

# Women and the Invisible Fist

## *How Violence Against Women Enforces the Unwritten Law of Patriarchy*

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“For the *Common Law of England* is nothing else but the *Common Custome* of the Realm: and a Custome which hath obtained the force of a Law is always said to be *Jus non scriptum*; for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but being onely matter of fact, and consisting in use and practice, it can be recorded and registered nowhere but in the memory of the people... and so by often iteration and multiplication of the Act, it becomes a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*.” (John Davies, *Irish Reports*)

“The crowd of mankind [*sic*], are directed in their establishments and measures, by the circumstances in which they are placed; and seldom are turned from their way, to follow the plan of any single projector. Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to future, and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.” (Adam Ferguson, “An Essay on the History of Civil Society”)

“Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of the law, without express state acts, often in intimate contexts, as everyday life.” (Catharine MacKinnon, *Toward a Feminist Theory of the State*)

## I. Rape Culture and Radical Feminist Theory

**F**eminist social theories hold that historical and contemporary societies are marked by widespread sex inequality – by systemic privileges for men and systemic burdens inflicted on women. *Radical* feminists, in particular, hold that sex inequality is not only widespread but deeply-rooted and self-sustaining – that casual sexism, misogynistic double standards, gender gaps in wages and social position, the exploitation of wives’ and mothers’ unpaid labor, political assaults on women’s sexual and reproductive freedom, and other harms inflicted on women should all be

understood as interlocking components in a system of class power (usually called “patriarchy” or “male supremacy”). Most radical feminists focus especially closely on the role of pervasive *male violence against women* as a foundational source, a clear expression, and a constant reinforcement, of systemic male power over women.<sup>1</sup>

Radical feminist theories do mention, and do attempt to account for, forms of mass violence against women that have been centrally organized and directed by male political authorities – such as lethal abortion laws, the use of rape as a weapon of war, the mass torture and execution of women during the early modern European witch-craze. But they often concentrate especially on pervasive but *diffuse* forms of violence, such as rape, domestic violence, harassment, and other forms of interpersonal intimidation and coercion, which are typically inflicted on individual women by individual men – intimates, family, acquaintances, or strangers – for motives of their own, and in “private” life, not in the “public” sphere of government policies or centrally coordinated campaigns. Feminist accounts of these forms of individualized violence have at least three key features in common. First, they characterize the violence as *pervasive* rather than abnormal, originally citing the shared experiences discovered in women’s consciousness-raising groups, and later empirical research

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1 Since my topic in this paper is the work of specific radical feminist theorist (Susan Brownmiller), when “feminism” or “feminist” are used by themselves in the text, they are often meant as convenient abbreviations for “*radical feminism*” or “*radical feminist*.” To be a “radical feminist,” in this sense, means something more technical than simply being “extremely feminist,” or “rhetorically militant about feminism,” or “a political radical who is among other things a feminist.” Radically feminist theories are theories in which sexual politics play a certain unique role, and radical feminism in this sense is typically distinguished from liberal feminism, on the one hand, and socialist- or marxist feminism, on the other. By contrast with liberal feminism, radical feminism is *radically* feminist in the sense of being *revolutionary* rather than *reformist* – it sees sex inequality not as a superficial constraint or an aberration within civil society, but as a deeply-rooted form of class oppression which can be found “at the root of” virtually all political, cultural, sexual and economic institutions. They see women’s oppression as upheld not only by arbitrary discrimination, bad policies, explicit prejudices, or outmoded ideas about women’s natural capabilities, but also as constantly reinforced in the material conditions of women’s daily lives and the structured relationships encountered in the workplace, government, the family, sex, education, language, religion, and every other sphere of social life. To put an end to women’s oppression would mean not only reforming sexism out of existing institutions, but in abolishing and transforming institutions and social relationships at the most fundamental level. By contrast with socialist- or marxist feminism, radical feminism is *radically* feminist the sense of treating women’s oppression as *irreducible* rather than *derivative* – as a form of oppression which, so to speak, goes “all the way down” – in the analysis and critique of existing society. Socialist-feminist theories treat sex inequality as by-product or epiphenomenon of economic exploitation, and marxist feminist theories focus specifically on the development of sexual inequality in families and cultures as historical precursors to capitalist divisions of labor, and their reproduction as by-products of the economic exploitation of workers (male and female alike) at the point of production. Radical feminists, by contrast, argue that a feminist theory must take account not only of the ways in which women, like working-class men, are oppressed *as workers*, but also the unique forms of oppression *by men* that women face *as women* (such as rape, wife-beating, stalking, sexual harassment, government abortion laws, and other forms of systemic male violence against women). Cf. MacKinnon (1989), Part I (“Feminism and Marxism”) and MacKinnon (1987), especially “The Art of the Impossible” (1-17) and “Difference and Dominance: On Sex Discrimination” (32-45).

confirming that as many as 1 in 13 men in the U.S. has attempted or committed rape,<sup>2</sup> that 1 in 6 women has been raped in her lifetime,<sup>3</sup> and that about 1 in 4 women has been raped or physically battered by her husband, boyfriend, or date.<sup>4</sup> Second, they characterize pervasive violence as *systematically structured by sex* (overwhelmingly committed by men against women, and rarely *vice versa*). Third, they argue that systemic male violence must be understood as *structural* or *political* – in addition to the physical and psychological harms inflicted on individual victims of violence, the violence has further, powerful *ripple effects* for *all* women’s social freedom and material well-being. To insist on this point, and to protest the common tendency to write off violence against women by hiding it in the “private” sphere, as a merely “personal” problem, radical feminists often challenged the common dichotomy between the “private” and “public” spheres, often quoting Carol Hanisch’s famous declaration that “the personal *is* political.”<sup>5</sup>

## II. Susan Brownmiller: Myrmidons and Misinterpretations

Radical feminist theories of sexual violence also have a fourth feature in common: they are commonly misunderstood, or even wildly distorted, by their critics. For an example of all four points,

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- 2 Koss (1988), 11 (Table 1.2). Koss’s results have, occasionally, become a subject of controversy, including within libertarian circles. This being a philosophy paper, I can happily say that, while I find most of the objections raised against Koss to be ill-founded, often to the point of intellectual negligence if not dishonesty, the truth or falsity of Koss’s *empirical* claims is largely independent of the *analytical* point that I wish to make about the relationship between Brownmiller’s Myrmidon theory and Hayek’s development of the concept of spontaneous order, and the former, empirical question is largely beyond the scope of this paper. However, see Warshaw (1994) for a detailed discussion of Koss’s findings and a defense against some of the most common objections; as well as later studies with quite different survey instruments, such as Tjaden and Thoennes (2000). Nothing essential to the empirical case for the prevalence of violence against women depends solely on the quality of Koss’s research.
  - 3 Research over the past twenty years has typically found a prevalence of between 1 in 4 women and 1 in 6 women having experienced an attempted or completed rape during her lifetime up to the time of the survey. For the upper and lower boundary figures, see Koss (1988) 10-11, and Tjaden and Thoennes (2000), 13-14 respectively. The difference in results may largely be due to differences in the operational definitions of “rape” used in each study: Tjaden and Thoennes’s National Violence Against Women Survey (NVAWS) included only cases in which a man or woman was coerced into sex through the direct use or threat of violence, while Koss also included cases in which a woman was drugged, or too drunk to consent. When questions related to alcohol or drugs were removed from Koss’s analysis, the rates were closer to those found by NVAWS. Besides the difference in definition, the NVAWS was also conducted during the mid-1990s, a decade and a half later than Koss’s study, and conducted with a broader sample (Koss surveyed American college students; NVAWS surveyed men and women of all ages and occupations from across the United States).
  - 4 Tjaden and Thoennes (2000). 26 (Exhibit 9).
  - 5 Carol Hanisch (1969/1970), “The Personal is Political,” originally published in *Notes from the Second Year*. The content of Hanisch’s paper is explicitly concerned with taking down the distinction of “‘personal’ vs. ‘political’,” and in the body Hanisch writes that “One of the first things we discover in these [c.r.] groups is that personal problems are political problems,” but when reprinting the article years later, Hanisch wanted to clarify that the specific *phrase* “The Personal is Political,” which appears only as the title of the essay, was not written by her, but rather provided by the editors of *Notes*, Shulamith Firestone and Anne Koedt (Hanisch 2006).

consider Susan Brownmiller's "Myrmidon theory" of stranger rape, as presented in *Against Our Will* (1975), her groundbreaking historical and theoretical discussion of rape as a political force. At the end of the first chapter, Brownmiller famously writes that:

Man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times, along with the use of fire and the first crude stone axe. From prehistoric times to the present, I believe, rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear. (14–15)

Antifeminist critics have slammed Brownmiller for supposedly slandering all men as rapists<sup>6</sup> (she does not actually say that; the verb in the sentence is not "rape," but "keep ... in a state of fear"), or for advancing an essentialist or determinist theory about rape, on which her remarks about "Man's structural capacity to rape" are taken to express not merely bare possibilities, but some deep, perhaps even inevitable fact about the biology of the human male.<sup>7</sup> Either sort of reading is hard to reconcile with any reading of the text that gets *beyond* page 15. In the last chapter of the book one can find Brownmiller writing, just as clear as could be, that "[I]nsertion of the penis (a descriptive phrase less semantically loaded than penetration, I think) *is not in itself, despite what many men think, an act of male dominance*. The real reason for the law's everlasting confusion as to what constitutes an act of rape and what constitutes an act of mutual intercourse is *the underlying cultural assumption* that it is the natural masculine role to proceed aggressively toward the stated goal, while the natural feminine

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6 For example, conservative Catholic philosopher Michael Novak, in a particularly ill-tempered and amazingly careless review of *Against Our Will* for *Commentary* (1976) writes: "The manifest thesis of this book may be simply stated: it is that the basic sexual relation between men and women is rape. ... For in defining rape so broadly and demanding its eradication, what else can Miss Brownmiller be flirting with but the eradication of all sexual relations between men and women?" (90). Wendy McElroy, a professed libertarian feminist whose writing has become increasingly antagonistic towards radical feminism in recent years, writes in "The New Mythology of Rape" (2001) that "Brownmiller's ... myth is that men, in general, have created a mass psychology of rape. Brownmiller claims that all men are rapists at heart and all women their natural prey. ... Although one might question how Brownmiller comes by her amazing information about rape and male attitudes in prehistoric times, her message is clear. Men are inherently rapists." (¶¶ 35-37).

7 The misunderstanding of Brownmiller as a biological determinist is not limited to antifeminist polemicists or conservative partisans. In Blackwell's *Companion to Gender Studies* (2009), Criminology contributor Tony Jefferson writes that Brownmiller's theory (along with other radical feminist theories) made groundbreaking contributions, but "In other ways ... they [failed] to surmount orthodox thinking.... [T]he notion of how individual men come to acquire patriarchal, masculine values, whether these were seen as *rooted in biology (as they were for Brownmiller)* or in culture (as became more common), is, like sex-role theory, implicitly deterministic: Weber's 'iron cage'" (220, emphasis added). Rosalyn Baxandall and Linda Gordon (2000) – themselves veteran feminist activists and co-editors of *Dear Sisters: Dispatches from the Women's Liberation Movement* – claim that *Against Our Will* "advances the theory that rape is biologically determined" and "called attention to anatomy as the basis of rape." Both claims, made in passing, are apparently based entirely on the brief passages at the end of the first chapter of the book, or on the reception of those brief passages by reviewers. For a more detailed defense of Brownmiller against the charge, see Johnson (2004).

role is to ‘resist’ or ‘submit.’” (384-385, emphasis added); the underlying cultural assumption is, presumably, a cultural assumption that she believes it possible and desirable to change. Perhaps more importantly for our analytical purposes, in Chapter 6, “The Police-Blotter Rapist,” Brownmiller discusses the commonplace criminological reality behind sensationalistic myths about the stereotypical stranger-rapist, and the effects of his actions on women’s daily lives:

Rape is a dull, blunt, ugly act committed by punk kids, their cousins and older brothers, not by charming, witty, unscrupulous, heroic, sensual rakes, or by timid souls deprived of a normal sexual outlet, or by super-menschen possessed of uncontrollable lust. And yet, on the shoulders of these unthinking, predictable, insensitive, violence-prone young men there rests an age-old burden that amounts to an historic mission: the perpetuation of male domination over women by force.

The Greek warrior Achilles used a swarm of men descended from ants, the Myrmidons, to do his bidding as hired henchmen in battle. Loyal and unquestioning, the Myrmidons served their master well, functioning in anonymity as effective agents of terror. Police-blotter rapists in a very real sense perform a myrmidon function for all men in our society. Cloaked in myths that obscure their identity, they, too, function as anonymous agents of terror. Although they are the ones who do the dirty work, the actual attentat, to other men, their superiors in class and station, the lasting benefits of their simple-minded evil have always accrued.

A world without rapists would be a world in which women moved freely without fear of men. That some men rape provides a sufficient threat to keep all women in a constant state of intimidation, forever conscious of the knowledge that the biological tool must be held in awe for it may turn into a weapon with sudden swiftness borne of harmful intent. Myrmidons to the cause of male dominance, police-blotter rapists have performed their duty well, so well in fact that the true meaning of their act has largely gone unnoticed. Rather than society’s aberrants or spoilers of purity, men who commit rape have served in effect as front-line masculine shock troops, terrorist guerrillas in the longest sustained battle the world has ever known (208–209).

Brownmiller does not then portray all men as rapists or biologically driven to rape; one important gear in her theory *turns* on the structural effects that rapists’ actions have for men who *do not* rape. When she says that rape is a conscious process of intimidation by which all men keep all women in a state of fear, she has to be understood as asserting not that all men rape, but rather that the *practice* of rape by *some* men functions to give all men a position of power over women. This corrected understanding may still be challenged. Many critics turn from the structural *effects* of rape to the *motives* of the rapist, suggesting that, since most rapists act on no such grandiose plans about upholding patriarchal control, but rather on concrete, personal desires (from whatever source), it makes no sense to claim that they act

to further the interests of men as a class. On the other end, critics frequently accuse Brownmiller of disregarding how far individual men, as well as male-dominated public institutions *condemn* rape (for example, by making and enforcing laws against it), thus, presumably, demonstrating that rape, however common and devastating, must be understood as a *private* crime, disavowed by existing political authority, and committed by isolated men for reasons of their own.

Both approaches respond to Brownmiller as if she had proposed a sort of conspiracy theory to explain the pervasiveness of male violence – as when Michael Novak claimed Brownmiller views heterosexuality as a self-conscious “extortion racket”<sup>8</sup> – in which the men all get together somehow, and the anonymous shock troops who commit rape consciously collaborate with the more respectable men who gain structural power over women, in order to advance a shared plan to keep women down. If that were Brownmiller’s proposal, then certainly it would suffice to show that most men are not in on any such grand plan. It is not Brownmiller’s proposal; she never says anything of the sort, and in fact explicitly states that the role of “police-blotter” rape in maintaining male supremacy “has largely gone unnoticed,” including among men. Such responses to Brownmiller reveal an *exegetical* failure – they read into the text a claim that Brownmiller never makes. But more than that, they reveal a *conceptual* failure: a failure to see what Brownmiller is saying because you haven’t yet got the right conceptual lenses through which to see it, or to understand what, theoretically speaking, is going on. This or that misreading can be dispatched, but the *source* of each misreading cannot be helped with closer readings of the *ipsisima verba*. What’s needed is an attempt at a more charitable reconstruction.

Contrary to canonical misunderstandings of feminist theories of male violence, I will argue that the central insights of radical feminist analysis can be illuminated by rereading them in light of a surprising source – by charitably reconstructing Brownmiller’s Myrmidon theory as an unusual but recognizable application of the concept of “spontaneous order,” as developed in the works of libertarian social theorists, and most notably the Austrian free-market economist Friedrich Hayek. Rearticulating Brownmiller’s theory in Hayekian terms provides a surprising resource for the radical feminist critique of rape culture; it may also dialectically clarify and enrich the concept of “spontaneous order” in the process of applying it to the concrete problem.

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8 Novak 1976, p. 90.

### III. Spontaneous Order and Libertarian Social Theory

Libertarian approaches in social theory are shaped by their central concern with individual freedom, and by strict expectations of *mutual consent* as a norm for all interpersonal relationships and social institutions. Individual freedom is understood as the right to be secure in your person, labor and effects without coercive interference – to be left free to dispose of them in any way you see fit, so long as you do not forcibly interfere with the equal freedom of any other person to make her own choices. Agreement is understood as genuine consent only when every party is free to participate or to peacefully decline the agreement, *as an individual*, without a threat of force or fraud.

Rights of entry and exit, and consensuality in social institutions, inform both the libertarian's positive concern for the role of civil society in community life, and also her negative concern for the size and scope of government. While non-libertarian political theories often understand the state as a mechanism for producing positive goods and social services, libertarians typically focus on the military, police, and prison functions of government, in order to draw attention to the negative means by which states establish hegemonic control over the goods they provide. Unlike other social institutions, governments assert the unique prerogative of using the threat of overwhelming force to compel obedience to their designs, forbid the withdrawal of support from their projects, and forbid participation in relationships (even peaceful relationships among consenting adults) that government declares contrary to their own compelling institutional interests.<sup>9</sup>

Since libertarians see governments not as vehicles for social service but as instruments of organized violence, the question is not simply what values or priorities a community ought to express through the state, but what values or priorities, if any, can legitimately be *imposed* on non-consenting parties by means of overwhelming force. While libertarian theorists are commonly accused of simply devaluing, or disregarding, the realm of public goods or shared social projects, this is simply a misunderstanding of the kind of normative boundaries that libertarians bring to questions of social organization. To deny that a task should not be taken on by the *state* is not to deny that it ought to be taken on by *consensual society*. And although a social good may be worth having in itself, it may not be

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9 Hence the common libertarian preoccupations with criticizing intrusive government policies, such as police state surveillance, paternalistic and moralistic prohibitions on “victimless crimes” among consenting adults, the use of taxation and eminent domain to provide government-sponsored “development” programs and government-directed “social services,” and government restraints on consensual exchange in private markets – all are seen as the unnecessary substitution of government coercion in place of consensual social dynamics.

worth hurting or killing folks to attain it. When libertarians insist that non-consensual political relationships aren't acceptable means for a given social good, the conclusion to be drawn is not that we should simply forget about it, but rather that the hegemony of the state over that area of public life needs to be dissolved, and responsibility for that good should be devolved, and taken up by, the creativity of individual people, grassroots community conventions, or consensual social organization.

Libertarian critiques of government economic planning, and emphasis on free exchange as a space for individual creativity and social experimentation, have inspired the development of conceptions of “spontaneous order” as a core element of libertarian social theories. Theories of spontaneous order spring from an observation that the vital underpinnings of human social life include large-scale patterns of interaction and coordinating structures which seem to emerge without – and indeed, *beyond the capacity of* – any intelligent designer or designers to construct or manipulate to particular ends. Hayek writes in “Kinds of Order in Society” (1964) that these “spontaneous orders,” unlike orders that result from conscious *organization* according to a preconceived plan, are “orders of another kind which have not been designed by men [*sic*] but have resulted from the action of individuals without their intending to create such an order;” (§ 7) he later characterizes spontaneous order as a “polycentric order” (§ 9) in which, rather than “creating a concrete preconceived order by putting each individual on a task assigned by authority,” the interconnected but spontaneous actions of individuals produce an emergent order, without putting any one person or committee of people in charge, as “an adaptation to a multitude of circumstances which are known only to the individual members but not as a totality to any one of them.”

Examples of spontaneous social orders are familiar and ever-multiplying both in economics and in libertarian social theory: common examples include the adjustment of market price signals to relative scarcities under conditions of free exchange, and the convergence on common media of exchange in barter economies. Similarly, spontaneous order can be seen at work in the original development of the amber roads and other early overland routes in Europe. This extensive network of heavily-trafficked and economically vital roads, which crossed the breadth of Europe before recorded history, were never laid out along a pre-planned grid, or engineered or maintained by any one road builder.<sup>10</sup> What happened is

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<sup>10</sup> Hayek (1952/1979) offers the evolution of roads as a brief example without any specific historical referent: “It is only in the very simplest instances that it can be shown briefly and without any technical apparatus how the independent actions of individuals will produce an order which is no part of their intentions; and in those instances the explanation is usually so obvious that we never stop to examine the type of argument which leads us to it. The way in which footpaths are formed in a wild broken country is such an instance. At first everyone will seek for himself what seems to him the best

that travelers through untracked wilderness would simply cut their way through, removing barriers and clearing a path for their own use as they went along. Once cleared, the path would be overgrown only slowly; later travelers, not knowing the original travelers from Adam, would still find smoother ground and thinner, newer growth along the old route – far easier to clear than the rough ground and old growth off the trail. So the more a path was taken, the more attractive it became to future travelers, who in turn cleared and smoothed the path again, creating a feedback loop as paths evolved organically from overgrown backwoods trails to large, open thoroughfares. The evolving network of roads was sustained mostly by those who depended on them, and the best, clearest roads naturally developed along the routes with the greatest local need for mobility. This was, in fact, how most roads were “built” and maintained throughout most of human history, until later expansionist governments, such as Rome and the later Western European powers, crowded out spontaneous road networks by engineering and maintaining roads of their own, laid out mainly to move armies of conquest and occupation, and built by means of tax levies and forced labor.

Although closely associated with free-market economics, there is no conceptual reason why the employment of spontaneous order concepts need be limited to capitalist economies or to narrowly economic topics at all:<sup>11</sup> Hayek argues that attention to spontaneous orders is the distinguishing feature of all serious social sciences, and frequently mentioned as examples the emergence and ongoing evolution of human languages and writing systems, which, he remarks, “possess an order which nobody has deliberately designed and which we have to discover,” through a science of linguistics. He devotes his closest attention, in later works, to the polycentric evolution of customary principles at *common law* for resolving disputes peacefully, without recourse to blood-feuds or vendettas.<sup>12</sup> Nineteenth-century

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path. But the fact that such a path has been used once is likely to make it easier to traverse and therefore more likely to be used again; and thus gradually more and more clearly defined tracks arise and come to be used to the exclusion of other possible ways. Human movements through the region come to conform to a definite pattern which, although the result of deliberate decisions of many people, has yet not been consciously designed by anyone” (70-71).

11 Or even to human explananda. The development of the economic concept was itself directly influenced by progress in evolutionary explanations of biological complexity, and the science of self-organizing systems. Failures to see spontaneous order at work commonly lead to the same sorts of creationist fallacies in either field, whether in Paley’s Watchmaker God, or in the founder-hero myths (Lycurgus of Sparta, Numa of Rome, the Three Sovereigns and Five Emperors in China, etc.) that many societies have used to invent authoritative origins for language, writing, cities, civil law, textiles, or money. See the brief remarks in Hayek (1964) and Hayek (1973) pp. 37ff and 81, and more recently the treatment in depth by Geoffrey Allan Plauché in “On the Myth of the Founder-Legislator in Political Philosophy” (2006). For funsies, see also Stephen Jay Gould’s “The Creation Myths of Cooperstown” (1991), discussed below, which compares the motivations behind more-or-less mythical account of Abner Doubleday’s whole-cloth invention of baseball to the intellectual impulses behind fundamentalist Creationism.

12 Feminist theorists have, of course, engaged in a long-standing critique of the common law’s treatment of women and sexual relationships – especially in the common-law doctrine of coverture and the treatment of “chastisement” (wife-

anticapitalist anarchists, such as Peter Kropotkin, often mentioned, as illustrations of their theories of consensual federation and stateless social harmony, the way in which European railroads managed to develop standards through free agreement to provide reliable continent-wide mobility, across multiple political boundaries, even though there was never any one company, country, or united global railroad authority to act as the “European Central Government of Railways”<sup>13</sup> or to dictate standards to the hundreds of separate outfits involved. Other prominent examples of spontaneously-developing

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beating) and marital rape. During the 19<sup>th</sup> century “first wave” of feminism coverture was widely protested as an assault on women’s rights to property and their civil rights. During the 20<sup>th</sup> century “second wave,” feminist reform campaigns finally managed to eradicate spousal exemptions which made it legally impossible for husbands to be accused of raping their wives. The latter reform campaigns aimed to eliminate spousal exemptions written into codified (state) law, but those exemptions descended from earlier common-law doctrines that denied the possibility of spousal rape (whether because, as per Hale, the marriage vows were held to involve irrevocable consent to any and every demand for sex from a woman’s lawful husband; or because, as per Blackstone, the act of marriage made husband and wife “legally one person,” such that “The legal existence of the wife is suspended during marriage, or at least is incorporated and consolidated into that of the husband,” and a wife could not bring any action for injuries to her person or her property except with her husband’s concurrence and in his name as well as her own). For partial discussions, see chapter 2 of Brownmiller (1975), MacKinnon (1987) and MacKinnon (2007).

Hayek, along with other libertarian legal theorists such as John Hasnas (2008), argue that a polycentric, evolutionary common-law process tends to secure relatively rights-respecting, libertarian results, due to the advantage that libertarian legal doctrines have in averting legal conflict and enabling peaceful social cooperation (Hasnas 2004 would prefer the term “customary law” to “common law”). But generally it may be said that the polycentric selection process claimed to be at work, will only in fact be at work for those who are recognized as having *standing* to bring their conflicts and defend their interests before the court. Hence those who are held to have no standing, or only a second-class and partial, derivative or “covered” standing, to participate in polycentric legal processes – in particular, historically, women, children, and enslaved men – tend to find much less opportunity to press for results that respect *their* persons, property, or liberty, and find common-law doctrines much more likely to represent congealed social oppression rather than individual liberty. It is in fact only a peculiar minority perspective which allows male writers like Hayek to see “law as we [*sic*] know it as the chief protection of the freedom of the individual” (1973, 67); a *feme covert* whose legal existence had lately been incorporated and consolidated into that of her *baron* would have considerably more trouble finding how the old legal order differed from “an apparatus in which the individual is made to serve the ends of [her] rulers” (1973, 67).

However, the fact that common-law produced these results does not, of course, indicate that monocentric legislation produced better results, or that campaigns to reform the situation through corrective legislation – rather than through changes within the polycentric framework of common-law – represented the best strategy for improving the situation. MacKinnon (2007), although concerned with the development of government antidiscrimination laws which radical libertarians reject fundamentally, offers a radical feminist defense of struggles within a polycentric, common-law process, as preferable to campaigns for legislative intervention, with intriguing parallels to Hayek’s later discussions of common-law and the law of legislation.

It may be asked whether concerted feminist struggle to alter the balance of customary practice within a polycentric legal system, so as to systematically alter or eliminate customary norms that ignore women’s rights or constrain women’s liberties, ought to count anymore as a development within a “spontaneous” legal order. After all, to the extent that such campaigns are successful, it will appear that they have succeeded in enacting specific, non-spontaneous designs for general legal norms, rather than allowing those general norms to evolve undesigned. (A parallel issue is raised by Timothy Sandefur (2009b) in his challenge to Hayek and to John Hasnas concerning rational action within putatively spontaneous orders.) But whether or not this counts as a non-spontaneous “intervention” will depend, in part, on whether “spontaneity” is intended to indicate an undesigned (or *emergent*) order, as defined below, or a *polycentric* order – a distinction that will be laid out, and will become central to the discussion, immediately below.

13 Kropotkin (1906), Chapter XI, ¶ 15. See Ch. XI, ¶ 8 *et seq.* for Kropotkin’s extended discussion of the European railway

community norms include conventions regulating the use of agricultural commons,<sup>14</sup> and even the evolution of common rules for American baseball.<sup>15</sup>

In the hands of Hayek and other libertarian social theorists, the concept of “spontaneous order” is employed not only as an *explanatory* alternative to monocentric, “constructive” orders and government planning, but also an alternative *normative ideal*. Thus, in his contributions to the socialist calculation debate and his responses to Marxist and Fabian worries about the “social anarchy of production,” Hayek invoked spontaneous order to argue that positive social order can emerge without deliberate “social regulation,” and that production without centralized control need be neither blind, destructive, nor chaotic<sup>16</sup> – that, in fact, ordinary individuals acting on the dispersed knowledge embodied in price signals could discover opportunities, anticipate future needs, correct allocative errors, and adjust to changing conditions far beyond the capacity of even the most comprehensive aggregate statistics and best-intentioned central regulator or planner. Changing gears from knowledge of production to the production of knowledge, an increasingly popular example with the kids these days is the explosive growth, refinement, and success of the Internet’s knowledge and communications

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network.

- 14 See Boettke and Coyne (2005) for a discussion of the work of Elinor Ostrom (inter alia), including her work on polycentric social regulation of agricultural commons and other “common pool resources,” in terms of Hayekian theories of spontaneous order.
- 15 Gould (1991) shows how the common rules of American baseball evolved polycentrically from the local rules for many different, pre-existing mid-19<sup>th</sup> century ball-and-stick games. Convergence on a common set of rules was largely the result of uncoordinated *ad hoc* compromises, as neighborhood teams began to solidify into standing clubs, and clubs with widely different local rules began to play more exhibition matches outside of their hometowns. Gould does not refer to Hayek’s or other economic formulations of spontaneous order theory; he approaches the topic by means of an analogy with biological evolution. But the overlap in explanatory frameworks is not accidental. Hayek’s father and paternal grandfather were both trained biologists, and Hayek later explained that his interest in spontaneous order was profoundly influenced by his early reading in evolutionary biology. See the first chapter of Ebenstein (2003).
- 16 In contrast with the view advanced by, for example, Friedrich Engels (1880): “Active social forces work exactly like natural forces: blindly, forcibly, destructively, so long as we do not understand, and reckon with, them. But when once we understand them, when once we grasp their action, their direction, their effects, it depends only upon ourselves to subject them more and more to our own will, and, by means of them, to reach our own ends. And this holds quite especially of the mighty productive forces of today. As long as we obstinately refuse to understand the nature and the character of these social means of action – and this understanding goes against the grain of the capitalist mode of production, and its defenders – so long these forces are at work in spite of us, in opposition to us, so long as they master us, as we have shown above in detail. But when once their nature is understood, they can, in the hand working together, be transformed from master demons into willing servants. ... With this recognition, at last, of the real nature of the productive forces of today, the social anarchy of production gives place to a social regulation of production upon a definite plan, according to the needs of the community and of each individual” (Chapter III. ¶¶ 35-36). Hayek (1973), apparently with similar views in his sights, writes: “If indignant social reformers still complain of the chaos of economic affairs, insinuating a complete absence of order, this is partly because they cannot conceive of an order which is not deliberately made, and partly because to them an order means something aiming at concrete purposes which is, as we shall see, what a spontaneous order cannot do” (37-38).

systems in general, and of Wikipedia in particular<sup>17</sup> – a project which was directly inspired by Hayek’s remarks on dispersed local knowledge in “The Uses of Knowledge in Society,”<sup>18</sup> and which depends on dispersed contributions, emerging consensus, and the polycentric implementation of evolving community norms to inform and shape its articles. In less than a decade Wikipedia has become the world’s largest and most successful encyclopedia even though – or rather, *precisely because* – its development is driven by the “social anarchy” of contributions and decentralized initiative from millions of volunteer reader/editors, without prior invitation, authorization, screening or direction by any central point of authority.

#### IV. Three Versions of Spontaneity

Given the overwhelmingly positive tone of most of the theoretical employments of “spontaneous order,” it may be surprising to realize that a careful re-reading of the Myrmidon passage from Brownmiller, with these Hayekian lessons in mind, clearly brings out a number of features in her analysis of rape culture that are reminiscent of common characterizations of spontaneous order. Brownmiller holds that rape culture involves some conscious, centrally-coordinated campaigns – such as the use of rape as a weapon of war in conflicts between male-governed nation-states. But her understanding of rape culture crucially depends on the structural effects of widely dispersed actions, which are carried out by a “swarm of men” acting “in anonymity,” rather than by governments or organized bodies of men acting on a centrally-directed plan; this ought to suggest a very clear and direct parallel to Hayek’s characterizations of spontaneous order as *polycentric* order, more akin to “organism” than to “organization.” The undirected but systematic actions of the “swarm” of Myrmidon-rapists have profound social effects but, because of their very anonymity, “police-blotter rapists have performed their duty ... so well ... that the true meaning of their act has largely gone unnoticed” (209); just as Hayek characterizes spontaneous orders in such terms as “the unintended *and often uncomprehended* results of the separate and yet interrelated actions of men [*sic*] in society.”<sup>19</sup> Yet there

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17 For discussions of the Internet or Wikipedia in light of, or as a straightforward example of, Hayekian spontaneous orders, see for example Boothby (2005), Mangu-Ward (2006), Sunstein (2006), Black (2007), Mangu-Ward (2007), Clark (2007), Lee (2008), Roberts and Wales (2009), and the passing references in the Preface and Acknowledgements of McCloskey (2010). Bragues (2007) discusses Wikipedia in terms of equilibrating processes in competitive markets, but does not make an explicit connection to Hayek or spontaneous order (seeming, rather, to draw on neoclassical rather than Austrian understandings of “competitive market structure”).

18 See, for example, the *EconTalk* interview “Wales on Wikipedia” (Roberts and Wales, 2009).

19 Hayek (1952/1979), 58. Emphasis added. Reading *Against Our Will* alongside Hayek’s *Law, Legislation, and Liberty*, it is hard not to see a very suggestive parallel between Brownmiller’s description of the “unthinking” police-blotter rapists

are of course other ways in which the sexual politics of a rape culture are more reminiscent of “constructed” order and governmental politics than they are of paradigmatic spontaneous orders. Crucially, the dispersed acts that we are discussing are, after all, not free exchanges or willing negotiations, but acts of force, and so any social order emerging from them must be seen as a social order imposed on women against their will, just as the economic or social plans of governments are imposed on the governed without genuine individual consent.<sup>20</sup>

Both the similarities and the differences from our paradigmatic cases may help reveal two important and interrelated points that I’d like to make about the notion of “spontaneous order.” Both points are easily missed, and often are missed, in extant writing about spontaneous order, in part because of the normative work that spontaneous order does in libertarian arguments for freeing economic exchange from government control. But as valuable and insightful as that normative employment may be, attempting to apply Hayekian categories to Brownmiller’s account of rape culture may help to highlight the fact that market exchange and government intervention, considered as systems of interpersonal coordination, differ from each other along *more than one* dimension. Perhaps because these dimensions are so often linked with each other in the cases that spontaneous order theorists commonly discuss, they are often treated as inseparable, if not simply conflated with one another. But rape culture, as understood in Brownmiller’s theory, exhibits some of the features of Hayekian spontaneous orders, while seeming in other senses definitely “constructed” and imposed, and considering a case where these features come apart, may help bring out these different senses of, and thus show that the notion of “spontaneous order,” as employed in libertarian writing, is systematically ambiguous. I would in fact argue that the term may evoke at least *three* different sorts of distinctions, depending on the precise sense of the critical term “spontaneous.”<sup>21</sup> “Spontaneous order” can be used to

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and their “largely unnoticed” contribution to the durable structure of patriarchy, and Hayek’s description of the role of lawyers in the deformation of law towards increasingly authoritarian conceptions, in which “the individual lawyer is necessarily more an unwitting tool, a link in the chain of events that he does not see as a whole, than a conscious initiator. ... It is often said that the professional bias of the lawyer is conservative. ... The situation is entirely different, however, when a general philosophy of the law which is not in accord with the greater part of the existing law has recently gained ascendancy. The same lawyers will, through the same habits and techniques, and generally as unwittingly, become a revolutionary force, as effective in transforming the law down to every detail as they were before in preserving it. ... Already the lawyers in many fields have, as the instrument of a general conception which they have not made, become the tools, not of principles of justice, but of an apparatus in which the individual is made to serve the ends of his [*sic*] rulers” (66-67).

20 See Johnson and Long (2005) § 2 on the parallels between sexual and political consent.

21 I use the term “at least” advisedly: there are many other characteristics associated with the spontaneous/constructed distinction which are too far beyond the scope of this paper to consider – among them distinctions between tacit and explicit norms, experimental and comprehensive or definitive approaches to policy, pluralistic and uniform selections,

mean a macro-scale pattern of social coordination which is:

- *Consensual* rather than *coercive* (when “spontaneous” means “uncoerced”);
- *Polycentric* or *participatory* rather than *directive* (when “spontaneous” means “unprompted”);  
or
- *Emergent* rather than a *consciously designed* pattern (when “spontaneous” means “not planned in advance”);

When “spontaneous order” means *consensual*, rather than *coercive*, order, coordination is achieved through the free actions and agreements of many different people, contrasted with coordination imposed by using force to compel the participation of unwilling parties. So, for example, when marketable commodities such as cigarettes emerge as *de facto* currencies in barter economies, they are not selected because any authority forces traders to accept them as payment for all debts public and private; it’s because enough people will willingly trade for a smoke that even non-smokers find it worth their while to accept cigarettes as payment, on the expectation that they could easily make a later exchange with some third party who does smoke, in order to get things they *can* use.

When “spontaneous order” means *polycentric*, rather than *directive* order, coordination comes about through the converging micro-actions of many players acting *independently*, rather than *deferring* to designated supervisors or authoritative decision-makers or relying on external plans or instructions. In *directive* orders, coordination happens vertically as players act on the bidding of a recognized *personal* authority, who takes responsibility for assigning, vetting, and integrating their many micro-scale courses of action. *Polycentric* orders, by contrast, depend on *participatory* or *entrepreneurial* action: there is no recognized final authority, action is guided by impersonal norms rather than personal deference, and it’s up to individual actors to horizontally coordinate with other participants, to determine which courses to pursue in order to achieve their goals, and so on. Consider the contrast between the *directive* system of top-down editorial vetting in Encyclopedia Britannica, and the wide-open system of self-correction in Wikipedia, which depends on the attention and initiative of an Internet-size pool of potential reader/editors to revise and correct articles. Contributions to Wikipedia are guided by a shared goal of factual accuracy and explicit community norms such as Neutral Point of

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evolving and fixed solutions, orders based on selection on the margin and orders based on refactoring or ground-up design, immanent and transcendent forms of social critique, “endogenous” or self-organizing forms of order and “exogenous” or imposed forms, et cetera.

View<sup>22</sup> or Citation Needed,<sup>23</sup> but rather than being imposed by privileged editors, the interpretation and implementation of these norms, as well as most other questions of vetting and policy, rely almost entirely on the convergent consensus produced by the back-and-forth among Wikipedians, all with equal power to add, revise or revert changes, and with anyone free to join the fray at any given time.

When “spontaneous order” means “emergent order,” contrasted with conscious design, forms of social coordination emerge from the actions of many different people, acting on motives separate from any conscious desire to effect that form of social coordination. Intentional orders effect social coordination through people acting for the sake of a shared purpose, whatever it may be; in undesigned orders, participants may know nothing about the macro-pattern emerging from their interlocking micro-scale actions; or they may be aware of it, but consider it only a *side effect* – even if a pleasant one – of pursuing a different private purpose. A path-breaker whose actions help clear and maintain a road through the woods is not *mainly* out to help future fellow travelers, or to lay the groundwork for a future highway; she’s out to remove obstacles that block her way from point A to point B. If it helps other people out later on, that collateral effect is just gravy.

For rhetorical simplicity, these three dimensions of spontaneity and non-spontaneity are presented here, as they usually are elsewhere, as if they were simple dichotomies. But each of them must be assessed relative to a level of social organization – an overall polycentric order may contain, as Hayek says, “several nuclei” of centered organization (such as firms or associations in an open market); a consensual process may produce their distinctive spontaneous results because they operate against a

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22 “Wikipedia:Neutral point of view” (WP:NPOV): “Neutral point of view (NPOV) is a fundamental principle of Wikipedia and of other Wikimedia projects. All Wikipedia articles and other encyclopedic content must be written from a neutral point of view. This means representing fairly, without bias, all *significant* views that have been published by reliable sources [WP:RS]. This is non-negotiable and expected of all articles and all editors.” The NPOV policy was formulated within months of the launch of Wikipedia, and based on similar policies in predecessor projects. Like most Wikipedia community policies, the rule was initially proposed in a simple form with a great deal of room for interpretation; over the course of a decade, Wikipedians have repeatedly found points of interpretation, dispute, debate, and the community consensus that slowly emerged from the efforts to resolve those debates has produced a tremendous amount of elaboration on, and interpretation of, the practical applications of WP:NPOV. Originally six paragraphs written personally by Jimmy Wales (including examples), WP:NPOV is now 16 pages long, with an 11 page tutorial and a 9 page FAQ, virtually all of it written, rewritten, and refined by Wikipedia contributors based on common experience and community consensus.

23 “Wikipedia:Verifiability” (WP:V): “The threshold for inclusion in Wikipedia is verifiability, not truth—whether readers can check that material in Wikipedia has already been published by a reliable source, not whether editors think it is true. All material in Wikipedia articles must be attributable to a reliable published source to show that it is not original research [WP:NOR], but in practice not everything need actually be attributed. This policy requires that all quotations and any material challenged or likely to be challenged be attributed to a reliable, published source in the form of an inline citation, and that the source directly support the material in question.” WP:V is the norm behind the marking of claims with “[citation needed]” in Wikipedia articles.

backdrop of coercive constraints (when cigarettes are consensually adopted as *de facto* currency in a prison economy, the adoption is at one level consensual; but of course it is profoundly shaped by pervasive, coercive constraints on possession and exchange, which forbid most uses of outside money). And both the distinction between polycentric and directive orders, and that between emergent and intentional orders, are really differences of degree, with many intermediate shades and borderline cases rather than clean categorical breaks. Participants can exercise greater or lesser degrees of autonomy in selecting and vetting their courses of action; the gap between micro-scale intentions and the macro-scale pattern that results may be more or less wide of a gap.

It is important to understand each of these three distinctions as interrelated but analytically distinct pairs of categories – but they tend to coincide in fact often enough that they might be mistaken as indistinguishable in concept. Notably, when libertarians contrast open networks of market exchange with economic planning and allocation by governments, they are contrasting socioeconomic orders that differ along all of our three dimensions: governmental allocation is *legally enforced, coordinated by requirements from a designated authority, and consciously designed* to achieve a predetermined set of policy goals; whereas free markets produce organic structures which are the product of *consensual* agreements, which are *participatory* in character (without a fixed center of authority), and develop an *emergent* structure that the parties to the exchange did not consciously set out to create. The question, then, is which of these differences we should treat as *definitive* of spontaneous order. Hayek himself was fairly consistent when he attempted *formal definitions* of “spontaneous order” — as we have seen above, he defined it in terms of *emergent* coordination, with a noticeable gap between micro-intentions and macro-patterns, and often recurring to Ferguson’s “results of human action but not of human design.” But Hayek also constantly characterizes spontaneous orders by *contrast* with “constructed” orders that he defined in terms of *monocentric* authority, simply equating them with “polycentric” orders which are “not made by anybody”<sup>24</sup> as opposed to order “which has been made by somebody putting the elements of a set in their places or directing their movements” (1973, 37). His *application* of the concept in discussing free-market processes consistently contrasted their healthy, unimpeded ordering process with purposive “interference” or “intervention,” which are both *monocentric* and

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24 Hayek (1964) ¶ 8. *Ibid.* ¶ 9 explicitly characterizes such orders as “polycentric,” placing the term in quotes apparently because he is taking it from Polanyi. Hayek (1973) tells us that “The spontaneous order which we call a society also need not have such sharp boundaries as an organization will usually possess. There will often be a nucleus, *or several nuclei*, of more closely related individuals occupying a central position in a more loosely connected but more extensive order” (47, emphasis added).

paradigmatically backed by the *coercive* power of government,<sup>25</sup> and in general closely linked it with cases where the *consensuality* of the transaction was at least as important as its emergent properties or participatory context. In any case, both later Hayekian scholars and popular writing have repeatedly used “spontaneous order” indifferently to refer to orders that are “spontaneous” in any of our three senses or all of ’em; or have equivocated between different senses of “spontaneous” from one statement to the next.

Thus, for example, in his chapter on Hayek in *Against Politics* (1997), Anthony de Jasay passingly characterizes “spontaneous orders” as *emergent* orders, “an unintended result of human actions directed at other purposes” (121-122), when distinguishing them from the results of conscious political activism. But later in the same chapter he directly equates spontaneous orders with *consensual* orders in order to argue that they have a “prima facie moral standing” which constructed (read, “coercive”) orders lack:

The attraction of spontaneity is both moral and prudential. Though it is not clear whether Hayek saw more than instrumental value in it, he stressed that the elements in a spontaneous order “arrange themselves” rather than being arranged by “unified direction” (1960, p. 160). When the elements are human beings, their property and their choices, *nobody’s dispositions are imposed on him [sic] by another’s command. Everybody chooses for himself [sic] what seems to him [sic] the best, given that everybody else chooses likewise. All choices are interdependent, and made mutually compatible by property rights*

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25 Hayek of course recognizes that monocentric orders (characterized as *taxis*, “organization,” or “constructed order”) may be consensually organized – in firms, families, associations, or other nuclei of social organization. But Hayek’s *normative* employments of spontaneous order concepts hardly ever remained within such carefully drawn conceptual boundaries; spontaneity is constantly contrasted not with constructed orders in general, but rather with purposive “interventions” or “corrections,” attributed to a desire for a totalistic and politicized form of constructed order, which coercively “interfere” with a healthy spontaneous order. Thus Hayek sometimes, and later writers very often, write as if it were a matter of a simple alternative between polycentricity and coercion, rather than treating the polycentric-monocentric and consensual-coercive polarities as cross-cutting, conceptually separate dictions. In his discussion of planning and market orders in *The Road to Serfdom* (1944/2007), Hayek treats the coercive power of government and centralization of authority in planned orders as simply identical: “The dispute between the modern planners and their opponents, is, therefore, *not* a dispute on whether we ought to choose intelligently between the various possible organizations of society.... The question is whether for this purpose it is better that the holder of coercive power should confine himself [sic] in general to creating conditions under which the knowledge and initiative of individuals are given the best scope so that *they* can plan most successfully; or whether a rational utilization of our resources requires *central* direction and organization of all our activities” (85). Similarly, in *The Constitution of Liberty* (1960/1978), at the end of his assault on constructive rationalism, Hayek writes that “None of these conclusions are arguments against the use of reason, but only arguments against *such uses as require any exclusive and coercive powers of government*” (70). In *Law, Legislation and Liberty*, Hayek argues characterizes constructivism as issuing in plans to “improve or correct [spontaneous] order by *direct commands*” (51). This is clearly a reference to directive order contrasted against polycentric order; depending on the sense in which “commands” is intended, it may or may not also be a direct reference to coercive means. In any case, we are soon told that “This is the gist of the argument against ‘interference’ or ‘intervention’ in the market order” by “directing authority,” (*Ibid.*) which clearly is a reference to the coercive power of government.

and their *voluntary exchanges*. *None dominates and none is subordinated*. This lends the order in question a moral *laissez passer*, while nonspontaneous orders, constructed by *imposing some alternative on the participants by authority or the threat of force*, are morally handicapped by their *coercive* element. If they are to pass for legitimate, they need to show some compensating merit. Spontaneous social orders, in other words, have a *prima facie* moral standing. Constructed orders must first earn it, or do without. (125-126, emphasis added)

But in the following paragraph, de Jasay argues for the “prudential attraction” of spontaneous orders by referring to Hayek’s knowledge problem for constructed orders—to the unique ability of *polycentric* orders to gather “irretrievably dispersed or latent” knowledge, and so surpass the epistemic limitations of planners, which inevitably hobble the ability to scale up *directive* orders:

The prudential attraction of spontaneous orders springs from the belief, strongly held by Hayek and fairly well supported by historical evidence, that since the knowledge required for successfully designing a complex order is either irretrievably dispersed or latent or both, the constructed order runs a high risk of being inefficient if not grossly counterproductive. (126)

These two paragraphs are followed by several pages of agonizing over the apparent difficulty that Hayek’s understanding of his own prudential arguments seems to depend on the deliberate enforcement of rules by an authoritative agency; but de Jasay makes no clear distinction, in his worries about “enforced enforcement” mechanisms, between (1) the *coercive* features of such mechanisms (as opposed to “voluntary conventions” like ostracism they are based on punitive force and paid for with tax levies), and (2) their *directive* character (as opposed to *participatory* social sanctions, which are implemented, unprompted, by ordinary people, “enforced enforcement” comes from authoritative orders and “exogenous sanctions” from an “ultimate, sovereign enforcer”). Although each of these arguments depends on a distinct sense of “spontaneity,” de Jasay uses the term “spontaneous order” throughout, without noticing that each argument turns on a distinct and conceptually separable characteristic, and that social orders may be “spontaneous” in any of these senses, with or without being “spontaneous” in the others.<sup>26</sup>

<sup>26</sup> Similarly, in a recent exchange in the online journal *Cato Unbound*, Timothy Sandefur (2009a) raised some rather different, and to my mind mostly ill-founded, concerns about the analytical rigor of “spontaneous order” theories; the Hayekian legal philosopher John Hasnas, in the course of his (largely successful) reply, stated “I would have thought the principled distinction between constructed and spontaneous orders was patent,” and then went on to offer three different characterizations of it within two adjacent paragraphs, apparently treating all of these characterizations as more or less equivalent. Hasnas uses “spontaneous order” as equivalent to “polycentric order” when he writes that “[C]onstructed orders have a designated final decision maker ... A spontaneous order has no such centralized, collective decision maker.” (2009, ¶ 5). Immediately afterwards, he writes that “spontaneous orders are systems of individual choice,”

But of course they can. These are simply three different distinctions, and while many examples overlap, the features may come apart even in some of the paradigmatic cases of “spontaneous order.” When barterers converge on a highly marketable commodity as the common media of exchange, they settle on it through iterated consensual exchanges; they also make the exchanges in dispersed interactions without any directing center. Market price adjustments produce emergent patterns that few or none of the individual participants could or did plan for (whether the feeding of Paris or the manufacture of a humble number 2 pencil); these emergent orders are possible because of the harnessing of otherwise irretrievably dispersed knowledge through a polycentric network of consensual exchanges. But orders may be consensual while being (voluntarily) directive; and orders may be polycentric while being to some substantial extent designed. Thus, for example, while the development of Wikipedia is a clear example of a consensual and participatory order – nobody’s forced to contribute; the editing process is wide open to anyone who wants to jump in without waiting for instructions – it is not a strong example of an *emergent* order. Typically, people edit Wikipedia, at least in part, with the intention of *improving the breadth and accuracy of information on Wikipedia* – that is, the macro-scale success of Wikipedia is a consciously-adopted part of the micro-level intention.

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(*Ibid.*) and that “Spontaneous orders are evolving systems. What makes the state the state is its power to stop evolution” (*Ibid.*), apparently referring to the coercive power of the state, and thus (if that is indeed what was intended), characterizing the spontaneous/constructed distinction in terms of the distinction between *consensual* and *coercive* orders. In the next paragraph, Hasnas characterizes the spontaneous/constructed distinction as straightforwardly equivalent to the emergent/consciously designed distinction, invoking a slogan that Hayek inherited from Adam Ferguson, that “Spontaneous orders are the product of human action but not human design; constructed orders are the product of human design” (§ 6).

A somewhat different example appears in Norman Barry’s “The Tradition of Spontaneous Order: A Bibliographical Essay” (1982), in which Barry actually attempts to *distinguish* two different senses of spontaneous order, but tells us that:

In one sense we speak of spontaneous order to refer to a complex aggregate structure which is formed out of the *uncoerced actions of individuals*, whereas in another sense we speak of the *evolutionary growth* of laws and institutions through a kind of Darwinian ‘survival of the fittest’ process (and the biological analogy is not inappropriate.) In both these meanings we are describing social structures that are similar in not being of conscious design and which emerge independently of our wills.... (§11)

Barry’s real concern here is apparently, first, the distinction between a focus on individual interaction and a focus on institutional persistence, and, second, the presence or absence of an “invisible hand” explanation for the reconciliation of initially disparate interests. The first half of his attempted distinction simply merges consensual with emergent orders, without any further justification or argument, while the second half explicitly discards individual consent as a criterion, but unhappily invokes the metaphor of biological evolution, which is by nature both polycentric and emergent, while the reference to the “invisible hand” invokes one specific form of emergent (conciliatory and mutually beneficial) consequence. Gordon (1982) criticizes Barry’s unexplained characterization of emergent order as necessarily consensual, saying “It isn’t at any rate obvious why a conscious agreement is morally inferior to a spontaneous order. It might be said that with a spontaneous order, at least one knows that the actions of the constituent individuals haven’t been coerced. *But this is wrong: why can’t coerced actions be the subject of invisible-hand explanations?* And agreements, on the other side, can be entirely voluntary. Barry evidently disagrees with the first part of this, as he apparently (p. 11) makes it a requirement of a spontaneous order that it operate on uncoerced actions. But he gives no reason for this” (§ 12, emphasis added).

The second high-level point to be made about the notion of spontaneous order is related to the point we have made about the equivocal meaning of “spontaneity.” Because the paradigms for applying the concept have generally been cases where a social order is participatory or unplanned, and is also consensual, what libertarians have tended to see in spontaneous order is almost always a macro-scale pattern that is freely chosen and where all involved find some mutual *benefit* from the proceedings. You don’t need top-down command and control to get many important things that libertarians like to use – language, or money, or roads, or Wikipedia.... So, in libertarian vocabulary “spontaneous order” is almost always employed to praise *benign* orders, especially benign orders that spontaneously accomplish something that government planners cannot do as well, or at all. It is remarkable and wonderful that bottom-up forms of social cooperation can so often produce unplanned large-scale social outcomes better than could be managed through comprehensive, consciously designed political schemes for social coordination. But nothing *conceptually* requires that emergent orders need be *benign* orders. If widely distributed forms of intelligence, knowledge, virtue, or prudence can add up, through many individual self-interested actions, into a benign undesigned order, then there’s no reason why widely distributed forms of ignorance, prejudice, folly or vice might not add up, through many individual self-interested actions, into an unintended, malign order.<sup>27</sup> So might widely-distributed, micro-level practices of *violence*; since libertarians are centrally concerned with individual freedom from violence and coercion, the possibility our threefold distinction raises of an *emergent but non-consensual* order must surely give us pause.

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<sup>27</sup> The prospect of malign spontaneous orders has rarely been wholly lost by spontaneous-order theorists, and is, as far as I know, hardly ever flat-out denied. The worry, rather, is that, in practice, it is rarely *mentioned* or *highlighted* as a significant possibility. However, Hayek does certainly entertain the possibility; as when he suggests that profit-motives alone do not “insure that [spontaneous market orders] will be of a beneficent character” (1964 ¶ 22), and that for a *beneficent* order “it is necessary that people also obey certain conventional rules ... which have become habitual in their society. The common rules of morals and law are the chief instance of this” (*Ibid.*). Kirzner (1982) explicitly introduces the *conceptual possibility* of treating social orders as both spontaneous and malign, mentioning theories which have acknowledged the descriptive power of spontaneous order concepts, but which “have questioned the social desirability of at least some aspects of these accepted regularities” and “claimed, correctly or otherwise, to perceive theory as showing the systematic emergence of social *immoralities* or social *inefficiencies*” (¶ 3). But while Kirzner thinks this has important effects on the *historical* story that needs to be told about the development of spontaneous order theories, and the intellectual figures who need to be included in that story, he associates the view with such thinkers as Marx, Pigou, and Keynes, whose economics Kirzner wholeheartedly rejects; he strongly suggests that the conceptual possibility of a malign order is not part of his own actual view of the social world. Rather, he suggests that the distinctive contribution of writers like Hayek is “the idea that the normative character of these systematic results *can hardly be judged as other than socially beneficial*” (¶ 2).

The most emphatic recognition of the possibility probably comes from Roderick Long, who has occasionally discussed phenomena which he takes to be actual social orders which are both spontaneous and “maleficent,” for which he has coined the unforgivable pun “spontaneous ordure” (Long 2006).

## V. The Invisible Fist and the Unwritten Law of Patriarchy

I would like, then, to return to Brownmiller, in order to attempt to charitably reconstruct her Myrmidon theory in more detail and in light of our enriched, and properly distinguished, concepts of spontaneous order. As I understand Brownmiller, her hypothesis that stranger-rapists serve a Myrmidon function for male supremacy, with benefits that redound not only to practicing rapists but to all men, is best understood as arguing that the pervasive fact of rape, and the *threat* that its pervasiveness inflicts on *all* women, produces a spontaneous (emergent) but coercive order, in which non-consensual micro-scale actions inflicted by unrelated, anonymous stranger rapists, end up reinforcing a macro-scale pattern of male dominance over women, and the cultural and institutional superstructure of patriarchy.<sup>28</sup>

Feminists highlight the far-reaching significance of the everyday fact that the threat of rape constrains women's range of free action. These constraints operate through felt danger and through explicit warnings: don't walk alone; not after dark; not in that neighborhood; don't go to that party; not dressed like that; watch what you drink; watch what kind of "signals" you give off. Paternalistic double-binds often narrow the range to a vanishing point: don't leave a late-night event without a man to walk you back; don't leave *with* a man, unless you intend to invite him in – or you'll "give him the wrong idea," and who knows what could happen then?<sup>29</sup> Women are warned about the dangers of crowded public spaces like subways, parties, or concerts while simultaneously being warned about the dangers of empty, secluded or private spaces like parking garages, alleys, empty country or a man's house or

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28 The common misunderstandings of Brownmiller's theory discussed above may be seen as parallel to the misunderstandings of spontaneous orders in society that Hayek dissects throughout his work. In Hayek (1973) 20-21, for example, Hayek discusses how spontaneous order forms a third category of *grown* orders, in between the *found* orders of the natural world and the *made* orders of conscious human design. For Hayek these grown orders demonstrate the inadequacy of "the false dichotomy of 'natural' and 'artificial'" (20). "The distinction intended may be either between objects which existed independently and objects which were the results of human *action*, or between objects which arose independently of, and objects which arose as the result of, human *design*. The failure to distinguish between these two meanings led to the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design" (*Ibid.*). Common responses to Brownmiller's theory treat her as if she must either be describing rape culture as a *found* order (based in some inescapable natural features of the human male), or else a *made* order (the product of a deliberate conspiracy among men). Such responses evince the same difficulty in seeing the possibility of a *grown* order, the product of dispersed human actions but not of concentrated human design, as a serious possibility, is little different from the difficulty that most social theorists have had in recognizing that law might arise neither from the *found* order of immutable nature nor from the *made* order of heroic founder-legislators.

29 Women often feel constrained to persuade men to help them just in getting home at the end of the night; and the constant warnings and real risks make the danger of the night intense enough that women often feel unsafe just in leaving a man's car, or his place, late at night, no matter how much they may just want to go home alone. Of course, the man in question may have nothing to do with that; he may not have ever thought about it, or he may deplore the fact. But nevertheless, the actions of the anonymous rapist have made his place a *de facto* jail cell—and made him its warden.

car. The double-binds construct both public space and private space, being *either* alone or accompanied, as pervaded with a lesser or greater degree of danger; ultimately the only space constructed as “safe” is *male-protected* space. And the reliability of male protection closely linked to personal connections with men, within a limited set of very specific, structured relations – usually either paternal authority, marital protection, or heterosexual availability.<sup>30</sup>

These restrictions on women’s everyday life, their use or exploration of public space, what they feel they can safely do or say, especially in the presence of men, simply mean that women’s freedom is systematically constrained by the fear of men, as a ripple-effect of the danger of widespread, intense, random male violence, and the practical need to solicit the aid of seemingly safe men for protection against the threat other men create. Thus, as Brownmiller writes, “A world without rapists would be a world in which women moved freely without fear of men,” but here, in this world, “That some men rape provides a sufficient threat to keep all women in a constant state of intimidation” (209). It is important to note here that, just as Hayek writes that in spontaneous orders, much of the structure of social life is determined by rules that are understood through tacit understanding and know-how, rather than conscious application of explicit general principles,<sup>31</sup> in Brownmiller’s discussion, while some of the “intimidation” she describes is expressed in self-conscious adjustment to felt dangers and explicit warnings; but a lot of it is tacitly inscribed in everyday relationships, or simply incorporated into an intensification of the sort of small-scale, subconscious acts of vigilance and self-protection that we all carry out, as a daily routine, or as an expression of felt anxiety.

Another natural consequence of the danger created by police-blotter rapists is for *men* who *don’t* rape, and who sincerely care about the safety of individual women. Such men are in a material and emotional position where they easily see themselves as needing to *protect* the women they care about from the threat of male violence, and where women, reasonably responding to that threat, often need to solicit their aid. The desire to protect others from violence is, in itself, a personal virtue, not a social

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30 Hence Brownmiller’s argument, in Chapter 2 and elsewhere of *Against Our Will*, that the threat of rape is essentially connected to the primitive origins and structure of marriage, as well as the social privileges demanded by husbands as a condition of their “protection.”

31 “Man [*sic*] does not know most of the rules on which he [*sic*] acts .... In animal societies and in a great measure in primitive human society, the structure of social life is determined by rules of action which manifest themselves only in their being obeyed. ... Though man [*sic*] never existed without laws which he obeyed, he [*sic*] did exist for millennia without laws which he knew in the sense that he was able to articulate them” (Hayek 1964, ¶ 18). Hayek stresses throughout his work that this reliance on considerable stores of tacit knowledge is modified in its scope, but remains of central importance – indeed, becomes far *more* important to successful functioning – in highly-specialized, complex, and modernizing societies, the “Great Society” constantly discussed in *Law, Legislation, and Liberty* (1973).

problem. But the danger is how tempting and easy – and how corrupting – it is for men to take the psychological step of going from an attitude of human solidarity to a fantasy of male rescue, of coming to see themselves as *defined* by their identity as a Protector *in contrast to* frail womanhood, and of coming to see women as uniquely dependent by nature – rather than uniquely threatened due to the chosen actions of other men. And to go even further, to try to make sure that women seek and depend on and stay within the scope of a man’s “protection,” whether or not they really want it – by using intimidating and restrictive warnings, by harassing women – blamed as foolish or wanton – who step outside the dependence of that “protection” or the stiflingly close boundaries of those “safety tips.” That kind of imposed dependence can just as easily become frustrating and confining for women, and that kind of power can just as easily become corrupting and exploitative in men, as any other form of structural dependence and power can. Libertarians and anarchists who so readily see this dynamic when it comes to government police and military protection of a disarmed populace, shouldn’t have any trouble seeing it, if they are willing to see it, when it comes to male protection of women.<sup>32</sup>

All of this can happen quite naturally when a large enough minority of men choose to commit widespread, intense, random acts of violence against a large enough number of women. And it can happen quite naturally without the male rapists, or the male protectors, or the women in the society ever intending to bring about any particular macro-scale social outcome. What *does* happen, noticed or not, is that women’s social being — how women appear and act, as women, in public — will be *systematically* and *profoundly* circumscribed, and the amount of time and effort they need to spend keeping supposedly “protective” men around and pleased and willing to help will be increased; while men’s everyday material leverage over women will be reinforced, and their psychosocial identities *as men* systematically channeled into more patriarchal expressions – through the diffuse, decentralized threat of violence, and the natural but unintended consequences of many small, self-interested actions carried out by women and men reacting to the unequal positions that that threat constructs.

I’ve talked about stranger rape all this time because that’s Brownmiller’s topic, and Brownmiller’s theory is a good case study in the point I’m trying to make. But similar remarks, with

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<sup>32</sup> The individualist anarchists of the 19<sup>th</sup> century certainly saw it clearly: as Ezra Heywood writes, “A cruel kindness, thought to be friendly regard, assumes to “protect” those who, by divine right of rational being, are entitled, at least, to be let alone. We are not among wild beasts; from whom, then, does woman need protection? From her protectors” (qtd. in Johnson and Long 2005). See also Johnson and Long (2005) on the radical libertarian feminism of the 19<sup>th</sup> century individualists, and the parallels between patriarchal “protection” of women and the state’s paternalistic “protection” of a disarmed populace.

different but importantly related consequences, could be made for other forms of violence directed against women – such as harassment in public spaces, or battery and sexual assault in intimate relationships – which Brownmiller’s theory does not encompass. In fact, I think that what feminist researchers have learned about rape in the years since the publication of Brownmiller’s book – in particular, the fact that the overwhelming majority of rape is actually committed by intimates and acquaintances, not by strangers – calls for some significant revisions to Brownmiller’s theory about stranger rape,<sup>33</sup> although what will remain after the revision is still a feminist theory importantly akin to Brownmiller’s. But whether Brownmiller’s theory is true, or something else in the neighborhood is, the different roles that different forms of violence play in shaping the violent undesigned order of a rape culture is best understood when they are seen as different expressions of the same underlying phenomenon.

## VI. Crises and Opportunities

A carefully articulated and fully radicalized concept of spontaneous order presents both a crisis and opportunity for radical feminists. Given the analysis of rape culture as a malign form of (non-consensual) spontaneous order, it might seem tempting to suppose that that offers feminist reasons for general skepticism of spontaneous orders, and a challenge to anything like libertarianism, which proposes to transfer vast spaces of social life from government control to spontaneous orders within civil society. But if the distinctions I have traced helped illuminate the radical feminist understanding of rape culture, I believe that they can also help illuminate how the genuine need for a *systematic* and

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33 *Against Our Will* was written from 1971 to 1975. While feminist speak-outs on rape, and sharing of women’s experiences in consciousness-raising groups, had begun to reveal that many women had been raped not by strangers, but by husbands, boyfriends, dates, and acquaintances, the full *extent* of this discovery would not become clear until the groundbreaking work of feminist researchers on “hidden rape” during the 1980s (most famously Koss 1987). Hence, Brownmiller discusses marital rape (380-382) and acquaintance rape (400) toward the end of the book, as areas where feminist scrutiny is beginning to reveal a problem which had heretofore been concealed or left unspoken. But she does not – and in 1975, she could not yet – give either topic the chapter-length treatment that she devotes to topics such as rape as a weapon of war, rape within institutions, or “police-blotter” stranger-rape. In 1975, Brownmiller could write that “We know, or at least the statistics tell us, that no more than half of all reported rapes are the work of strangers, and in the hidden statistics, those four out of five rapes that go unreported, the percent committed by total strangers is probably lower.” By 1988, Mary Koss’s investigation into the “hidden statistics” had revised “no more than half” downward to *less than 15%*.

In order to account for the discovery that the *overwhelming majority* of sexual violence committed against women is committed by men who know them, and profess to love them, within intimate and allegedly “protective” relationships, had a profound effect on feminist writing on sexuality and violence during the 1980s and later, when radical feminist theories began to incorporate this new information, and this changed perspective on male “protectors,” into their analysis; see, for examples, Dworkin (1983), Dworkin (1987), or “Sex and Violence: A Perspective” in MacKinnon (1987), et cetera.

*comprehensive* response to oppression need not entail a *governmental* response: spontaneity is not chaos, and resistance can be systematic and comprehensive while remaining decentralized and bottom-up. Abandoning government solutions to oppressive political systems like patriarchal violence hardly means trusting that anonymous “civil society” will come up with a solution, somehow. If distinguishing consensual from unplanned from participatory orders allows us to better understand feminist understandings of the problem, it may also help us better understand the radical impulse behind many feminist *solutions* – woman-led social movements to counter the effects of diffuse male violence outside, or *beyond*, the sphere of government and conventional political lobbying. C.r. groups, speak-outs, culture-jamming, building grassroots networks of battered women’s shelters, rape crisis centers, and other feminist spaces originally had little if any connection to hierarchical power-politics or the male-dominated State, and all could productively be understood as *voluntarily-coordinated*, *polycentric*, but *consciously organized* political resistance to a *polycentric, emergent, coercive* order of violent oppression.

But libertarian social theorists face their own crisis, and their own opportunity, as well. Given the central role that pervasive violence against women plays in upholding patriarchy, the way in which a *pervasive, diffuse* threat of coercive force constrains the liberty of women in everyday life to move and act and live as they want, libertarians must recognize patriarchy as a system of violent political oppression even older, just as invasive, and no less powerful, than the violence of invasive government and state command-and-control. But unlike the kinds of State violence which male libertarians have been accustomed to discuss — violent restrictions of freedom handed down as explicit policies, ratified through political processes, promulgated from the center and consciously carried out by official agents of the State — patriarchy expresses itself in attitudes, behaviors, and coercive restrictions that are largely produced by bottom-up, decentralized forms of violence, committed independently by countless unrelated men, freelance terrorists who commit violence of their own accord, out of a desire for domination and control but without any grand unified social plan, without conscious collaboration or conspiracy, sometimes in conflict with the explicit provisions of the law (though rarely investigated and ineffectively prosecuted in the male-dominated legal system). This is part of what I take Catharine MacKinnon to mean when she writes that:

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of

the law, without express state acts, often in intimate contexts, as everyday life. (1989, 161.) It is vital for libertarians to recognize that the coercive social orders that arise from this kind of diffuse gender violence, both as a direct consequence and as social, psychological, or economic ripple effects from the direct consequences — are no less real, no less important, no less political, and *no less evil*, for being undesigned, for battering women into the social position they currently occupy as if by an invisible fist. As I have argued elsewhere, together with Roderick Long, that the radical traditions within libertarianism and feminism have many critical insights to offer each other in social theory and political practice; and that the form that the exchange should take is not one of mutual compromise, in which the more “extreme” end of one’s libertarian or feminist principles are watered down for the sake of, or traded off against, some sort of superficial political or cultural alliance, but rather one of mutual radicalization, in which each side of the dialogue encourages the other to live up to their own better selves, and to more fully embrace the radical insights that they have held thus far, but only at arm’s length.<sup>34</sup> Here as elsewhere, the insights of libertarian theory are genuine and essential, but to apply them for all human beings, they must be *radicalized*, and applied everywhere that systemic coercion limits freedom. That includes invasions on liberty by the State; but it also includes radically different forms of invasive violence, coordinated through wholly different means, and calling for different sorts of response.

Spontaneous order and civil society, on a properly rich and well-delineated conception of both, can be a space for hard-driving, conscious grassroots activism at least as much as conventional governmental politics can. Too many libertarian theorists have written as if only forms of oppression enacted through the familiar structures of government legislation and enforcement are worth treating as serious political issues, while too many feminist theorists, while recognizing the prevalence of non-governmental forms of oppression, have written as if only action by the state can provide a systematic and effective response. In fact, spontaneous order theory is vital as a tool both for analyzing the workings of non-governmental forms of oppression, and also for more clearly understanding the unique non-governmental forms of *solidarity and resistance* that radical feminists have employed – which have often, over the past 40 years, done a much more effective job at changing social attitudes towards violence against women, and at providing life-saving help to women who need it, than any comparable government program. When feminists challenge the dichotomy of pervasive “private” crimes from

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<sup>34</sup> See Johnson and Long (2005).

“public” policy, and insist that the personal is political, antifeminist critics often react to this move by treating it as an attempt to extend our preexisting conventional notion of political order out to new cases, which we had formerly classified as “personal” — in particular, as an attempt to interpret “private” violence as parts of a consciously-coordinated social policy, aimed at some defined common end and directed towards that end by policies handed down from The Patriarchy as some recognizable central authority, or coordinating body. But the aim really is to *challenge* conventional understandings of politics, in favor of more supple conceptions, encompassing other dynamics of oppression and liberation: power expressed through dispersed “private” interactions without conscious coordination, or recognizable centers of authority, but which nevertheless embody social structures and relationships of power that share the pervasive, systematic and far-reaching characteristics of more conventionally “political” social structures. If, as I argue, spontaneous order theory can provide a rich conceptual resource for articulating this new conception of political order and political resistance, then a fuller development and application of spontaneous order theories, to an agenda set by the needs of women’s freedom as well as men’s, may provide a vital point of reconciliation between feminist and libertarian insights, by further radicalizing libertarianism and liberating radical feminism, and by helping to highlight possibilities for more effective radical activism than male-dominated state politics could ever allow for. Spontaneous order theory, so often misrepresented as a tool of political quietism or conservative defenses of the socioeconomic status quo, can and should be defended as a vital tool for radical politics and transformative social critique.



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