
Symposia on Gender, Race and Philosophy

Volume 5, number 1. Spring 2009

<http://web.mit.edu/sgrp>

Commentary on Ann Cudd's *Analyzing Oppression*

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Analyzing Oppression is an excellent work.¹ Cudd defends the view that oppression is the fundamental injustice of social institutions. Oppression on this account is an institutionally structured, group based and unjust harm. It can be material, which includes physical violence and economic domination, or psychological. To defend this view, Cudd presents an engaging and tightly argued philosophical account supported by relevant, empirical research. The result is a powerful conception of oppression that will not be overlooked by anyone engaging the issue seriously. Naturally, it is far beyond the scope of this commentary to do justice to the richness of Cudd's work. Instead, as is customary, I will raise

a few questions regarding some central aspects of the account that I find particularly puzzling.

The first two questions concern Cudd's conception of just or rightful coercion. Cudd's analysis of oppression does not explicitly address the issue concerning what constitutes rightful coercion, or coercion consistent with the requirements of justice. A main reason for this is that the account presupposes, and so does not include, a "background moral theory" (231). Nevertheless, I believe that Cudd provides us with some clues as to what the right kind of background moral theory would look like. It seems fair to suggest that rightful use of coercion will be seen as directed at "direct and indirect material [physical violence and economic domination] and psychological forces that violate justice" (26). Rightful coercion concerns actions insofar as they have some sort of causal power in the world. In addition, Cudd claims that the account of oppression she provides is, and should be, compatible with "a liberal contractarian view of the sort developed by John Rawls in *A Theory of Justice*, or the more libertarian version of David Gauthier in *Morals by Agreement*" (231). Since Cudd believes her position is compatible with both Rawls's and Gauthier's positions, I believe she understands liberal positions as ultimately seeing state power in terms of individual's rights against one another, and hence the form of liberalism she endorses is compatible with libertarianism. The main contribution *Analyzing Oppression* makes to liberal theory so understood is her claim that rightful use of coercion will also deal with private group harm since this is "consistent with - indeed required - by liberalism's fundamental commitment to individual rights" (221). Having individual rights against one another includes having rights against oppression in virtue of individual memberships (chosen or not) in various social groups. Still, to be consistent with a libertarian form of liberalism, individuals must be able, in principle, to enforce their rights on their own, though as Cudd points out, as a

matter of practice it is “implausible” that they are able to do so individually or in small numbers (21). This is why it is more rational that individuals enforce their rights through the state apparatus. In these ways Cudd is attempting to make compatible a libertarian conception of coercion and an account of injustice that includes systemic group harms. This marriage, however, as I will argue, is infelicitous for Cudd’s account of oppression.²

We may begin by asking this question: Why is a libertarian conception of rightful coercion problematic for Cudd’s account of oppression? The reason is that because Cudd aligns herself with libertarianism, she seems unable to secure rights against oppression for all groups. First, it is unclear how her account secures non-oppressive conditions for groups consisting in powerless individuals and those incapable of moral responsibility, such as children and seriously mentally incapacitated people. Per definition, these two groups cannot exercise rightful coercion on their own. So to secure the rights of particular powerless individuals and morally incapable individuals, who happen also to be victims of oppression, we must match up those rights with duties of particular others external to the oppressive relations in which they find themselves. Unless Cudd can show that these duties of others exist, I do not see how her theory secures these vulnerable groups’ rights against oppression. Moreover, it is not enough to say that powerless or incapable groups have rights without also giving a satisfactory account of how they are enabled to exercise them. For example, consider powerless Thai female sex slaves or girls growing up in very oppressive patriarchal families. It seems fair to say that Cudd would agree that no members of these groups are able to form the intention to resist the oppression (103ff). Yet it seems that on Cudd’s account, no other particular private person or group external to the oppressive relationships commits a punishable wrong if she or it does not interfere to stop the oppression. Someone might interfere, of course,

because she sees it as an ethical duty. But ethical duties cannot do the work of securing the corresponding rights. If these groups are left at the mercy of others’ virtuous decisions to take it upon themselves to fight their battles for them, then the security of the right is now subject to someone’s consent. And if the security of the right is subject to consent, then we haven’t secured a right at all. In order to secure such rights they must be connected with the duty of some specifiable other who must intervene to protect them. To put the point differently, we may say that in order for people to be secured perfect rights of justice, there must be a corresponding perfect duty of justice. An imperfect duty of virtue cannot do the required work of securing perfect duties of justice. It follows from this that what we need is an explanation of why persons external to oppressive relations do wrong if they fail to intervene on behalf of powerless or morally incapable individuals or groups of individuals. Libertarian positions, however, appear particularly unsuited to provide such explanations because a necessary duty to intervene conflicts with the libertarian notion of “self-ownership”. Libertarians agree that “self-ownership” includes an exclusive right to oneself, one’s property and thus to one’s power to act. As Nozick famously argued, if needy others are given rightful claims to one’s means, then there is no liberal right to live one’s own life with one’s rightful means.³

Second, Cudd might respond that this problem can be overcome by appeal to the state’s duties towards each of its citizens. But still the possibility of rights for the powerless and morally incapable remains subject to consent – at least insofar as Cudd envisions her account as compatible with libertarian anarchism, since actual consent is necessary for the establishment of a legitimate political authority. Consequently, the powerless will have no right against oppression unless others agree to establish a state. The problem is even worse for the morally incapable, who precisely in being incapable, cannot give actual consent. The

result, as A. John Simmons points out, is that the relations between the morally able and the morally incapable remain in the state of nature.⁴ Therefore, either the state has no rightful standing in these relations or we need an account of why the state has such standing even though the morally incapable cannot consent to its authority. Naturally, the citizens may consent to authorize the state to fulfill other, non-mandatory duties on their behalf, including the duty to intervene in oppressive relationships involving morally incapable individuals. Still, securing the rights against oppression in this way entails that the possibility of the rights are subject to the consent of the powerful/capable. This is hardly sufficient. To overcome this problem we need an explanation of why everyone has a right and duty to intervene by means of a 'hypothetical consent' account of rightful coercion. But searching for a 'hypothetical consent' account leads us back to the general libertarian problem of reconciling the duty to intervene with "self-ownership", as discuss in the previous paragraph.

More generally, it is not clear to me why Cudd would want her position to be compatible with libertarianism. The two problems I have identified are just some of the challenges involved in taking on the libertarian dictum that the rights of the state are reducible to the rights of individuals and that the need for the state is merely prudential. Legalistically speaking, libertarians are committed to the claim that 'public law' (the rights of citizens with regard to state institutions) is fundamentally co-extensive with 'private law' (the rights of individuals against one another), precisely because the state is merely a prudential means through which individuals enforce their rights against each other. Cudd's analysis of oppression in terms of harms done ultimately by and to individuals, even if as members of groups, seems to stem from a desire to remain faithful to this commitment. Yet I believe that Cudd's liberal account would be strengthened if she were to give up her commitment to libertarianism.

One reason why Cudd's account might be better off without libertarianism is that libertarianism does not seem to fit well with Western, liberal legal frameworks. Typically, in the interest of consistency, libertarian analyses often demand a rather radical restructuring of the operating legal framework. We see evidence of this in two relevant ways. On the one hand, libertarian analyses have trouble tracking how individuals have rights against one another (private law) and how as citizens they have rightful claims on public institutions (public law) that go beyond the right to enforce private law through the state apparatus. On the other hand, libertarians cannot make good sense of how the rights individuals hold against one another is quite different in nature and extent from the rights they have in relation to public institutions. My welfare rights, for example, are not rights I hold against other private individuals, but rights I hold only against our common public institutions. Hence, insofar as we believe it a virtue that our accounts can track prominent features of current liberal legal practices, such as to track the differences between private and public law and thereby make our theories capable of directly engaging and informing legal arguments, Cudd's commitment to libertarianism is a disadvantage.

Consider, for example, Cudd's proposed strategies to fight oppression. She mentions five: "Rhetorical and Symbolic Strategies" (202-4), "Economic Strategies" (204-6), "Armed Struggle" (206-9), "Legal Strategies to End Oppression within States" (209-18), and "Resistance to Indirect Economic and Psychological Force" (218-21). To start, it is not clear to me what principle(s) distinguishes these categories, why these are the five categories delineated, or why Cudd thinks they are the strongest means for fighting oppression. For example, amongst the legal strategies for states are mentioned laws governing hate speech, group defamation, abortion, spousal abuse, and sexual harassment. First, Cudd seems to focus

primarily on private law strategies to fight oppression, as most of these legal strategies are private law examples. This is not puzzling given her commitment to libertarianism, but it is puzzling in light of the fact that on her view oppression is institutional or systemic, which seems to call for stronger, presumably explicitly public law strategies to combat it. Second, states' actual public law strategies seem to go beyond the ones mentioned. For example, US public law strategies not mentioned by Cudd include measures such as affirmative action law, the Equal Pay Act, Title Nine of the Education Amendments of 1972, the Americans with Disabilities Act, the Civil Rights Act, and so on. It seems to me that these public law measures constitute some of the most powerful tools the state has in fighting structural, institutional oppression of the kind Cudd describes in *Analyzing Oppression*. These are legal measures aiming to secure systemic justice, which cannot be understood merely as the state enforcing individuals' or groups' rights against each other. Instead, they constitute legal claims citizens have, and can only have, on their public institutions (public law). The libertarian will hold that since all public law ultimately is understood as state enforcement of private law, all public law, in principle, must be enforceable by virtuous individuals, alone or in groups, in the state of nature. Yet the reason why we institute public laws to ensure systemic justice, I suggest, is not merely that it is implausible or inconvenient for individuals or smaller groups to do it on their own. Rather, public law requires public, instead of private, enforcement for two reasons: First, it is simply impossible empirically to track who (in particular) harms whom and how much when it comes to systemic oppression. What is more, this difficulty entails that the enforceability of rights suffers indeterminacy and is subject to luck. Second, it is impossible for each individual simultaneously to assume coercive control over the related systems – economic, educational, etc. – to enforce her rights as protected by public law. If Cudd wants to stay faithful to her libertarian commitments, it seems that she is required to

explain how private individuals, alone or in groups, in principle can enforce public laws aiming to secure systemic justice.

Let me try to illustrate these last two points from a different direction. Cudd argues that because crimes such as rape and spousal abuse are linked to sexual oppression of women, these crimes should have a harsher penalty (218). I think she's right about the conclusion, but it seems that the argument in support cannot be presented as a private crime argument as her commitment to libertarianism demands.⁵ I believe Cudd indirectly gives the reason for this:

Suppose that we explain some aspect of life as oppression that comes about as a result of actions m_1, \dots, m_n . Now we see that m_1, \dots, m_n are in fact the means to some state s_1 . But suppose that we can show with our moral and political theories that s_1 is unjust, and thus undesirable. So we have an argument for not doing m_1, \dots, m_n, \dots . Furthermore, while the sequence m_1, \dots, m_n results in oppression, that does not mean that each of m_1, \dots, m_n are separately oppressive (32).

It seems to me that if oppression has this structure – and I believe Cudd provides very strong reasons to believe that it does – then the wrongdoing involved cannot in principle be covered by private criminal law. Private crimes can track the particular attempts at depriving others of their rights, but it cannot track systemic injustice. Thus, private criminal law cannot ensure justice when “ m_1, \dots, m_n results in oppression”, but “each of m_1, \dots, m_n are [not] separately oppressive”, namely when the collection of acts is oppressive but each individual act in the collection is not. Since oppression involves a type of systemic wrongdoing that is not in principle traceable in terms of individuals' particular wrongdoings against one another, the wrongdoings involved cannot be seen as private

crimes. Although there might be individual wrongdoings involved, as for example in individual cases of rape (a private crime), the oppression itself must be redressed through public (order) criminal law. Although the conclusion that private crimes also involving oppression should be fought with harsher penalties is justified by Cudd's analysis of private group harm – that in raping one woman all women are harmed – it seems easier to make it a public criminal law argument. The state may as a matter of public criminal law increase the penalties on such attacks since they undermine its efforts to create conditions of systemic justice for its citizens. That is to say, private crimes that also sustain oppression, because they undermine the possibility of justice itself, can and should be covered by both private and public criminal law with penalties relative to each kind of infraction. Unfortunately, due to Cudd's commitment to a libertarian conception of rightful coercion this kind of argument is unavailable.

Here is another example illustrating why Cudd's considered view would be stronger without a commitment to a libertarian conception of justice. Cudd argues against Nozick that individuals should have a right to "autonomy" against one another (129ff). Unless the right to autonomy Cudd advocates is merely an original right to material resources sufficient to obtain autonomy *if prudently used*, I doubt the argument will succeed on libertarian, or even liberal grounds. After all, if people are to have a continuous right to autonomy beyond such an "original share right", then they must have a continuous right to access other persons' private property, which seems inconsistent with the possibility of a consistent liberal account of private property rights. For example, assume I squander my original fair share of the resources. If I have a right to autonomy that goes beyond having a right to an original fair share of the resources, I now have a right to a share of your share of the resources. But having a right to choose in such a way that I obtain an enforceable right to

another's property contradicts the very (liberal) notion of private property rights. As noted above, a commitment to the libertarian notion of self-ownership requires that we are protected from coercive interferences of this kind.

In addition, Cudd seems to understand the right to autonomy as a systemic right – a right to be treated in a certain way by the economic system as a whole. The question is whether such a right against a system can be explained in terms of private law. First, employment and any notion of welfare (autonomy) rights are, I believe, inherently public laws; they involve claims on the *public* institutions. They are not reducible to rights individuals hold against one another. Yet if Cudd wants to remain committed to libertarianism, we need an explanation of the way in which these kinds of systemic rights *actually are* explainable in terms of individuals' rights against one another. I cannot see that this is done successfully by Cudd or indeed by any currently available libertarian account. Second, it seems impossible for individuals to enforce such systemic (autonomy) rights against one another without thereby depriving each other of any notion of an autonomy right at all. If I am to assume control over the economy to ensure that it provides me with autonomy, you cannot do the same contemporaneously. But if not, then surely each of us cannot be said to enjoy an enforceable right to autonomy.

Each of the problems I argue Cudd's current account of oppression encounters is easily solved by giving up the commitment to libertarianism. She need not, however, also give up liberalism. She could adopt an alternative liberal view in which the rights of the state are not reducible to individuals' or private group rights. In fact, the rights of the state and the rights of individuals (or private groups) can be seen as quite different in nature. The state still enables enforceable private law through public law, but in addition it sets up a set of institutions that are inherently public in

nature, namely institutions on which the citizens have claims in virtue of public law. In my view, the state does this not only because, as Cudd points out, it must set up a monopoly on coercion (209), but also because it must reconcile its monopoly with the rights of each citizen as free and equal. Hence, when Cudd says, “Ending oppression is a legitimate, liberal social goal” (217), I believe she’s got it almost right. Were she to adopt the alternative liberal theory of justice along the lines I have suggested, her considered view would be that ‘Ending oppression is a legitimate, liberal *public* goal’. As such, the state does not attempt to eradicate all social exclusions by, say, forcing people to include those they want to exclude from their particular social group. If I don’t like soccer players, I do not have to include them in my private world – indeed, soccer players are out of luck with regard to most people’s private lives if others share my preferences regarding friends. But with regard to the economic and political systems as governed by public law, we – the non-soccer players and soccer players alike – are considered as citizens, and as such we are all free and equal. The just state will fight oppression in that it denies and heavily punishes any group of its citizens that tries to make it the case that ‘the basic structure’ – to use Rawls’s framework – does not recognize each citizen as free and equal. By protecting each person’s (or private group’s) rights under private law and also by building public institutions governed by public law, the state systemically secures the rights of each of its citizens.

At this point we might ask why only the state, and not groups of individuals, can enforce public law? Why can’t we together as a social group find a way to control the systems that seems agreeable to all or at least the majority? The reason is, yet again, a problem of conceiving the possibility of enforceable rights as subject to consent. If we make it a requirement that everyone agrees, then the possibility of right has been subjected to particular persons’ consent as to how to control the systems. Alternatively, if we require only majority

agreement, then the solution fails to justify the resulting coercion against those who disagree, and hence opens up the ‘tyranny of the majority’ problem. In either case we have lost the notion of enforceable public law.⁶

Finally, accepting the proposed alternative view of rightful coercion, as constituted both by private and public law, seems to result in a more plausible and a pragmatically better way to address historical injustice. First, it is simply not possible to trace the actual effects of all historical injustices. I believe Cudd is quite right to think that insofar as we can, and if the wrongdoers are still alive, then private law is an important tool for redress. Nevertheless, I believe Cudd is mistaken in implicitly assuming that private law can provide the kind of restitution she wants. Cudd argues, “anyone who has gained from theft, coercion, or slavery should be forced to make restitution, to the victims if they are living, or to some suitable descendant if the victims are not living” (102). Because, however, so many historical injustices are untraceable to individuals, on Cudd’s account they are irreparable. Moreover, it is surely no solution to put those who have benefited unintentionally on trial for crimes intentionally committed by others against someone else – all of whom directly involved are now long dead. But if we accept that the state’s rightful use of coercion is not in principle reducible to those of individuals or private groups, then this need not be the end of the story. If the state’s function is to provide a framework within which its citizens can interact as free and equal and if the state determines that some of the socio-economic inequalities are traceable to historical injustices, then it can provide remedies without also knowing the individual perpetrators or victims. Because the state is necessary to enable justice in principle and because citizens must be seen as consenting to establishing a state that reconciles its monopoly on coercion with the rights of each, they must be seen as agreeing to a state that does not merely secure private right for all, but also systemic right through

public right measures. Public right aims at providing systemic protections enabling fair conditions of interaction. Hence the state, but not private individuals, can establish various public law measures that aim, over time, to strengthen those groups of citizens that are currently suffering the effects of historical oppression.

In the above, I have given some reasons to encourage Ann Cudd to give up her commitment to libertarian conceptions of justice. I have argued that these commitments hamper her ability to provide the arguments necessary for the conclusions she draws concerning how to fight oppression. My suggestion is that she let go of the idea that all rightful, liberal uses of coercion are reducible to the rights individuals hold against one another. Then her view will be compatible with a liberal framework in which public right is not reducible to private right. The result, I believe, is only to Cudd's advantage, since she neither needs abandon any substantial commitments made nor conclusions drawn in *Analyzing Oppression*. Instead, her ability to critique our legal and political institutions is only strengthened.

References

Cudd, Ann. 2006. *Analyzing Oppression*. Oxford: Oxford University Press.

¹ I'm grateful to Sally Haslanger and Shelley Weinberg for excellent comments on an earlier version of this commentary.

² It's an open and complex question, in my view, whether Rawls's position in *A Theory of Justice* shares this understanding of individuals' rights, but that issue is beyond the scope of this commentary.

³ This is why Nozick argues that all apparent redistribution of material means must be explained in terms of the proviso – a fundamental assumption much libertarian theory, including left-wing libertarians like Michael Otsuka and Gopal Sreenivasan, accepts. An important exception in the Lockean camp is A. John Simmons. But then again, his notion of an enforceable right to charity is one of the weaker points in his theory exactly because he doesn't explain how it is reconcilable with a liberal conception of private property and self-ownership. Locke himself was clearly aware of this problem as reflected in the contrast between his affirmation of a right to charity in the first *Treatise* and his rejection of such a right in *A Letter Concerning Toleration*.

⁴ See chapter 4 ("Rights and the Family") in Simmons (1992).

⁵ On libertarian anarchist analyses, that all criminal law is public law results from the fact that individuals entrust the state to enforce their individual rights on their behalf. Because individuals can punish rightfully in the state of nature, on these accounts, criminal law is fundamentally law concerning rights private individuals holds against one another.

⁶ Another reason is the same as that which explains why, contrary to Cudd's claim, her considered view is incompatible with socialism. According to Cudd's conception of socialism, the state owns the means of production (133). Yet it seems to me that if the state (rather than individuals) originally owns the means of production, then the state, in principle, cannot be an impartial

representative of its citizens. If the state originally owns all the means of production, then not only does a person's access to any means of production become subject to other people's consent (namely the social group in power, whoever they are), but also the state cannot be properly impartial to any particular conflicts regarding the means of production. Since the state itself is an interested party, in principle it cannot be the impartial adjudicator between other interested parties. That is to say, if a social group gets to decide and enforce the rules of social interaction, then there is no reason to believe that it will not merely perpetuate the oppression rather than provide the ideal means to overcome it.