Libertarian Alliance

LIBERTARIANISM AND THE LESSONS OF COMMON LAW

LEON LOUW

One of the frustrations I've had ever since I've been a libertarian is that in both the libertarian literature I've read and in the libertarian seminars and discussions in which I've participated there is an enormous amount of "reinventing the wheel".

Libertarians frequently discuss questions of law or jurisprudence, such as : when is a contract formed?; how are obligations under a contract enforced, or carried out or discharged? Having decided that rights should exist, libertarians then get very confused about how you establish what constitutes a violation of those rights.

Of course, I'm speaking in general terms. Naturally there are some - specifically the libertarian lawyers - who do think more rigorously and analytically and clearly about these things.

However many libertarian luminaries, whom I won't name, don't, and seem to discuss some of these matters literally as if there has not been the four or six thousand years of very fine jurisprudence in environments characterised by large degrees of liberty, voluntarism and mutual consent. There exists a rich jurisprudence of precedent - although not all of it will necessarily be to the satisfaction of all libertarians. Nevertheless, I think that this body of jurisprudence can give some very good insights, insights that tend to be ignored, in my experience, in may libertarian ruminations.

What I would like to do in this paper is contribute some legal insights for libertarians to bear in mind when they discuss issues.

The next frustration that I have is a very important one, and that is that libertarians often hold out, in trying to sell their case, that having established a fairly simple and clear rights position, the non-aggression axiom, (or, as I will suggest later, what I would rather term the *consent* axiom or paradigm, which I think is more instructive than the "non-aggression" one. We should describe our position by what it's *for* rather than by what it's *against*, for if you describe what you're against that leads to all sorts of problems.)

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FOR LIFE, LIBERTY AND PROPERTY

Libertarians tend to think that having established this fairly simple, consistent, unambiguous rights position, even though we have problems applying it in some areas, we have solved all problems.

But let me caution you that a society with rights, especially one with lots of rights, as libertarians envisage, is a society in which the defence and application and interpretation of those rights is the *most difficult*, legally speaking. To put it the other way round, in a society with no individual rights you have no problems in applying the system. There are no problems of interpretation, no problems of application, no grey areas.

THE EXAMPLE OF RAPE

Let me give you an illustration of that. Libertarians would generally hold that rape is wrong and seduction is okay (speaking *legally*, of course, and not necessarily in terms of personal morality). I use this example because it tends to be a memorable one, but I can apply the same reasoning in any other area of libertarian rights advocacy, whether advertising, assault, theft, robbery, burglary, fraud, or whatever. But rape is a convenient example, because I think libertarians would say that that which results from persuasion is in order and that that which results from coercion is not in order.

Now we can state that we are unambiguously and always against rape. Rape is always wrong, and seduction is never wrong, to a libertarian.

Now let us hypothesise that this attractive lady walking in here invites me into her room tonight, and we disrobe together, and we mount the bed together, and she whispers sweet nothings into my ear and caresses me gently and tenderly. And, when penetration is just about to take place, she whispers tenderly and gently into my ear: "No". But I proceed. And then I get charged with rape.

Now according to some, like Walter Block, I should be jailed, forthwith. Would every libertarian agree with that? Would every libertarian think that there is no position at which I can say: "Well, I really didn't think I was acting non-consensually there." I think most libertarians would think that in those circumstances there hasn't been a rape, or if there has it hasn't been an *actionable* rape.

However, let's develop this example. Let us say that when penetration is imminent, instead of whispering gently and sensually "No", she screams "No!". She shrieks and wriggles and fights and kicks,

but I still penetrate. Well now I think libertarians start thinking that sounds a bit more like rape.

But let's assume that some say: "Well, if she went that far, lying in the missionary position with splayed thighs beneath me, that is still too late."

What I'm saying to you is that there are great difficulties which are matters not of rights theory, of what to jurists call *substantive* law, but of *evidence* theory, or *procedure* in law. We may be unambig- uously against rape, but *that which constitutes rape* can sometimes be a very difficult thing to establish. And, in my example above, how do you produce the evidence that she whispered sensually "No"? She says she screamed and I say "No she didn't, she whispered."

Now I want to suggest that although libertarians have a lot of legitimate things to say about evidence and procedure, the libertarian *paradigm per se* does not. The consent or non-aggression *axiom* doesn't tell you anything about how you prove what happened or did not happen, or how you adopt procedures to prove what did or did not happen. For example, should people be summoned to court? Do you have judges or a jury? Do you have an accusatorial or an inquisitorial legal system? The libertarian paradigm doesn't answer or even address those issues. So libertarians, I think, need to be a little careful. Having established a rights position, libertarians can find themselves being confronted with more problems of application and interpretation than other philosophical/political positions.

The more liberal, the more free, the more libertarian the philosophy, the greater is the difficulty of establishing evidence and proof, not the lesser. And I'm afraid libertarians do like to think that they've solved the problem, once they've said that they are against the violation of rights.

THE RECORD OF WESTERN JURISPRUDENCE

Now I want to move on to how jurisprudence has dealt with these problems over the years. On the journey to the conference at which I delivered this talk I drove some libertarian activists to the airport. As we drove we had a discussion of the sort libertarians like to indulge in, about all sorts of thorny problems. If I can use the sexual analogy again, libertarians, I think, do a great deal of intellectual masturbation. In these sorts of discussions we tend not to talk about problems we have to solve now, in bringing about more freedom. We talking about end states, and how things will be in our nirvana, our eventual utopia many years or decades away.

A specific point in this discussion was a common one. Libertarians tend to say that one can use one's property as one likes. Well, that sounds nice. But what if I ask: can I sit on my front veranda with my rifle and shoot people through the head, passing down the side-walk? It's on my property, after all. Well, the answer is very simple to libertarians: no, because you are violating the rights of the pedestrian, and the pedestrian isn't on your property. There's a lack of consent, an initiation of aggression. That's very simple.

But now, what if I had a sneeze machine. That's one of those things which shoots out tear gas, and I sit on my property and I blast this into the sidewalk, over my fence? And a lot of people choke and cough, and their eyes fill with tears. Well most libertarians think this would also be violating their rights. If you can't blow lead through their heads, you can't blow gas into their nostrils. That seems to be reasonable.

But what happens if I urinate against my fence post, in view of the public? Most libertarians, I think, will say people have the right to turn their eyes away. They don't need to look at that. And as long as it's on my property, I can do what I like.

But can I for example put up a billboard with a great obscenity on it, a donkey engaging in sexual intercourse with a woman, or whatever, looking down on the village square, in fact in front of the church square? Or into the monastery or the convent? Well, I think here we have a problem. Walter Block argues for example: yes, you may, because you are not initiating physical aggression. But if you can violate rights by sending gas over ones property boundaries can one violate them by sending photons or light rays?

Let me examine that question. Let us say I had a spotlight, of fifty thousand candle power, and I'm right next to your bedroom, and I flash this on and off into your bedroom, all day and night. Or alternatively, let's assume I've put this through a lens, so that it comes to a point right in the middle of your tummy and sizzles it. Now at some point, I think most libertarians have to start saying: yes, the beaming of light rays or the reflection of light rays in certain forms of certain intensities into somebody else's property does constitute a rights violation. Now, where's this boundary? This is precisely the problem.

THE 'REASONABLE MAN' TEST

How jurisprudence deals with these things is to adopt various criteria or tests which I think are eminently reasonable, and I think libertarians should bring them into their scheme of things.

If we don't talk about light rays or photons, how about sound waves? If I cough, next to my fence, and a pedestrian walking by gets a fright and jumps, have I assaulted him or her? Most libertarians would say no. But let's imagine I blast some ten thousand watt amplified sound into the person's ear and blast a hole through his eardrums. Well that seems to be an excessive amount of sound waves. Utilizing light, sound, gas, smoke, lead, sticks or whatever, can at some point, in some quantity, degree or circumstance, constitute aggression.

To show you that the problem doesn't only arise when you apply *reductio ad absurdum* to the example of light rays or noise, let's examine physical force. Libertarians seem to be very dogmatic that if I initiate physical aggression, that's assault. However, I'd just like to test that quickly. Would you please just touch the fellow next to you on the shoulder. Ahah! Now, there is a non-consented initiation of physical force against the person next to you. Is this an actionable wrong? Is this a violation of libertarian rights? Should he be jailed, as some libertarians would say? I suspect most of us would think not. Why is this so?

Well, jurisprudence holds that there's a so-called "reasonable man" test. If I'd said: punch him as hard as you can on the nose, the case would be rather different. The point is: the same action reaches a stage, progressively, where we start getting uncomfortable about it. The reasonable man (using the term in its gender free meaning) test holds that there is a point at which the reasonable person says the initiation of aggression has become actionable, or a rights violation. As it is with photons or with nuclear radiation, or smoke, or whatever.

The reason why, in this example, tapping someone gently on the shoulder does not constitute a rights violation is also related to another important legal test, that of "*... imus non curat lex*", which means: the law does not concern itself with trivialities. This is very important. Libertarians concern themselves with so many trivialities that it sometimes drives me to distraction. But I defy any libertarian to suggest a legal order in which *all* their trivialities will be accommodated. Those things which are trivialities, like coughing across my fence, or blowing cigarette smoke over my boundary, or whatever, are *minima*. Those are not subject to the rights or the consent axiom.

CONSENT

Libertarianism argues that one may not initiate aggression, or fraud, or theft. The absence of force or fraud is, in my view, not enough to distinguish permissable from nonpermissable acts. This is why I prefer to speak of the "consent axiom". For example if I leave my car with the key in it and somebody sees it there and drives off in it - have they aggressed? Have they initiated force? Have they defrauded me? It seems to me not. It seems to me that the much better litmus test is whether they have used me or my property without my consent. That is surely a much more universally applicable and useful test.

The consent axiom helps with a lot of other things. It helps, for example, with contract. When do you or don't you have a contract? The test is, in law (and has been for many centuries): when there is consent, or what is called *consensus ad idem*, a meeting of the minds, you have a contract. This, in my view, is one that libertarians should accept and develop and purify in their own context. It solves all

kinds of other libertarian problems. For example: if a one year old baby puts his or her thumb print on a contract to work for thirty years in a sweat shop, there hasn't been a meeting of minds, there hasn't been *consensus ad idem*. So it is with some- body suffering an epileptic fit, somebody who's drunk, sombody who's drugged, or whatever. The test is: has there been real - or sometimes libertarians might call it "informed" - consent?

This is no great new invention, in fact it's part of a very rich literature of jurisprudence in the Roman/Dutch tradition, the Arabic tradition, the Anglo-Saxon tradition - all common law traditions. Concepts such as these have been applied to voluntaristic social situations by great jurists and great thinkers, to a point where we don't really need to invent much more. We would do a great deal more good by going and reading these people. Here and there we will find things that are quite clearly not libertarian, but they will be rare and exceptional.

VICTIMLESS CRIMES

The other thing that I tend to think needs some attention by the libertarians is our opposition to laws against victimless "crime". It's very easy to say that we are against victimless crimes, and it goes down very well with many audiences. It seems eminently reasonable to well-meaning people. If there isn't a victim, there isn't a crime.

But I want to caution you that one day you may be challenged by a sophisticated jurist or philosopher who asks: How does crime as such fit into the libertarian context?

Libertarians hold that in the absence of a violation of the rights of some person or persons, there has not been a wrong. But a crime, in law, or in the dictionary sense, usually means a wrong against society, in the abstract, a wrong against the collective. It's an essentially socialist idea - that you can commit crimes without committing an actionable delict or tort or civil wrong. Libertarians need to make it very clear that we are in favour of civil law that is concerned with protecting the individual, the victim, against the violation of the victim's rights. Some libertarians go as far as arguing that not punishment *per se*, but the compensation of the victim or his dependents, should be the sole purpose of law.

This latter position, however, raises problems. What do we do about the person who enjoys murdering village idiots, who might have no relatives or friends or descendants? The victim cannot be compensated, and there are no dependents.

Many people will certainly want to see the murderer punished, hanged in the village square, or whatever. But it seems to me that this is not something libertarians, with libertarian principles that is, can justify.

The well established distinction in jurisprudence between civil and criminal law, between tort and delict on the one hand, and crime on the other hand, or wrongs against society or wrongs against the state, can be justified on a libertarian, rights protecting basis.

The reason why I think in a libertarian context you restrain the murderer of the village idiot or beggars in the park is for the protection of other village idiots and beggars in the park. That's what libertarian philosophy entitles one to do. That is to say, to prevent the violation of rights.

A lot of libertarians might well argue that I am opening a Pandora's Box here, establishing an ominous precedent that could be extended to restrict rightful liberty in the name of stopping potential crimes.

RETALIATION

How does the reasonable man test apply to the issue of restraint prior to the commission of an offence or a civil wrong. Let us assume that someone throws a punch at my nose. Utilising my karate skills I block and deflect it. A rigorous, dogmatic application of libertarian principles would surely say that that person had not coerced me, the fist not actually having reached my nose. Conceivably it might have stopped short of my nose by a fraction of an inch. Would libertarians say, in such a context, that I'm actually the aggressor? I think not. Most libertarians would surely hold that you can retaliate when the evidence is enough to suggest that violation of rights is imminent, or beyond reasonable doubt, which is another good legal criterion.

Let me give you another example. My neighbour discovers that I am having an affair with his wife. I observe him walking up my drive, carrying a machine gun, and muttering threats to kill me. As he walks menacingly down my drive I hide behind a corner and knock him out. Who is the aggressor in this context? I'm certainly the one who has initiated the actual force. But the reasonable man would surely say that this was a legitimate evasive action or retaliation, that danger was sufficiently imminent.

But at what point is danger sufficiently imminent? A belief in liberty alone can't tell you that. This is a matter for rules of evidence and procedure. What I'm really trying to do is to get libertarians to separate out the substantive law, which defines your rights, from the other kinds of law that define when you know the rights apply. How do we distinguish between rape and seduction, exaggerated advertising and fraud? Similarly, when is coercion trivial, for example brushing somebody's shoulder in the supermarket or standing on the toe of your dancing partner, and when is it assault? Those are very difficult, necessary decisions, and there are many others like this that law has always had to face and always will face.

Libertarians argue that coercion exercised in retaliation is legitimate. But again, the issue is not so simple. Let's assume my fourteen month old daughter comes up to a strong healthy looking man, and pummels him on his shin. She's aggressing against him, and he says: well, ahah, libertartarians are allowed to act in self defence. He pulls out a submachine gun and mows her down. Well I think most people will say there's something wrong here. Again, jurisprudence has always held that aggression is wrong, and that it has had to find out under what conditions the retaliation is justified. And it's come to, I think, some workable conclusions, albeit difficult ones to apply. The retaliation, it holds, has to be commensurate with the aggression. You may use the reasonably necessary means to defend yourself against the aggression.

Now, that does not mean that you give the criminal the choice of weapons. For example, if somebody attacks my five year old daughter with a baseball bat, and my five year old daughter happens to have a gun and shoots him, well I think most people would say that given the circumstances that was the only effective defence she had.

CAUSALITY

Another matter that tends to be glossed over or confused by most libertarians is the question of fault. In jurisprudence there's a sophisticated set of criteria as to when somebody is liable. For example, you have to have what is called causality. Let me explain the problem. If I punch someone on the nose, it seems very clear that my fist propelling at that speed towards his face was the cause of the collision between his nose and my fist, and there's no causality problem. Let's imagine, however, that I'm running down the road to the railway station with a bundle of parcels, and I drop one. Someone else is also running to the station and trips over my dropped parcel. They subsequently miss their train, and a plane. They catch a later plane, which crashes and kills them, leaving a distraught wife and much uncompleted business. Am I legally responsible for this ensuing chain of consequences?

In law, you have to establish that there is some kind of reasonable linkage between the cause and the effect for which you hold somebody liable, or for which you allege there's a rights violation. That's a problem of causality, and you try to solve it by what is called the test of foreseeability. You ask: were those consequences reasonably foreseeable as a result of that action? And there are very interesting cases. It's really delightful reading for those of you that want references to, for example, the famous Waggonmound case, which was when an oil rag burnt and as a result a ship was set on fire, as was a neighbouring ship. The question was, in the insurance dispute, whether the oil rag falling into the hold was the cause of the loss of millions of dollars of damage.

One test is foreseeability. Others are *culpa* and *dolus*, which are two legal concepts. I won't go into them that much, except to say that

they concern whether the person was responsible for his actions? Did they have a guilty mind? For example if they were having an epileptic fit, can you hold them liable for the consequences? I don't think libertarianism offers an obvious answer. My tendency is towards answering yes, that we must come out on the side of the victim as often as we can - even when the causality is very remote, and the consequences are largely unforeseeable. But I think we have to concede that somewhere we must stop. We can't hold somebody responsible for the consequences of actions for ever.

There is a concept in the Germanic and in the Dutch and the Roman and the Greek legal traditions which unfortunately is not part of the Anglo-Saxon legal tradition. The concept is *tu rechnungs vehrkeit* in German or *tu rechnungs fatvahrheit* in Dutch. It means something like: the ability to comprehend. And I can't do more than let you know that I think libertarians will find a lot of comfort in holding that the actor has to have some kind of comprehension of the consequences of actions.

CONTRACT

The last issue I want to discuss here in this very brief synopsis of the application of mainstream jurisprudence to freedom is in the area of contract.

I'm afraid that this issue suffers from the most lamentable treatment in libertarianism. The discussion, even by writers I otherwise hold in awe, is conducted as if no one knew anything about contract until the current writer emerged onto the scene. But again, throughout human history there has existed the libertarian principle of contract - of mutual consent - and throughout history there have been attempts by the greatest jurists to apply the principles of freedom to contract. We really don't need to pretend that this has never happened.

This is, of course, a very complex area even to people who've studied it for years and years. But I'd just like to give you a view of some of the kinds of problems that arise. Some libertarians hold that contract arises as a result of a transfer of property rights. For example, suppose I sell you this pen for one pound and I deliver the pen to you now. The pound is due to be paid next week, and you don't pay next week. It is held that the reason why there's a violation of my rights is because you've taken my pen by fraud or force, or whatever. But you haven't. At the time I delivered my pen to you, you intended paying me. You just changed your mind five minutes later. So where's the fraud? There are many other problems, like this for example: what constitutes delivery? When do rights get created as a result of a contract? Again, there is a rich legal tradition which I don't think is always right or always libertar- ian, but nonetheless it's very much more sophisticated than any- thing I've seen in the libertarian literature, and I think very much more instructive and sensible. Quite frankly I think that any lawyer who might otherwise be a libertarian who reads what has been writ- ten on contract, is going to be turned off, because he'll think it's so crude and so simplistic that it doesn't really offer anything of any real philosophical substance.

In considering many of these issues our first question should be not what has some libertarian theorist we follow or respect a lot said happens in contracts? We should not set about establishing *a priori* or in advance what we think the principles are that should govern a contract. The first and most libertarian thing to do is to leave it to the contracting parties. If the contracting parties want to say that the rising of the full moon will be the factor that determines the passing of rights, well, that's fine. That is their agreement. Who are we to say otherwise? If they want to say it's when somebody dies or when you shake hands or when you sign a document, so be it.

Let me here take a small diversion and point out that a contract is not a document, a confusion frequently made by libertarians. A contract is simply an agreement with legal consequences. Again, many agreements don't have legal consequences, and libertarian writers seldom recognise that. They think all agreements have to have legal consequences. For example, if I agree to play squash with one of you this evening, and you go to the squash court, and I forget to arrive, I've breached my contract with you, and therefore according to some people, I should be liable for damages. But the problem is not that I breached my contract, because the test would be: did we have or could the average reasonable man predict that we intended legal consequenes from our agreement? And the chances are we didn't. So there is no actionable wrong, if an agree- ment from which no legal consequences were intended is breached.

The first thing to consider is: what did the parties intend? Only in very rare cases does that not give you the answer.

Sometimes contracting parties omit to include an important element in their agreement. Again law has an approach here, which is to say that you must look at whether the omission from the contract is material or non-material, or trivial. Suppose I say I will build you a house for fifty thousand dollars, and we shake on it, and then I come and build a little mud hut. You say: no, no, what I intended was a big palace. The law will say that our contract was so vague as to be void for vagueness. We did in fact not have a contract, we did not have consensus of the minds, and therefore there are no legal consequences. However, if the only thing we've omitted from the contract is whether the door should be metal or wooden, then the law wil say that that is not a material thing, and what you will try to do is to fill in that omission by looking at what is reasonable in such a house. What does the average reasonable man think the parties did intend or should have intended? And that is the sort of approach that you would apply to whether a contract has been breached - not what the terms of the contract are. Very rarely should we be in a position where libertarianism has to suggest what governs a contract. That is the right of the parties.

Let me also point out to you why writing or even words are not necessary for a contract. You can have so-called *implicit* contracts, with no words or documents, and they can have massive consequences. Last night Bob Poole and I and our respective wives went to dinner in London to a restaurant, and we walked in, sat down, and had a nice meal, ordered from the menu. No words had passed. At the end of it, we liked it, and somebody presented a bill.

Well I mean, now, for heavens sake! I thought the restauranteur was just somebody who liked feeding bypassers. I think we agree that there was something there that did create a binding obligation to pay the prices reflected on the menu, or in the absence of them being reflected, the prices normally charged for those dishes by that restaurant, or something.

However, now let's think of some other complications. Let us say that the salt seller was full of arsenic. And we all liberally pour salt on our steaks, ate them, and died of arsenic poisoning. And the restauranteur says: but there was nothing in my contract with them to say that the salt seller had salt in it. We never discussed the salt seller. Well, has there been an aggression against me? Yes. Because in all contracts there are a mass of implicit conditions which one must not forget. Our implicit, unspoken understanding was that when we went to the restaurant the food would be reasonably healthy, it would be hot when served. The steaks would not be miniscule but of reasonable size. What's reasonable would be whether someone who looks at the steak says: I think that's about as much steak as you normally expect when you order a steak. That is a reasonable man test. And there's no other way of settling these issues. We cannot get more certainty. We cannot be more dogmatic. We have to accept these things.

CONCLUSIONS

I want to conclude with a little *rondo*, and come back to what I said earlier. You must be very wary, unless you've done some discussion or thinking in these areas, of taking dogmatic positions with people you're trying to persuade, because it's very easy to be pushed into all kinds of uncomfortable corners. I see libertarians doing this all the time.

If I were can take any of the libertarian positions, in the various schools and factions, and put on my jurisprudential - my courtroom lawyer's - hat, and cross-examined their adherents, I think I could squeeze most of them into more and more uncomfortable positions, by *reductio ad absurdum*. Your escape is not to try and protect your position in its ultimate ridiculous limits, but to say: jurisprudence will solve that problem. We must give their correct dues to both substantive and procedural law.