of them, and the masters began to perceive these "disorderly types not under the thumb of some authority" as the primary threat to social order.[6] The old frameworks, describing society as a unified hierarchy, no longer made sense.

Consent theory, according to Herzog, was not caused by social change but was presented as a more accurate description, a better map for understanding and evaluating a changing social world than the unified hierarchy concept. While he asserts that consent theory presented a superior alternative to the unified hierarchy concept, Professor Herzog does not give us a chance to agree with him that other alternatives were less superior maps than consent theory. He does nothing else but mention them - civic humanism, the ancient constitution, natural rights and God's providence.[7] We know, three hundred years later, that consent theory has proved to be the long-lived, dominant description of the social world, and Professor Herzog's assertion that consent theory has survived by virtue of being the most apt description certainly seems plausible. However, he leaves us wondering if consent theory didn't get its start due to better press. Was consent theory really accepted as the best map of human relations, or was it simply the biggest?

Once consent theory had been presented, it became not only descriptive of social change, but prescriptive as well. "[O]ur social lives are partly constituted by the beliefs we have about roles and obligations. . . . So changing these maps can already be changing the social world."[8] Those who sought to control the shape of their social world wrote their own versions of consent theory with this prescriptive force in mind. Herzog interprets Hobbes' *Leviathan*,[9] and Locke's *Letter concerning Toleration*,[10] as prescriptions intended to address very particular social and political situations.

---

5. *Id.* at 53.

6. *Id.* at 45.

7. *Id.* at 35.

8. *Id.* at 24.

9. T. HOBBES, LEVIATHAN: PARTS ONE AND TWO (H.W. Schneider ed. 1958).

10. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (J.W. Gough 3d ed. 1966).

Professor Herzog reminds us that *Leviathan* was published in 1651, nine years after civil war erupted in England and two years after King Charles I was put to death. England had become a world of masterless men and Hobbes describes this world in terms of consent theory. What Hobbes was prescribing, however, was not continuing social change, but a return to social order. The most interesting part of Herzog's interpretation comes next: Hobbes blamed the civil war on bellicose nobles seeking glory and fanatical Puritans seeking to make England a holy state. Hobbes realized that these were the people who would ignore his arguments. He also realized the driving power of ideas in politics. Hobbes' program, therefore, was to change the institutions and the vocabulary in which the trouble making ideas were learned. He took aim at universities and the language of disobedience. *This*, according to Herzog, was "Hobbes's strategy for influencing politics."[11] That is, Hobbes was not simply proposing governance by stable sovereignty in *Leviathan*. Hobbes sought to change the basic elements used in forming ideas, and more specifically, to subtract the elements used in forming the concept of consent.[12]

Perhaps Professor Herzog applies his contextual analysis too well. In doing so, he transforms Hobbes from a theorist whose claims about the state of humankind reflect past centuries and bear relevance in the

---

11. HAPPY SLAVES, *supra* note 1, at 97.

12. *See* T. HOBBES, *supra* note 9, at 253-54.

> In the second place, I observe the *diseases* of a commonwealth that proceed from the poison of seditious doctrines, whereof one is *that every private man is judge of good and evil actions*. . . .
>
> Another doctrine repugnant to civil society is *that whatsoever a man does against his conscience is sin*; and it depends on the presumption of making himself judge of good and evil. For a man's conscience and his judgement is the same thing, and as the judgement, so as the conscience may be erroneous. Therefore, though he that is subject to no civil law sins in all he does against his conscience because he has no other rule to follow but his own reason, yet it is not so with him that he lives in a commonwealth, because the law is the public conscience by which he has already undertaken to be guided.

Id. (emphasis in original).

twentieth century to a shrewd and pragmatic politician, located in a specific place and time.[13] He does so at the cost of diminishing Hobbes' ideas to mere strategic responses.[14] This will offend fans of Hobbes-the-philosopher. For example, Herzog argues that Hobbes' assertions about egoism were simply techniques for making glory-seeking nobles look foolish.[15] Professor Herzog expressly denies that Hobbes was making any claim about elemental human motivation. By making only a contextual analysis of *Leviathan*, Herzog overlooks the possibility that Hobbes' pragmatic responses may be based on principles or presuppositions formed outside the context of post-civil war England.

Locke fares better under contextual analysis. Professor Herzog uses Locke's response to a particular problem as an example of how the liberal concept of neutrality developed.[16] During the Tudor and Stuart periods, the distinction between law and politics arose. This, of course, is a concept essential to liberalism. As an opponent of liberalism, Hobbes asserted that law be interpreted in light of sovereign command. For the problem of religious dissent, Hobbes advocated passive obedience to the sovereign's choice of religious practices. Locke, in response to the same problem, elaborated on the law/politics distinction as a means of achieving religious toleration.[17] According to Herzog, Locke was describing an ideal world, in which church and state were separate.[18] Like Hobbes, Locke was addressing an immediate politic concern.[19] But Herzog asserts that unlike Hobbes' response to the English civil war, Locke's pragmatic response to the problems caused by religious dissent can be

---

13. Schneider, *Introduction* to T. HOBBES, *supra* note 9, at VII (1958) ("In 1651, when the work was first published, the religious parts were for immediate application to the crisis in which Cromwell found himself.").

14. *Cf. id.* at VII-VIII ("To Hobbes himself, however, both parts, the general theory and the religious application, were taken with utmost seriousness and both express Hobbes' intense devotion to his country and to his faith.").

15. HAPPY SLAVES, *supra* note 1, at 82 ("First, Hobbes wields egoism as a strategy for unmasking the pretenses of his political opponents. Second, he thinks of egoism as a therapeutic alternative to other human motivations.").

16. *Id.* at 148-81.

17. Gough, *Introduction* to J. LOCKE, *supra* note 10, at xli (1958) ("The fact that the civil magistrate may become a member of a church does not affect its status as a voluntary society, or in any way add to its powers.").

18. HAPPY SLAVES, *supra* note 1, at 165.

19. *See* J. LOCKE, *supra* note 10, at 128 ("I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.").

abstracted from the context of Tudor and Stuart England. "Locke's *Letter* is best thought of as urging the merits of social differentiation."[20]

"Social differentiation" is a term that comes from social theory. Herzog uses social theory to elaborate on Locke's thesis in *Letter Concerning Toleration*. The language of social differentiation describes a society divided into separate spheres - family, workplace, school, etc. On the individual level, this means that a person holds a variety of largely separate roles - daughter, waitress, student, etc. On the institutional level, this means that different institutions dominate different spheres. Liberalism tells us that differentiation is desirable. "Leakage across roles" and spheres must be resisted in order to maintain a real opportunity for individual choice.[21] The state must refrain from using its influence in the religious sphere. This preserves the religious sphere as an area in which the individual may exercise her power to choose, and it eliminates an area in which the state's integrity will be subject to challenge.[22]

Locke's *Letter Concerning Toleration* was written in response to a specific context - the proliferation of religious views and practices in seventeenth century England. Yet, unlike his treatment of Hobbes, Professor Herzog credits Locke's work with meaning beyond the context of the one dispute.[23] Herzog validates Locke's claims by accepting them as capable of being generalized, outside the context of seventeenth century religious dissent. Of course, Locke's claims are essential to liberalism. And while Professor Herzog notes that liberalism differs from consent theory, he rightly points out that they overlap, and that "[a] liberal world

---

20. HAPPY SLAVES, *supra* note 1, at 168.

21. *Id.* at 166.

22. *But see* Michelman, *The Supreme Court, 1985 Term - Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 5-17 (1986). Michelman describes Goldman v. Weinberger, 475 U.S. 503 (1986), as an example of how the application of an abstractly neutral rule may result in unjustifiable interference with personal freedom. In *Goldman*, the Supreme Court voted 5-4 to reject the claim of Simcha Goldman, an Orthodox Jew and ordained rabbi, that his commander's refusal to let Goldman wear a yarmulke while on duty at the March Air Force Base hospital violated his first amendment right of religious liberty. Michelman casts this decision as a "Coverian Parable," an example of Robert Cover's assertion that law under liberal neutrality does not effect toleration but provides "a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify." Cover, *The Supreme Court, 1982 Term - Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983) (footnotes omitted).

23. HAPPY SLAVES, *supra* note 1, at 168 (concluding that "Locke's *Letter* is best thought of as urging the merits of social differentiation, of opportunistically extending a happy trend").

must be, in part, a world of consent theory . . . ."[24] So, he must accord Locke credence as a philosopher. While his interpretation of Locke has significant merit, Professor Herzog's contrasting treatment of *Leviathan* suggests that he was a little strategic himself.

During his discourse on liberal neutrality, Herzog begins the final task of *Happy Slaves* - addressing the question of whether consent theory is relevant now. His answer is a resounding 'yes!' Consent theory provides a "reliable map" to modern society as well as to the social relations among masterless men and women in earlier times.[25] As a map, Herzog reminds us, a political theory is both descriptive and prescriptive. "Consent theory is our map to what our social relations look like - and our guide to what they should look like."[26] That is, consent theory provides an ideal with some transforming power.

In anointing consent theory as the most "admirable guide" to modern society, *Happy Slaves* becomes less "A Critique of Consent Theory" than a justification of consent theory. It is here that methodological pluralism serves Herzog best. Because it requires him to justify consent theory on several different levels, methodological pluralism adds depth to Herzog's project. For those who find political philosophy a little too heavy in hypotheses based on unrealistic assumptions, the use of history and social theory may infuse Herzog's arguments with a necessary sense of experiential-based analysis and therefore, credibility. And, the interdisciplinary approach not only enriches our understanding of Locke, liberalism and consent theory, but it also contributes to the cause of scholarship. Herzog's work in *Happy Slaves* illustrates that political philosophers, historians, social theorists, etc., need not work isolated from each other. On the contrary, their authority may be strengthened, as Herzog's is, when the disciplinary barriers are dropped.

Ironically, by using an interdisciplinary approach, Herzog equips the reader with the tools to critique consent theory where Herzog would justify it. He praises differentiation as the necessary means to achieving individual freedom. He has us consider the values of freedom, autonomy and individuality in terms of social theory. Thus, "an individual is free when he faces a range of significant options."[27] These options arise not from the individual, but from social and institutional arrangements. By defining the values of the liberal state - freedom, autonomy and

---

24. *Id.* at 179.
25. *Id.* at 247.
26. *Id.*
27. *Id.* at 173.

individuality - in the context of social theory, Herzog calls into question the arrangements that would promote those values.

In liberal theory, an arrangement in which social and institutional roles are highly differentiated will provide the range of significant options necessary to free choice. Liberal neutrality requires the individual to "be selectively forgetful in their different roles and attend only to considerations that are contextually defined as relevant."[28] Thus, the individual must categorize aspects of her life as relevant or irrelevant.

As a starting point, requiring a person to determine that aspects of her life are irrelevant seems dehumanizing. Herzog does make it clear that persons are subject to this requirement when they function as judge or jury. The individual is being asked to avoid biases appurtenant to one role while in another.[29] According to Herzog, therefore, differentiation serves to maintain norms for appropriate role behavior.[30]

The reason suggested by Roberto Unger and other critical legal scholars is that liberalism and consent theory, in effect, stifle our ability to imagine alternative social arrangements in which the individual could transcend these conflicts.[31] Where differentiation is the organizing principle for social relations, the individual and the society are fragmented. Since an individual cannot experience a life in which she can realize all aspects of herself at once, it becomes difficult to envision a set of social relations that would accommodate the whole person. The act of re-imagining society is further inhibited by the fact that the liberal state exists to promote an orderly society; a society that changes little or not at all. If the rearrangement of social relations never occurs, we become reluctant to predict the success of a new set of social relations. We fear

---

28. *Id.* at 166.

29. For example, "Michael [a printer, a Democrat and a Greenpeace activist] should not deliberately delay jobs already contracted for by industrialists or Republicans in the print shop even if he finds them politically objectionable." *Id.*

30. This, however, begs the question. The only reason it seems inappropriate for Michael to delay jobs contracted for by industrialists and Republicans is because we accept the norm of neutrality. And, more importantly, it is because we accept a picture of society that allows Michael to be either a printer or a political activist, but not both at the same time. True, the neutrality principle appears to be based on acceptable values - fairness and equality. But why can't we form a set of social relations that would not fragment the individual? Why can we only imagine a society in which Michael is able to avoid conflict with himself by ignoring aspects of his own identity?

31. *See, e.g.*, 2 R. UNGER, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY; FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 355-95 (1987); R. UNGER, PASSION, AN ESSAY ON PERSONALITY 39-89 (1984).

that implementing alternatives would prove infeasible, and so, we rarely try.[32]

This does not mean, however, that change has become impossible. Professor Herzog seems to believe that the power of our present set of social relations to shape our identities paralyzes our ability to recreate those relations.[33] Ironically, he underestimates the building power of human imagination. The irony arises from the content of *Happy Slaves*, which documents an earlier transformation in social relations, fueled in part by the prescriptive power of a product of human imagination - consent theory. But consent theory, apparently, is the end-all and be-all. Herzog admits that consent theory is not foolproof.

> We often overlook the complications and retreat to facile but misleading accounts . . . . [W]e pretend our social roles and institutions are purely libertarian, that we choose to enter them and choose within them. We use consent theory not as a map . . . but as a set of blinders or rose-colored glasses that make the world look clearer, less problematic, than it really is.[34]

His solution seems to be an admonition to us to remember that consent theory is a map and should not be used as rose-colored glasses. But doesn't that beg the question, too? Doesn't consent theory prescribe a simplistic, unproblematic picture of the world? Perhaps we need a complex and troubling map to help us realize our complex and troubling selves.

The use of differentiation to maintain neutrality as a normative

---

32. Recent attempts have varied in scope and acceptance. An example is a community in Middle Florida that shelters itself from the busy world by living with the earth. "More than just another hippie commune of the [19]60's, Gentle World is a throwback to the 19th-Century utopian societies of Brook Farm and the Oneida Community." Schudel, *The Gentle Folk: A Few Idealistic Refugees from the '60s Exert a Quiet Pressure on the Rest of us to Respect the Earth*, Ft. Lauderdale News/Sun-Sentinel, June 18, 1989, SUNSHINE (The Magazine of South Florida), at 6. Other examples include the Jonestown Tragedy and the various Hare Krishna groups. *See* Delgado, *When Religious Exercise is not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1071 (1984); *see also* Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986).

33. Herzog, *Rummaging Through the Emperor's Wardrobe* (Book Review), 86 MICH. L. REV. 1434, 1442-43 (1988).

34. HAPPY SLAVES, *supra* note 1, at 247.

force raises another point. As a normative force, differentiation seems to repress individuality - one of the values supposedly promoted by liberalism and consent theory. Herzog asserts that differentiation allows room for individuality. One can escape an oppressive norm by occupying another role.[35] Escape, however, does not cure the problem. Some roles cannot be ignored. And some norms pervade so many spheres of life that changing roles will not provide escape. A person of color in our society cannot escape the oppressive cultural norm of racism by becoming white. Even if one could change color, this would not eliminate the oppression. It might, in fact, perpetuate the problem.

Herzog's response might be found in Chapter 6 - Consent of the Governed, where he discusses the problem of the permanent minority in a democracy. The individual's obligation to the state is tied to the state's responsiveness to the people. Therefore, if the government is less responsive to certain minority groups, the state's authority is less legitimate as to members of those groups and the individual members of those groups have a weaker obligation to obey the law than those to whom the government does respond. So, Herzog describes a very appealing picture - "a state responsive to all the people, rich and poor, male and female, white and black, and so on . . . ."[36] He also admits that this view requires "sober skepticism," for "[t]he modern state is a juggernaut, all too fond of embarking on decidedly ugly projects."[37] Yet, according to liberal theory, "it's better than the alternative, so we are justified in embracing it."[38] This appears to deny the power of consent theory to prescribe a means of achieving the ideal. As a map, then, does consent theory only offer us a means of avoiding something worse?

In sum, Professor Herzog's account of liberalism and consent theory is worth reading. His use of history and social theory to illuminate political theory is well done and highly informative. He justifies consent theory as far as it is possible to do so. So, for those reading with rose-colored glasses, *Happy Slaves* will prove very satisfying. For those concerned about the fragmented individual and political minorities in our society, *Happy Slaves* will stimulate further concern and perhaps, fruitful critique.

---

35. If Michael botches a job at work, "his mistake will not relentlessly follow and shame him wherever he goes. He can spend more time at party headquarters, where people probably neither know nor care about his performance on the job." *Id.* at 174.

36. *Id.* at 213.

37. *Id.* at 214.

38. *Id.*