

Libertarian Rights

An Essay Presented

by

Alexander Norman Harris

to

The Committee on Degrees in Social Studies

in partial fulfillment of the requirements

for a degree with honors

of Bachelor of Arts

Harvard College

June 2008

## Introduction: Completing *Anarchy, State, and Utopia*

Robert Nozick began his most famous and controversial book, *Anarchy, State, and Utopia*, with the words “Individuals have rights, and there are things that no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.”<sup>1</sup> Nozick published this bold opening line in 1974, three years after Rawls published *A Theory of Justice*, the work that revived political philosophy. Rawls’ theory is still the basis for much philosophical argument today. If it can be said that all philosophy is but a footnote to Plato,<sup>2</sup> one can certainly claim that all contemporary political philosophy is but a footnote to Rawls. Though Rawls’ philosophy generated a flurry of alternative theories of justice – from other egalitarians, like G.A. Cohen, from communitarians, like Michael Sandel, and from utilitarians, like Peter Singer – I will here focus on the theory offered by Nozick.

When Nozick asserted that people have rights, he had in mind a particular set of rights – libertarian rights to be free from force, coercion, and fraud. These rights will be the topic of my thesis. Nozick’s rights take the form of what he called “side constraints.” Rights are, in other words, not a good or a goal to be promoted, but rather absolute prohibitions on action. They delineate which actions one may never do, regardless of one’s goals or the good such an action may do. Rights are, as Ronald Dworkin put it, “trumps.”<sup>3</sup> Nozick’s rights come from his “entitlement theory” of justice.<sup>4</sup> The entitlement theory consists of three parts – a theory of justice in initial acquisition (how one can justly come to own formerly-unowned things), a theory of justice in transfer (how one can justly transfer one’s property to another), and a theory of justice in rectification (how one can justly correct past injustices).<sup>5</sup> Nozick spent the greater part of *ASU* discussing justice in transfer, since justice in transfer is the central point of disagreement

between libertarians and liberal-egalitarians. To Nozick, if parties enter into a mutually consensual agreement to exchange their property, the resulting arrangement is always just, for the transfer was consensual and therefore just. “A distribution is just if it arises from another just distribution by legitimate means.”<sup>6</sup>

Nozick’s entitlement theory seems particularly appealing. The notion that certain actions are wrong and must be rectified is roughly the basis behind ordinary criminal law prohibiting theft, assault, and the like, and ordinary tort law prohibiting breaking of contracts, causing injury, and the like. However, the entitlement theory does not serve as the basis for many philosophical theories of distributive justice (justice in who gets what stuff). Many such theories are what Nozick calls “end-state theories” – that is, they come up with a desired distribution and assess the justice of actions by their tendency to promote the desired end-state. The problem with end-state theories, Nozick says, is that they treat distribution as “if things fell from heaven like manna, and no one had any special entitlement to any portion of it.”<sup>7</sup> This manna-from-heaven argument is a recurring theme in *ASU*. The appeal of Nozick’s theory is that it assesses the justice of the *actions themselves*; it claims that some actions simply must not be done, regardless of the consequences. Side constraints delineate a sphere in which each person is inviolable. As Nozick says:

The moral side constraints upon what we do... reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good.<sup>8</sup>

These constraints, Nozick says, limit not just what people can do to one another in a state of nature, but also what people can do to one another through institutions like the state.<sup>9</sup> Thus, Nozick objects to taxation for purposes other than enforcing side constraints.<sup>10</sup> Taxation is theft. It is people, in a group, demanding money from other individuals and threatening to lock up the non-compliers. Of course, some will *voluntarily* consent to being taxed. Others, however, will

agree and pay because they were coerced with the threat of force. It is the same as if a mugger pointed a gun at you and said “your money or your life” – it forced you to choose between two things that are legitimately yours, your money and your life (or your freedom, in the case of the threat of imprisonment).

So, Nozick’s theory is appealing and its conclusions radical. What more could one ask for from a theory of justice? Yet in spite of the appeal of the libertarian theory of justice, Nozick’s work has been subject to its own criticisms,<sup>11</sup> some valid and others less so. Since Nozick never wrote another major piece of political philosophy responding to objections, and since no other libertarian political philosopher has produced a book nearly as important as Nozick’s, objections to Nozick’s theory have stood largely unanswered and problems with it have stood largely unrepaired. As Nozick himself admitted, *ASU* was quite incomplete.<sup>12</sup> It did not include anything like a thorough proof of the libertarian rights he presumed existed. It lacked a discussion of the principle of rectification, and it simply assumed the correctness of John Locke’s theory of initial acquisition. Further, it failed to respond to or just mishandled certain arguments. Nozick did not say much about the difference between positive and negative rights. He replied to certain egalitarian arguments as they were presented in *A Theory of Justice*, but did not anticipate future, better, versions. Further, Nozick was wrong about a few issues, such as the problem of historical injustice and whether the state could legitimately force its anarchist citizens to pay taxes for protective services.

The goal of this thesis is to complete *Anarchy, State, and Utopia* – not to write a new one, not to rehash what has already been said, but to make the old great text of libertarian political philosophy more whole. A revised edition of the book is due out soon. Consider this thesis the set of *my* revisions of *ASU*. In it, I shall employ a style similar to Nozick’s – presenting

questions and potential answers, and calling for further argumentation from others, without necessarily claiming to be speaking the absolute last words on any subject.<sup>13</sup> After all, this is only a first revision of a major work, not a whole new theory unto itself. I will focus on those issues previously mentioned in which *ASU* is, today, lacking. I chose the topics both because they seem the most important to address and because my answers to them will hopefully reveal something new and interesting about libertarianism.

In the first chapter, I provide the reader with some background about the Rawls-Nozick debate, and in the process I establish what a theory of justice must be and what it must do. Specifically, I consider the substantive theory of justice that Rawls developed as well as the methodology he introduced. I ask what a theory of justice *is* – how it is to be established (teleologically? deontologically?) and what content it must have (end-states to achieve? rights to be respected?). In Chapter II, I use this groundwork to fill in the biggest gap in *ASU*: its lack of a proof of rights. In order to see how to prove rights, I first show what kind of rights – positive or negative – a theory of justice must contain, adding to Nozick’s under-argued criticism of general positive rights. Then, I evaluate attempts philosophers since Nozick have made at proving libertarian rights. Having shown how libertarian rights may be proven, in Chapter III I turn to two related objections different liberal-egalitarians make against libertarianism. Both objections agree that free choice is important for political philosophy, but claim that libertarianism in fact makes our holdings depend on factors other than our free choice. These are objections that Nozick insufficiently refuted and whose complete responses will demonstrate unique aspects of libertarian rights theory. First, I look at the objection that libertarianism allows our holdings to be impermissibly determined by our natural talents and social positions, things we are not responsible for, rather than our choices, which we are responsible for. In the process, I

demonstrate: a) that such an argument relies on an incompatibilist view of determinism and moral responsibility and b) that the libertarian principle of self-ownership provides a compatibilist answer to this old metaethical question. Second, I examine the objection that libertarianism relies on hollow, narrow, formalistic definitions of “choice” and “coercion.” I agree with the substance of the objection but argue that a thorough proof of libertarian rights can address such a difficulty. For both arguments, the answer is similar: libertarianism is not about ensuring that people deserve what they get from their choices, but rather about respecting rights. Finally, in Chapter IV, I apply the libertarian theory of justice I sketched in the rest of the thesis to two issues Nozick mishandled, and that differentiate my version of libertarianism from the standard version. First, I explore the question what is to be done about past injustices. In the process, I discuss how property can be initially acquired and whether one can pass on holdings after one’s death. Finally, I turn to Murray Rothbard’s objection to a Nozickian minimal state: that it violates the rights of those who do not wish to pay taxes for protective services. I conclude that states must therefore never claim sovereignty over a geographical area but only over the people who choose to be governed by it.

Before arguing for that striking conclusion, however, I must first turn to the debate in the early 1970s that began the domain of political philosophy as we know it today.

## Background: Political Philosophy, Pure Procedural Justice, and Side Constraints

In this chapter, I seek to frame my thesis by providing a fuller background of Rawls' seminal work and the points within it that Nozick disputes. As part of this exploration, I will evaluate the arguments made by Rawls and Nozick and assess more thoroughly the dispute between end-state theorists and deontologists.

### The Rawls-Nozick Divide

In *A Theory of Justice*, Rawls rejects the utilitarianism that had been dominant before the 1970s. He instead seeks principles that outline what rights people have and what the state can legitimately do from the realm of what he labels “pure procedural justice.”<sup>14</sup> “Pure procedural justice,” Rawls writes, “obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, providing that the procedure has been properly followed.”<sup>15</sup> Rawls uses the example of a fair bet: when one places a bet and loses, one cannot complain that the outcome of the bet was unjust since there is no *just outcome*, simply a procedure that if followed ensures justice.<sup>16</sup> Nozick adopts the idea of pure procedural justice and, in a sense, builds his theory around it. His entitlement theory is, in Nozick's phrase, “historical.”<sup>17</sup> If one follows certain procedures – the principles that apply to acquiring property from an unowned state, transferring it to others, and rectifying injustices – then the outcome will be just (to the extent that one can speak of “just” and “unjust” *outcomes*). On the other hand, using the wrong procedures, for example by stealing from an innocent individual, is always forbidden by side constraints.<sup>18</sup> Actions themselves are either just or unjust. The states of the world that result from actions are irrelevant to the question of whether the actions that produce them are just. This is a pinnacle

example of pure procedural justice: outcomes have no bearing on justice. It is a wholly anti-consequentialist view.

On the question of pure procedural justice, then, Rawls and Nozick are in apparent agreement (though I will challenge this appearance later in the chapter). But they disagree substantially about how principles of justice can themselves be justified. Rawls searches for a theory of justice by invoking a hypothetical consent agreement. Rawls imagines a group of people getting together to form a society deciding on the basic structure, the fundamental institutions, that will govern it.<sup>19</sup> These people, however, are not like regular people we see walking around, knowing where they are going, what they want, how much money they have, and who they are. The people in Rawls' "original position" are behind what he terms a "veil of ignorance."<sup>20</sup> They do not know who they will be in the society they are about to enter – whether they will be rich or poor, strong or weak, funny or banal. They do not know what they will want in life or how they will wish to live to get it.<sup>21</sup> They, in short, know nothing about themselves. Every characteristic that could result in some advantage for one over the others – which is to say every characteristic about themselves – is hidden from them. These "people" have no distinguishing traits whatsoever; in fact, they are all identical.<sup>22</sup> They are mutually disinterested, instrumentally-rational wads of life force that know they will be randomly placed into bodies once society begins.<sup>23</sup> They are trying to figure out what principles would make their lives, about which they know nothing, go best.<sup>24</sup> This thought experiment perhaps more closely resembles a single person engaging in abstracted reasoning than a hypothetical contract between multiple people. They have no differences in reasoning (for none knows her conceptions of the good nor has any notion of justice and all are self-interested), nor any differences in knowledge (since none knows any relevant fact about herself or others) that would lead different parties to support

different principles. Rawls claims that “the veil of ignorance deprives the persons in the original position of the knowledge that would enable them to choose heteronomous principles.”<sup>25</sup> He might just as easily have said “heterogeneous.”

Regardless of how one characterizes it, Rawls claims in *A Theory of Justice*<sup>26</sup> that the original position method is the correct one for thinking about questions of justice.<sup>27</sup> If one is to show a theory of justice to be true, one must show why it would be accepted in the original position. Nozick disagrees with this assessment. He finds Rawls’ original position rigged. Nozick demonstrates that libertarianism cannot be considered in the original position. He shows that, in fact, “the nature of the decision problem facing persons deciding upon principles in an original position behind a veil of ignorance limits them to choose end-state principles.”<sup>28</sup> This is because each party in the original position is exclusively self-interested and so he “evaluates any non-end-state principle on the basis of how it works out for him; his calculations about any principle focus on how he ends up under the principle.”<sup>29</sup> Only caring about the results, one would have no reason to consider any historical-entitlement position. The parties would treat any goods as manna from heaven where “no one had any special entitlement to any portion of it”<sup>30</sup> and therefore there is “an open question of who is to get it.”<sup>31</sup> Everything must be open to be distributed, so the original position methodology excludes any entitlement-based reason – in fact any reason other than ignorant self-interest – for holding a principle to be correct. This stringent limitation robs the thought experiment of some of its appeal by precluding a class of reasons from entering the discussion. Without entitlement-based reasons, Nozick demonstrates that only manna-from-heaven principles can emerge; thus “Rawls’ original position presupposes that no historical-entitlement conception of justice is correct.”<sup>32</sup> Rawls may admit this, but claim that it misunderstands the purpose of the original position. Rawls might argue that there are other

reasons to reject historical-entitlement conceptions of justice that explain why they were not included in the original position. Perhaps ignorant self-interested reasons *are* the only kind that can justify principles of justice. In this case, the original position will have been rigged, but appropriately. It seems as though this criticism, then, did not get Nozick very far in arguing against the original position. One needs to evaluate alternate proofs of principles of justice to see if entitlement-based reasons provide justification for certain distributions. That shall be my goal in the next chapter.

Rawls argues that the parties in the original position would choose two principles of justice, lexically ordered: the first grants “equal basic liberties,” which Rawls restricts to liberties such as freedom of speech and of religion, and the second mandates that honors and offices be distributed in accordance with fair equality of opportunity and that society be organized in accordance with the difference principle.<sup>33</sup> The second principle has been more discussed. Rawls defines fair equality of opportunity as follows: “Those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.”<sup>34</sup> As Richard Arneson points out, this principle could have far-ranging implications; quite onerous intervention might be required to equalize life chances, greatly beyond what would be required to only enforce a commitment to non-discrimination in the workplace (“careers open to talents”).<sup>35</sup> Arneson complains that fair equality of opportunity is too extreme, but Nozick rejects the project of equality of opportunity as a whole, for it is a general positive right (or, as he puts it, “a right *to* various things”<sup>36</sup>) whose realization requires violating negative rights. Nozick does not flesh out this objection to general positive rights, but I will in the next chapter.

The difference principle, however, has received more attention than fair equality of opportunity in *TJ*, *ASU*, and elsewhere. The difference principle states that inequalities are only justified if they benefit the least well-off.<sup>37</sup> In order to determine whether an inequality benefits the worst-off, that unequal distribution must be compared to *every possible more equal distribution*. If the worst-off are better under *any* more equal distribution, then the inequality is unjust. If Distribution A has the worst-off in a better position than Distribution B, then Distribution A is preferred, regardless of how (e.g. by voluntary gifts, market exchanges, or theft) each distribution of goods came to be. Indeed, Distribution B is unjust, for the worst-off *could be* better off than they are under Distribution B. (Inequalities exist that *do not* benefit the worst-off.) If a third distribution, Distribution C, is possible under which the worst-off are better off than under either Distribution A or B, then both A and B are unjust, since the worst-off could do better under Distribution C. In short, the distribution that results in the worst-off being as well-off as possible is the just distribution. All others are unjust. Thus, while Rawls assiduously avoids the label “maximin,”<sup>38</sup> the difference principle is essentially reducible to a command to maximize the amount of social primary goods (things like income, wealth, and the social bases of self-respect) held by the worst-off class in society.

Nozick does not find the difference principle any more compelling than several alternative principles, such as its analog, maximax. Maximax states that inequalities are only justified if they benefit the best-off in society; it thus declares the just distribution to be the one where the best-off are as well-off as possible.<sup>39</sup> Nozick objects equally to both of these principles, for the reason that they are fundamentally end-state principles of distribution.<sup>40</sup> They care not about *how* the worst-off or best-off came to be so well-off; what matters is simply that

they are. In other words, they are ahistorical. Nozick makes a few arguments against these sorts of principles:

For one, Nozick claims, they require “continuous interference with people’s lives.”<sup>41</sup> Nozick famously uses basketball star Wilt Chamberlain as an example. Begin with the favored end-state, e.g. distribution according to the difference principle. Now, if you let people spend their holdings on whatever they wish, some of them will pay to see Wilt play. At the end of the year, if one million people have paid \$.25 each to see Wilt play, Wilt will be \$250,000 richer and each of the million will be \$.25 poorer, including those members of the worst-off class that are also Wilt fans. Thus, there will be an inequality that has not benefited the worst-off (in terms of giving them more social primary goods – they have less money, though they clearly feel they have a richer experience, or they would not have traded their \$.25 away), which is unjust. The only solutions are to forbid these sorts of transactions (which of course include *all* transactions, *every* transfer of money from one person to another) or to constantly interfere to maintain the favored end-state.<sup>42</sup>

This brings us to a second argument Nozick offers. End-state principles require redistributive taxation to fund them. Some people must have their property stolen in order to provide the funds to distribute to the worst-off. This, Nozick points out, violates property rights. A person cannot have a right to keep her property, which includes a right to not give it to the government, and an obligation to give it to the government. If the government forces someone to do something she has a right not to do, then the government has violated the rights of an innocent person, which is always unjust.<sup>43</sup> It is important to note here that Nozick’s argument requires an assumption that the present holdings of property are just (and therefore a pre-institutional view of property, a view that people could rightly own property without the state) and that the

redistribution is not rectifying any past injustice. We shall see later some challenges to both of these assumptions.

But Nozick also argues that taxation is not merely theft of property; rather, “taxation is on a par with forced labor.”<sup>44</sup> Some choose to labor more so as to get more goods. Some choose to labor less in order to have more leisure. Taxation seizes the laborer’s goods, just as forced labor seizes the vacationer’s time.<sup>45</sup> Both, Nozick says, “involve appropriating the actions of other persons.” Those forcing you to work or give up your property are “a *part-owner* of you;” they have “a property right in you.”<sup>46</sup> This argument is, however, not as self-evident as Nozick thinks. If it is unjust for people to hold certain property without giving it to the government to be redistributed, but it is not unjust for people to do what they want with all of their time without giving it to the government to be redistributed, then there is no contradiction between a prohibition on forced labor and a belief in redistribution. Nozick makes the case that it is difficult to find a reason for this separation that is not terribly *ad hoc*.<sup>47</sup> I know of one. Left-libertarians contend that people are absolute self-owners, but that the income they derive from owning property (namely the land value in their property) is not legitimately theirs, but rather belongs to all equally. More will be said about this in later chapters. It is also true that observing libertarian rights requires forced labor. If Robert steals Kate’s microwave and refuses to return it or pay her compensation, a just punishment may be that Robert has to work a certain amount of time for Kate to repay his debt. This example, of course, furthers Nozick’s point about the equivalence of labor and goods, but suggests that not only redistributionists\* require forced labor – though they, but not libertarians, require it of innocent people.

---

\* “Redistribution” is, as Nozick has pointed out (Nozick, ASU, 149-150), an inaccurate term for what “redistributionists,” as he calls them, do. In a free state, people acquire things through individual transactions with each other. There is no single *distributor* who assigns people holdings. “We are not in the position of children who have been given portions of a pie by someone who now makes last minute adjustments to rectify careless cutting”

It is striking how infrequently proponents of end-state theories consider their effects on those they force to pay. Very little attention is paid to the appropriation aspect of redistribution, while much attention is heaped on the distribution end, with endless questions about who is to get what and why. Indeed, Nozick notes, egalitarians generally ignore what has to be done to get the goods they distribute (namely theft). Instead, they treat goods like manna from heaven. Egalitarians hold that one cannot determine who owns something simply by asking who made it and from what stuff; one must decide who owns it on the basis of what end-state distribution that ownership will promote. (Others ignore all of the *details* of production and simply claim that since things are socially generated, they belong to society as a whole.<sup>48</sup>) Nozick sees the circumstances differently: “The situation is *not* one of something’s getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them.”<sup>49</sup> The trouble, in other words, is that the objects that egalitarians want to distribute to achieve their end-state already have owners, “people who therefore may decide for themselves to whom they will give the thing and on what grounds.”<sup>50</sup>

The manna-from-heaven argument is a running theme throughout *Anarchy, State, and Utopia*. It is related to another argument Nozick makes against end-state principles:

If some persons are in prison for murder or war crimes, we do not say that to assess the justice of the distribution in the society we must look only at what this person has, and that person has, ... at the current time. We think it relevant to ask whether someone did something so that he *deserved* to be punished, deserved to have a lower share.<sup>51</sup>

We should similarly ask whether the beneficiaries of redistribution have had anything done to them for which they are *entitled to* compensation (e.g. had their rights violated) and we should certainly ask whether those whose holdings need to be taken to fund the redistribution have done anything that makes them *entitled to* punishment (e.g. violated rights). In fact, neither is true. The

---

(Nozick, ASU, 149). “Re”distribution is really the first *distribution* that the goods in question will see. A more accurate phrase for describing the activity signified by “redistribution” might be “appropriation and distribution,” but I will use the euphemistic term for the sake of simplicity.

recipients have not had their rights violated and the taxpayers have not violated any rights. The taxpayers are *entitled* to what they have and it cannot legitimately be taken from them.

### Deontology and Consequentialism

In spite of these major differences, Rawls and Nozick share one view in common: the rejection of utilitarianism as a just theory. Moreover, their critiques are substantially overlapping. At the heart of each philosopher's criticism is the notion that, as Rawls puts it, "utilitarianism does not take seriously the distinction between persons."<sup>52</sup> Utilitarianism contends that what matters when designing policy is the aggregate happiness of *all people*, added together. If an action would decrease one person's utility, but increase another's by a greater amount, that action is required. This treats justice as if it were a question of one entity, which encompasses all people, achieving the greatest utility for itself. This "one man"<sup>53</sup> model ignores the fact that this supposed social entity is nothing more than a collection of *individuals*, each of whom are inviolable and cannot be added together to make one other creature, like cells in a macroscopic organism. In other words, "justice denies that the loss of freedom for some is made right by a greater good shared by others."<sup>54</sup>

Nozick offers a very similar argument. It is worth quoting him at length to see just how close his and Rawls' arguments are:

There is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him.<sup>55</sup>

While this argument sounds just like Rawls' argument against utilitarianism, Nozick does not present it as an argument against utilitarianism. (Only later, in a different section, does Nozick

offer what he believes to be his devastating attack against utilitarianism: the experience machine. There, Nozick argues that people would not choose to live their lives in a virtual reality where they could be anyone they wanted and do anything they wanted. Nozick presents this argument to attack utilitarianism's supposed commitment to experiential sensations, which is not an essential component of consequentialism. Further, his argument is unconvincing; he simply asserts that no one would want to plug into a machine that could give her any experiences she desires, but in fact many would and are not troubled by their decision.)<sup>56</sup> Rather, Nozick used Rawls' argument against utilitarianism as an objection to *rights consequentialism*, the view that we should act so as to minimize the number of rights violations. This principle would require us to violate rights in certain situations. If killing one innocent woman would set an example that would prevent fifty murders, rights consequentialism demands that she be killed, though she has done nothing to deserve this punishment. While rights consequentialism takes the position that we should minimize using a person in specified ways, Nozick argues, "following this precept itself may involve using someone as a means in one of the ways specified."<sup>57</sup> Nozick, on the other hand, takes the stance that it is never permissible to violate rights. Charles Fried notes that side constraints "would not allow killing an innocent even to save several innocents from death; but the consequentialist interpretation would require the killing."<sup>58</sup> Rights are so fundamental that they should never be violated. A side constraint is the only formulation of a right that acknowledges and respects its overwhelming importance. Any other position says that it is sacrificable, revocable, unworthy of the intrinsic respect it is due.

Nozick's objection to rights consequentialism (which is also Rawls' objection to utilitarianism) is, as he recognizes, an objection to *all* forms of consequentialism or "end-state theories" and therefore a reason *for* deontology.<sup>59</sup> I should here explain what I mean by the terms

“deontology” and “consequentialism.” I must note that I am here defining the terms *for the purpose of my use in this paper*, not to express some linguistic truth about what the terms “really mean.” I do not wish to get into scuffles over diction; rather, I simply wish to set out clearly what I am arguing for and against. Deontology, as I define it, has two requirements: one for how principles of justice are *justified* and one about what their *content* must be.

At the level of proofs, deontology excludes any teleological grounding for principles.<sup>†</sup> Rawls agrees with this definition of deontology, but thinks that it goes no further.<sup>60</sup> If this is all deontology means, however, then a deontological theory could potentially have *any content*. One might even attempt to prove utilitarianism non-teleologically, for example by using a proof similar to Rawls’ original position. Indeed, some have – very convincingly – argued that utilitarianism, not justice as fairness, would arise from the original position.<sup>61</sup>

But a deontological proof does not make utilitarianism a deontological theory. Deontology does not merely exclude certain modes of proof for deriving principles. It also functions as an independent judge of principles. The second requirement of deontology applies *regardless of how the principles were proven*. It is the requirement of non-consequentialism. This is perhaps even more widely understood as the definition of “deontology” than the first requirement. Wikipedia, possibly the greatest authority on popular usage one can find, explains

---

<sup>†</sup> Actually, deontology’s implications for proofs are a little broader. Deontology excludes any derivation of an “ought” from an “is” – any jumping of the *positive-normative gap*, for such a move can never be justified. Anything on the right side of the equation, so to speak, will not *necessarily* be true. The “proof” will have established nothing. An excellent example of the sort of positive-normative-gap-jumping reasoning prohibited by deontology is Mill’s “proof” of utilitarianism. Mill claims that the proof of utilitarianism is so self-evident as to be tautological: humans desire happiness as their only end, therefore happiness is an end and we should maximize it. (Mill, John Stuart. *Utilitarianism*. Indianapolis: Hackett, 2001. p. 39.) But this makes two leaps. First, people do not desire happiness in general, the happiness of all mankind, as their only end. They desire specifically *their own* happiness. So, if it were legitimate to proceed from is to ought, Mill’s evidence would support ethical egoism – the view that each person should act so as to maximize her own happiness. Of course, Mill does not hold that view. He makes the second impermissible leap, from is to ought, as if it were true that people desired the happiness of all mankind as their sole end. This leap is as illegitimate as the first; there is no reason to hold that simply because people desire something that it is right for them to have it. This is a fallacy that shows up in all sorts of “proofs” of principles of justice, such as social contract models or derivations of rights from interests.

that “deontology... is an approach to ethics that focuses on the rightness or wrongness of actions themselves, as opposed to the rightness or wrongness of the consequences of those actions.”<sup>62</sup>

Deontology forbids taking consequences into account. Side-constraint views are deontological in this sense. An absolute prohibition on, for example, prostitution would be non-consequentialist.

Consequentialism judges the rightness of an action based on whether or not that action produces a certain end-state. A requirement to produce a certain result, e.g. an equal distribution, may be derived non-teleologically, but it is still *consequentialist*, since it claims that an action is right if it best produces a more equal distribution and unjust if it increases inequality.

“Consequentialism” is just another name for “end-state theory.”

Rawls rejects the second requirement of deontology. Indeed, he dismisses it without argument, saying that “all ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>63‡</sup> Perhaps this has something to do with the fact that Rawls’ own difference principle is an end-state theory. The difference principle (though, as we shall see, not justice as fairness on the whole) requires maximizing the position of the worst-off, *regardless of what that means for any other person*. The difference principle has its maximand that it requires the promotion of, regardless of what means must be used to achieve that end. And, indeed, satisfying the difference principle would certainly require forcibly appropriating the holdings of many, using their goods, their labor, their rights, and them as means to the betterment of the worst-off.

---

‡ One could argue that Rawls is right: that all theories take consequences into account in *some way*. Even libertarianism presumably uses consequences in the theory of rectification. Two identical actions, say putting poison in someone’s drink, may end in very different results. Surely if the first target drank her drink and died, but the second target threw hers away, the first rights-violator deserves more punishment than the second. I will discuss the principle of rectification in later chapters, but I do not believe that this is what Rawls had in mind. To a libertarian, both actions were wrong. Even rights-violating actions that end up *helping* the victim are wrong. (Nozick, ASU, p. 95.) The essential point is that an action’s consequences cannot determine whether it was just or unjust. Rawls evidently disagrees with this assessment.

Here, Rawlsians may raise the objection that the first principle of justice limits the second. This would be a solid objection *if* the first principle precluded all rights violations – if, that is, it simply adopted Nozickian rights wholesale. But Rawls’ list of “basic liberties” is much more limited. Not on the list, for example, is the right not to have your property stolen for the betterment of someone else. If libertarian proofs of rights, to be discussed in the next chapter, are correct and people have a right against theft, then Rawls’ first principle allows massive rights violations. The next two points Rawlsians would raise would be that justice as fairness is not teleologically-derived and that the difference principle does not apply to individuals. The first point notes that the difference principle emerged from the original position, which was constructed to establish fair principles of justice. It is not because the social primary goods of the worst-off are some intrinsic Aristotelian good that must be promoted that the difference principle asks us to maximize them. The second point notes that Rawls decided to apply justice as fairness only to the process of constitutional design.<sup>64</sup> That is, justice as fairness only judges whether the basic structure – the most fundamental constitutional system and institutions – of a society is just. Whether individual laws are just is judged by whether they follow the constitution.<sup>65</sup> Whether individual actions are just is judged by whether they follow the laws.<sup>66</sup> In other words, justice as fairness only applies to the state; individuals do not have to worry about whether their actions will result in the betterment of the worst-off.

The objection to both of the Rawlsians’ arguments is the same: that a truly *deontological* theory cannot be consequentialist in *any* part. A theory must be deontological all the way “up” to proofs of the theory, all the way “down” to individual actions, and at all points in between. What it means to be “deontological” will be different at different levels. At the level of proof, Rawls is correct that a theory cannot be teleologically-derived. And, indeed, justice as fairness is not a

teleological theory. The basic structure question is trickier. Why cannot a theory be consequentialist if it only uses its consequentialism to judge how the “basic structure” is set up (what the constitutional designers did), but what individuals do is governed by derivative laws expressed as side constraints? Rule utilitarianism in a sense does this. One could imagine an even more parallel form of utilitarianism (call it “macro-utilitarianism”) that applied only to the “basic structure” of society: the basic structure must be organized so as to maximize utility, but people do not have to think about maximizing utility in their everyday decisions. (Call macro utilitarianism, rule utilitarianism, and Rawls’ view “one-up consequentialist principles,” since they are consequentialist one level up from individual action.) One can even imagine macro-utilitarianism proven by the original position method. Indeed, this is exactly parallel to Rawls’ theory, only substituting the consequence “maximization of utility” for “maximization of the social primary goods of the worst-off” as the result to be achieved. But this is still not a deontological theory! The state’s actions are judged by consequentialism; as a result, the state can violate rights not protected by the first principle (such as those rights that shall be established in the next chapter). Further, the rules in rule utilitarianism come from a philosophy that impermissibly treats people as means to an end; the rules that emerge will be designed to do this!

One might question why one would want rule utilitarianism or consequentialism only at the level of the basic structure at all. Why not be consequentialist all the way down? Judging individual actions by the consequentialist principle would, by fiat, best promote the consequence. Rules, however, are only imperfect. For example, a rule to never kill an innocent person will *generally* promote happiness, but it will prohibit some actions that would further happiness. Similarly, as G.A. Cohen points out,<sup>67</sup> a 60% tax rate may *generally* maximize the position of the worst-off, but a 100% tax rate on all income above the level of the worst-off coupled with a

command to work as hard as possible to generate as much income as possible would do this much better. If the duty to aid the worst-off is so great, why require its fulfillment only indirectly, through the basic structure, rather than applying it directly to individual action?<sup>68</sup> (This leaves open the question of what to *tell* people; it may be most effective to give them a list of rules, but philosophers can still judge their actions by the correct principle of justice.) To answer this question, one should examine all the reasons why a theory must be deontological, rather than consequentialist. If one of these reasons does not apply to one-up principles as well, then that would be *a* reason to believe that one-up consequentialism is superior to act consequentialism. But if *any* of those reasons *do* apply to one-up principles as well – that is, if any reasons against consequentialism also suggest that it may be impermissible to derive side constraints from consequentialism – then a theory must be deontological all the way up and all the way down. Obviously, both could be true, in which case one-up consequentialism may be superior in one way to act consequentialism, but still unjust.

Perhaps the best argument for deontology is the one already mentioned: that consequentialism treats a collection of people as if they were one person, and so finds justice in sacrificing some for the greater benefit of others. But there is in fact no greater “social good” – only individual *goods*. In other words, consequentialism treats individual moral agents as mere means to another end, an end that does not really exist.<sup>69</sup> One-up consequentialism does this too. It performs a moral balancing act; it claims that there is a moral outweighing of the rights of the stolen-from by the benefit given to the worst-off. One-up consequentialism creates principles that will *most effectively* sacrifice some for the benefit of others. The fact that they are rules to be followed is irrelevant; the point is that those rules *do not* “reflect the fact of our separate existences;”<sup>70</sup> they reflect the *myth of our common existence*. The rules are judged by

consequentialism; the best rules are the ones that result in the best consequences. Unjust rules are sure to be chosen by an evaluation mechanism that picks on unjust grounds. So, the fact that consequentialism does not apply directly to individual actions makes no difference to this most important argument for deontology; the Rawls-Nozick separateness contention argues against introducing consequentialism at any point of a theory of justice.

A further problem with the consequentialist view is that it makes no distinction between aggressors, who deserve punishment (which I here use to mean using force, theft, coercion, fraud, and all those actions libertarians view as morally prohibited to be done to innocent people), and innocents, who do not. It is permissible to violate the would-be rights of *aggressors* to save yourself or others, under the libertarian view, not simply because if you took no action, innocent people would die but also because those whose rights you are violating are morally responsible for trying to violate rights and thus deserve punishment. But consequentialism treats the innocent person as equally liable to have force used upon her as a guilty person. By allowing us to view an innocent person as someone whose rights can be violated whenever the circumstances make it expedient, it treats the innocent no better than aggressors who actually deserve punishment by force. No person is marked as “off limits” for punishment by virtue of facts about her (such as her actions themselves); rather, punishment (like every other action) is justified simply because it results in the best outcomes. This is Nozick’s objection to end-state principles: it may be relevant to ask why the worst-off are so badly off.<sup>71</sup> Once again, one-up consequentialism will pick principles that will ignore this distinction. The principles that emerge will not punish aggressors and compensate victims, but punish those with holdings and compensate those most favored by the consequentialist principle. Punishment will

be handed out not to those *entitled* to be punished, but to those who it is *useful* to punish to promote the interests of others.

Another argument for deontology is that consequentialism destroys all moral liberty (freedom to act without moral proscription). Under consequentialism, one action is required and all others are forbidden. One must act so as to best promote the favored consequence. Any other action would sacrifice this best action; the best action serves as opportunity cost to all other actions. So, if one badly-off child is drowning in a lake, diving in and saving her might seem pretty good according to our everyday morality. But if one could have instead driven a few miles to a lake where *two* even worse-off children were drowning, and thus aiding the worst-off even more, then saving the single child is wrong. Simply put, when one action is required, all others are forbidden. Side constraints, on the other hand, allow for moral liberty. A few actions are forbidden, but all others are *permissible*. People have the freedom to choose between several courses of action, as Nozick says to choose and pursue their own ends,<sup>72</sup> bounded only by those rules that ensure that they do not prevent others from doing the same. This is potentially quite a powerful virtue of deontology, since some proofs of theories of justice might use one's freedom to pursue one's own ends as a premise. Indeed, the argument that Nozick presents that comes closest to proving libertarian rights relies upon the notion that libertarianism allows a person to lead her life.<sup>73</sup> Of course, as Shelly Kagan proves,<sup>74</sup> one person's virtue is another's vice: allowing moral liberty might also be a sign of a bad theory of justice. Where does one-up consequentialism fall with respect to moral liberty? The moral liberty objection to act consequentialism does not, in fact, apply to one-up consequentialism. One-up consequentialism gives people some choice, as agents are bound only to follow the rules but free to act otherwise. They have moral liberty, and depending on the specificity of the rules, possibly more moral

liberty than under some deontological systems. This may be the reason rule utilitarians and Rawls have for using their one-up systems: they allow a greater scope for individual choice. Rawls shackles the basic structure with an onerous principle that he makes sure individuals are not bound by. Only one constitutional system may be just, but plenty of individual choices within that structure are just. Yet it is also the case that individuals are bound by some principles that the state is not. We can imagine the Rawlsian state threatening a rich man with imprisonment unless he pays a large portion of his net worth to the government, while at the same prosecuting a mafia boss who threatened exactly the same thing. So one-up consequentialism creates a sort of contradiction: the principles that apply to agents acting for one end, the government's, are different than the principles that apply to agents acting for another end, their own. Certainly this is also true in a libertarian state, and in fact in any job: but in these cases there are *more* restrictions on what you can do as the state's or someone else's agent than as your own, not fewer. The side constraints that apply to me do not get removed when I put on my government uniform – except in a nation governed by one-up consequentialism.

Finally, consequentialism rests on erroneous views of causality and its relation to moral responsibility: what results of one's actions one can be held responsible for and thus liable to be punished for. Consequentialists claim that a person acts unjustly when she does not act in such a way as the most-favored results will arise. She is responsible for preventing the best results from coming about by acting differently. An otherwise innocent person who fails to act in some way (for example, refusing to torture an innocent person) to stop an unspeakable harm is at least partially responsible for the harm that she failed to prevent, and thus guilty. We have to pick between having one rights-violation on our hands, say the consequentialists, and having the blood of millions. It is an unfortunate choice, they say, but we must choose the lesser of the two

evils. If this was true, and people were responsible for all of the consequences of their actions, including the actions of others, the consequentialist position could be justified.

In response, Alan Gewirth posits a moral standard, which he calls the “principle of intervening actions” (PIA). Gewirth takes the position that we are solely responsible for the morality of our own actions in two senses. First, *only we* are responsible for the acts we commit, even if someone else’s action caused us to act as we did. (For example, if a woman’s husband cheated on her and she, upon finding out, grew enraged and killed his lover, she – not he – would bear sole responsibility.) Second, we are only responsible for *our own actions*, even if they lead to other actions. Thus, we have a preeminent duty to never act immorally, even if doing so would preclude others from taking even more immoral actions. Gewirth contends that never violating the negative rights of another “is an obligation so fundamental that it cannot be overridden even to prevent evil consequences from befalling some persons.”<sup>75</sup> He clarifies with an example. Imagine that a group of terrorists kidnaps a woman and offers her son a choice: he must torture his mother or they will blow up a city with a nuclear weapon. Gewirth argues that the son has a primary duty to not violate the rights of his mother, whereas he is not the actor who is blowing up the city – the terrorists are the moral agents responsible for that action, not the son. If the son had the choice, he would pick neither. *His* duty is to *never* violate rights; the only way to fulfill this is to not torture his mother. Gewirth argues: “It would be unjustified to violate the mother’s right to life in order to protect the rights to life of the many other residents of the city. For rights cannot be justifiably protected by violating another right.”<sup>76</sup>

PIA is the only consistent, justifiable moral theory of consequences. First, one should note that only PIA sets a non-arbitrary limit on the string of effects that can factor into the moral calculation. PIA says that no consequences of other actions can count; the only other non-

arbitrary standard says that all consequences in the chain must count. One cannot claim that I am responsible for only, say, the first four other actions resulting from my action. One must either consider only my actions or all resulting actions. Thus, if the destruction of the city by terrorists actually ended up preventing more rights violations by, say, staving off a Malthusian population crunch that would result in mass starvation and world war, then the consequentialist position has to endorse the terrorists' action. Consequentialists have to count *every* effect in the chain, even in the absurdly far-off future, to determine whether an action is moral. This fact, of course, does not by itself constitute a reason to reject consequentialism in favor of PIA, but it does suggest that PIA is the only reasonable interpretation of the requirement of non-consequentialism. It also suggests an implausible feature of consequentialism.

The libertarian first principle of self-ownership (to be further elucidated in the next chapter) shows why the inclusion of all resulting actions is implausible. Since we are born owning ourselves and nothing else, controlling our mind and body and no one else's, it makes perfect sense that we should be responsible for only the actions that we ourselves commit. Some could argue that we should be responsible for the *results* of these actions. PIA states that we are. If a person gets a wrecking ball and knocks over a building, which then falls and crushes twenty people, the person is to some degree responsible for those results. But this is not the case if someone else's action intervenes, because another moral agent is the more proximate cause of the effects; she has stepped into the line of causation to take the moral responsibility. When you act upon a rock that you hurl at an enemy's face, you are responsible for the effects of the rock for two reasons: first, you are using force upon the rock; secondly, the rock has no agency over the effects it causes. The rock, by the fact that it has no agency of its own, is merely your tool, an extension of your agency.

But neither of these reasons holds for using non-coercive measures that result in a person's action. As long as one does not use coercion to compel another to commit a rights-violating action, one has not reduced that other person's agency. Possessing full agency, the person is morally responsible for the totality of her actions; thus no one else can assume any portion of that responsibility. You are not responsible for anyone else's free actions and no one else is responsible for yours. If the son were somehow partially responsible for the terrorists blowing up the city, that would necessarily diminish, by whatever fraction of responsibility the son assumed, the terrorists' responsibility for that action. They would not be wholly responsible, because the son had caused their action. But this must not be the case; the terrorists must be held totally responsible for the destruction of the city. Consequentialists ask, "Which set of rights-violations do you endorse: the torture of the mother, or the deaths of the millions?" Gewirth responds that PIA endorses neither. PIA gives the terrorists complete responsibility for their actions, and emphatically condemns them, in a way that no other position is capable of. Only PIA is capable of giving rights their supreme status by proclaiming that they may never be violated for any reason, including preventing future rights-violations.

One-up consequentialism creates rules that would violate PIA. The reason for picking the rules it does is *based on* the notion that people are responsible for actions other than their own. A rule prohibiting the sale of drugs or handguns or violent videogames, for example, might be established because those items cause people to act violently. My selling them leads to someone else acting wrongly. So *I* am acting wrongly when I sell them. PIA denies this line of reasoning; it says that punishing people for others' actions is always unjust. The rules that one-up consequentialism establishes, then, are also unjust.

The aforementioned reasons (with the exception of the moral liberty objection) show the necessity of formulating principles of justice that are deontological all the way up and all the way down. They must be thoroughly non-consequentialist, and their justification must be non-teleological and not jump the positive-normative gap. In the next chapter, we will see what sorts of justifications can be offered and what principles arise from them.

# Proving Rights

## Positive and Negative Rights

I now turn to the crucial and difficult question of how to *prove* that rights exist and how to prove *which* rights exist. But before attempting to establish the truth of a particular theory of justice via proof, one must answer philosophical questions whose answers will limit the possibilities for the theory. In the last chapter, we saw some such limitations: theories must be proven without impermissibly jumping the positive-normative gap and they must not be consequentialist. I have adopted Nozick's phrase "side constraints" for describing the principles the second requirement mandates. But this is not fully accurate. Certainly, absolute prohibitions on certain actions are non-consequentialist. But so are absolute requirements to act. Side constraints and duties can both be found in a deontological theory. So saying that a deontological theory must contain only rights expressed as side constraints would be too limiting. Philosophical rights may take another form as well: they may be *positive* rights.<sup>§</sup> Positive rights are claims that the right-holder is entitled to certain goods or services. They are distinct from negative rights, which are rights that entitle the right-holder to be free from having certain actions done to her. The best way to explicate the difference between negative and positive rights is by examining the duties that are correlative with those rights. A negative right imposes a prohibition on acting – for example, one is not permitted to kill another without her consent. A positive right imposes a duty to act – for example, one must save me if I am drowning.\*\*

---

<sup>§</sup> Though the terminology of negative and positive rights has fallen out of use, I believe that the concepts are precise enough for the purposes of this paper. I use those terms simply to bring out the distinctions I wish to draw; the ideas that the terms convey are those I wish to express here. Other diction that can express the same thoughts would be equally welcome.

\*\* One might question the firmness of this delineation. If I see a child drowning in a lake and I refrain from saving him, have I really done nothing? Or is my refraining itself a sort of action? Roger Pilon, a libertarian student of Alan Gewirth to be introduced later in the chapter, devoted a substantial portion of his dissertation to drawing the moral distinction between action and inaction. (Pilon, pp. 40-67.) In a series of steps impossible to lay out here, Pilon

Libertarianism is often said to be a negative rights theory. But the libertarian view of justice also involves some kinds of positive rights. For example, if I (foolishly) sign a contract with Jane, whereby Jane agrees to pay me \$20 and I agree to sell her my copy of *Anarchy, State, and Utopia*, and she fulfills her end of the bargain, she now has a positive right. She has a right that I transfer to her the specific object that I promised her and I have a correlative duty to give it to her. My consent has alienated a right I formerly possessed, the right to keep my book, and given it to Jane. The act of consenting has created a positive right. There is a second way in which a person can come to possess a positive right and another can be bound by a duty to act. If I steal Chris's copy of *The Grounding for the Metaphysics of Morals* then, under a likely principle of rectification, I have a duty to (possibly among other things) give Chris the book back or do something equivalent to compensate him. Chris has a correlative positive right to the book or compensation. Once again, my action has created a duty for me and a positive right in a recipient of my action, though this process is governed by the principle of rectification, not the principle of transfer.

All of these positive rights and duties to act are of a *special* form. Both the rights and the duties apply to specific people and over specific objects. When I promise Jane something or take something of Chris's, Jane and Chris get rights that *I* give them the *particular objects* I stole or promised. Jane and Chris do not have a right to *any* of my books they choose, and they certainly do not have a right that they get a book from *anyone*. If I die before I fulfill my duty, Jane cannot break into Chris's home and take a book because *I* should have given Jane a book. Nor may Chris do this to Jane. Moreover, *none of these rights would have existed were it not for my*

---

concludes than inaction is characterized by *failing to cause a relevant change in the world*. Whether one knows the result of her inaction, intends the result of her inaction, or is able to act are facts irrelevant for deciding whether something is an action or inaction. Pilon concludes that "refraining is not, as Brand suggests, one kind of action, but is rather, as Fitzgerald suggests, a species of not doing." (Pilon, p. 62.)

*action*. Had I done nothing (or had I only done actions with no recipient but myself) – had I not promised Jane my book or stolen Chris’s – no positive rights and no duties to act would exist.

However, one can imagine positive rights and their correlative duties to act holding *generally*, just as libertarian negative rights hold generally. Someone would have positive duties to act when she has done nothing (or at least performed only actions with no recipients, or where the recipients have consented). Imagine a child drowning in a lake. If she has a positive right to be saved, this imposes a duty on a bystander sitting on a park bench at the water’s edge. And the positive right to aid is general in another sense. The child has a right to aid, but not to aid from any *specific* person. Similarly, a positive right to disaster relief would give the bearer a right to food and clothes and whatnot, but not to any specific dollar bill or article of clothing. This right does not reference a particular object that the right-holder had been promised or had taken from her, as libertarian specific positive rights do, but could be satisfied with some object to which she has no relation. It could be satisfied with any of a range of objects, taken from anyone.

Before looking at particular attempts at proving rights, then, we will examine the question of what rights *are*. Are general rights, the rights central to a liberal theory of justice, negative rights or positive rights? Can one be said to have a right to shelter in the same way as one can be said to have a right to not be beaten? After addressing this question, we will have a much clearer idea what sort of theory of justice might be correct – and thus what theories can be established by human reason.

Our description of general positive rights has given us a good starting point from which to assess their justice. What our description immediately makes lucid is that general positive rights over a certain subject (e.g. food) inevitably conflict with negative rights over the same subject (e.g. *my* food). This is a unique feature of *general* positive rights. When I consented to

give Jane my book, I created a special positive right in her but I also alienated my negative right to the book (or, perhaps more specifically, my right to not give the book to Jane). When I stole Chris's book, I similarly alienated my negative right to that book and whatever other objects and actions would be required to rectify the injustice. But if Wanda possessed a general positive right to be pulled out of a lake when drowning, to satisfy her right would require violating the negative right of someone nearby to do what he wishes with his own body. No action of the bystander alienated his right to his labor. Thus, Nozick writes:

The major objection to speaking of everyone's having a right *to* various things such as equality of opportunity, life, and so on, and enforcing this right, is that these 'rights' require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.<sup>77</sup>

This conflict between negative and positive rights is probably irreconcilable. *Any general positive right* will require, in its enforcement, taking somebody's property or using somebody's person – for any general positive right imposes some duty that an agent may not wish to fulfill. Even the very limited right of the child to be saved from drowning will require, at some point, someone to act – violating his negative right to never be forced to act. Since any general positive right to an object will require the violation of some indeterminate person's (or multiple people's) negative rights to that object, if negative rights to that object exist, positive rights cannot. Thus, *if negative rights exist over every person and object, no positive right can exist*, for in a complete and consistent theory of justice, rights cannot conflict.<sup>78</sup> As Nozick says, "the particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition."<sup>79</sup>

However, this fact is not by itself a devastating objection to positive rights. For one may posit a theory whereby *not every object and person* is the subject of a negative rights-claim. For example, if Bob does not possess any negative rights over himself, then a positive right to Bob's

labor does not cause a conflict of rights. (This is why ownership rights of animals do not cause rights conflicts; animals are not self-owners and so have no negative rights not to be forced to carry water for humans or be eaten by them.) Or, one could have a limited negative rights theory that put *some* actions (e.g. violating one's right to free speech) out of bounds in the fulfillment of positive rights, but left property in general uncovered by negative rights. So one can make a theory that combines *some* general negative rights and *some* general positive rights, but (like the special positive rights in the libertarian theory) the positive rights and the negative rights must reference different *rights-objects*. Those objects over which only positive rights exist will be governed by what Nozick has labeled "the reverse theory,"<sup>80</sup> which places "only such universally held general 'rights to' achieve goals or to be in a certain material condition into its substructure so as to determine all else."<sup>81</sup> Nozick claims that "no serious attempt has been made to state this 'reverse' theory,"<sup>82</sup> but Nozick did not offer any objection to such a theory. I shall present and examine two arguments that may be offered against it.

Of course, any reasons for believing in negative rights will weigh as objections to the reverse theory, since the reverse theory cannot allow any negative rights over the objects to which it pertains. The reverse theory would have to hold that no person has a right to herself and her property. No one has a right to be free from the rule of force, because force is necessary to secure the particular things that other people need. If Cindy has a positive right to relief aid from a flood, I (and everyone else) have a duty to improve Cindy's material position, to move her to a higher indifference curve, regardless of whether or not I have done anything to worsen Cindy's situation. People cease to be ends in themselves; they are only valuable because they can produce money or goods or jobs to be given away to others.

But this answer is not quite sufficient, for there are presumably also good reasons for

believing in positive rights – such as the benefits the rights-holders get. There is one more fundamental reason why general positive rights are implausible. Specific positive rights are limited to the parties to an agreement or the violator of someone’s rights – to *responsible* persons. But this limitation does not exist for general positive rights. There is no *inherent* reason for the demands imposed by such rights to not apply universally. If I have a positive right to a glass of water and you did not provide me with a glass of water, you have violated my right. But so has my neighbor Bob, and Jill, who lives in New York and has never met me, and Amy, who resides in Calcutta, and every other person who has failed to give me a glass of water. Even *I* have violated my right by not providing myself with a glass of water. When positive rights are violated, there is no single identifiable perpetrator of the offense who must be punished to secure justice. Everyone has committed the crime. This does not jibe with our ordinary notions of responsibility, which are based on a conception of causality not easily refuted. When we say a murderer is culpable and deserves punishment for killing someone, it is because that person has performed an action that caused the victim’s death. A moral agent’s action has caused a result. A positive right, on the other hand, says that a non-provider of the “victim’s” water is culpable and deserves punishment because that person has *failed* to perform an action that, had it been performed, would have resulted in the victim having water. Is it not implausible that a person who has never acted has *caused* some bad result and thus become *culpable*? Is inaction ever rights-violating and thus unjust? We shall shortly encounter a proof of libertarian rights that responds directly to this question.

### Proofs

For now, we have sufficiently established that a theory of justice must only contain

general *negative* rights, not positive rights. This consideration, as well as the considerations of deontology introduced in the last chapter, substantially limits what theories of justice may be correct and how they can be proven. These restrictions give us a better sense of what we are looking for and what we are not when we seek principles of justice, but they do not get us all the way there. For one can imagine a great variety of negative rights theories other than libertarianism. Some would be far more restrictive than libertarianism. A theory that prohibited anyone from doing anything that would cause harm to another would contain only negative rights to be free from harm. But it would forbid things like boycotts, collusive agreements, and defamatory statements – actions that libertarianism would allow. Similarly, some alternative negative rights theories would be far more permissive than libertarianism. A theory that contained only self-ownership rights against being beaten or killed, but no property rights in objects would allow unrestricted use of non-human objects, which libertarianism does not. Given this wide range of possibilities, it should be clear that much more needs to be said to establish *libertarian* negative rights. Nozick left this crucial task unfinished – in fact, barely begun. Theorists have accused Nozick of *assuming* libertarian rights without proof.<sup>83</sup> In spite of the various arguments he made for libertarianism, much seemed to be taken for granted. As noted in the introduction, Nozick began *Anarchy, State, and Utopia* with the assertion “individuals have rights, and there are things no person or group may do to them”<sup>84</sup> and with the assumption of Locke’s state of nature for describing these rights.<sup>85</sup> Nozick throughout appealed to the intuition that the use of force – through theft, breaking of a contract, or physical violence – was wrong without ever *establishing* that it was so. I will examine a few ways one might go about attempting to correct this omission.

## Liberty

First, one might imagine that libertarianism has an intimate connection with the concept of liberty. After all, a libertarian state is highly permissive. Subjects of a libertarian state may adopt a large variety of different lifestyles. Within a libertarian state, one might theoretically find an infinite variety of diverse groups and individuals living very different lives. Individuals might come together, either geographically or not, to form groups to discuss, mutually support, endorse, or even proselytize their belief in a religion, cause, or morality. One can imagine Hutterites and Amish living in their own communities. Objectivists and atomistic hermits may keep mostly to themselves.<sup>86</sup> Anti-sweat shop leagues may organize a boycott of Wal-Mart. Certain types of feminists may burn pornographic magazines and convince prostitutes to leave their jobs. None of these groups and none of their actions are any more un-libertarian than sewing clubs and their activities, for none of their actions are prohibited by libertarian side-constraints – none involve violence, theft, or coercion of innocents.<sup>87</sup> So the libertarian state remains neutral between all those options, providing adherents of every view equal access to its services (protection from force) at an equal price. Since any action that does not violate libertarian side-constraints is permitted, and since the state treats no lifestyle any different from any other, anyone may live by any life plan they choose. The possibilities appear as limitless as they can be; the state appears to promote *maximum liberty* to lead one's life as one chooses. If we sought a state that maximized the scope of liberty, it seems as though a libertarian state would achieve this.

Appearances can be deceiving. To say that libertarianism best ensures or best respects liberty and is thus justified is to leave much out, in particular an appealing definition of "liberty." As Samuel Freeman points out,<sup>88</sup> one needs to define liberty in terms of absolute property rights

(to oneself and to one's other possessions) in order for libertarianism to be a theory that maximally defends liberty. But why liberty should be defined in terms of property rights is a further question (as is why liberty should be the basis of a theory of justice at all), and thus such statements really get us nowhere. For a non-libertarian state might provide more "real liberty." For example, Philippe van Parijs claims that his ideal redistributive state would ensure – as his book's title puts it – "real freedom for all" better than a libertarian state.<sup>89</sup> And, indeed, one can easily see how a universal basic income would better ensure that everyone is able to lead the lives they desire than a purely libertarian system. In a libertarian state, some people are forced into desperate circumstances, with little "real" choice; van Parijs's universal basic income would allow people to pursue a wide variety of life plans, including surfing in California, without even working. The price, in terms of liberty, may be minimal: Bill Gates would have pretty much as many, and as good, options with \$5 billion as with \$35 billion. Further, one could imagine a state that forbade contracts such as selling oneself into slavery guaranteeing much more real freedom than a pure libertarian state.

Shelly Kagan makes Freeman's point much more thoroughly. Kagan considers a number of possible conceptions of "liberty" that a libertarian state might be said to maximize or best respect and shows that none can be the basis of a proof of libertarianism.<sup>90</sup> First, Kagan examines moral liberty.<sup>91</sup> Moral liberty, as described in the last chapter, is freedom from *moral* constraint. The fewer restrictions one has on what one can morally do, the more moral liberty one has. But the system that maximizes this sort of liberty would be *amorality*, a total absence of all moral constraint on what one could do. Libertarianism puts absolute constraints on what one may do. For example, one may never steal from, kill, or injure an innocent person. Kagan also examines this-worldly liberty: freedom from actual interference. One can phrase the "interference" being

prohibited however one likes (including exactly as libertarians do: violations of one's person or property), but it makes no difference. As Kagan points out, to maximize freedom from interference, whatever that interference is, should require a form of rights consequentialism. Libertarianism prohibits actions that violate rights, even when those actions will prevent even more rights violations. Thus, libertarianism cannot even theoretically be said to best ensure the minimum possible amount of interference.<sup>92</sup> Kagan considers several other permutations of the liberty argument and concludes that none can support libertarianism.

Indeed, this is true: there is nothing that libertarianism can truly be said to *maximize*, including its root word, "liberty." Most libertarians, I think, would agree that a world in which fewer rights violations were committed is "better" in some sense than a world in which more are. But if one contends that the "better" nature of the world with fewer rights violations gives justification for moral principles – for using force – then that person is not a libertarian, but a teleologist. Liberty is, further, not *precisely* what deontological libertarianism is about. Libertarianism is about rights, rights in the form of side constraints. Libertarianism is about moral principles. Libertarianism does not claim that there is any intrinsic value to "real liberty," though some libertarians – and many non-libertarians, to be sure – might find "real liberty" good for themselves or others. And while libertarianism gives special purview to certain types of interference and to freedom from those kinds of actions, it does not value that freedom *in itself*. In other words, deontological libertarianism – the political philosophy – does not judge states of the world. Rather, it provides principles that govern actions. Those principles constrain what people may do. While libertarianism is often described as a theory of what people are *allowed* to do, it can also – and perhaps better – be described as a theory of what people *may not* do. People may never use force (meaning violations of person or property) upon those who have never used

force themselves. The innocent may never be punished.

### Natural Rights to Self-Ownership

Side constraints define what libertarianism is and this definition helps us see what paths may lead to libertarianism. A promising candidate is self-ownership. Self-ownership is an intuitively appealing concept, though it is a bit difficult to phrase formally. The central notion is that we own ourselves. In some sense, we are the masters of ourselves; we have rights to totally determine what happens to our own bodies. Since our bodies *are* us (we are in some way defined by the atoms that make us up), it certainly seems appealing that we should control them. Putting this precisely is, however, exceedingly difficult.

Michael Otsuka, a prominent left-libertarian, has proposed a definition that shall do for our purposes. He cites Nozick's explanation of "the central core of the notion of a property right in X" as "the right to determine what shall be done with X."<sup>93</sup> So, to say that we own ourselves is to say that we control ourselves. Otsuka claims that:

a person's right to self-ownership is full if and only if that person possesses, to the greatest extent and stringency compatible with the same possession by others, the aforementioned rights 'to decide what would become of himself and what he would do, and... to reap the benefits of what he did.'<sup>94</sup>

So, Otsuka's definition of self-ownership utilizes Nozick's notion of ownership as control. But it is important to spell out what Nozick means by determining what shall be done with something. Otsuka brings in the central notion that such a right must be compatible "with the same possession by others." Thus, I posit the following definition of ownership: A moral agent, A, owns a thing, 1. For A to own 1 is for A to have (total?) control over what happens to 1 – to be able to determine exactly what happens to it – consistent with other moral agents having ownership over 1', every atom in the universe not in 1. (Or is it A', every atom in the universe not owned by A?) So if I own a knife, I may do with it what I want, but I may not leave it in your

body.<sup>95</sup>

Next, we would want to ask in what sense of the term above a person is a self-owner. How can we *prove* that a person owns himself? I shall present one possibility that I call a “natural right to self-ownership.” This argument begins with the empirical notion of ownership as control, shows that human beings are self-owners under this definition, and contends that this establishes the *normative* notion of a property right in one’s person. The natural right to self-ownership argument points out that all human beings own themselves under the definition of ownership just given. Only Amy is able to control her body. No matter how much Hector concentrates, his will can never be able to move Amy’s arm, much less unilaterally change her mental state. Amy has that sole power. From here, the argument from self-ownership would go on to derive rights claims. It would argue that because Amy owns her own body, it should be in her sole power. Hector coming up to Amy, grabbing her arm and flailing it around is a violation of Amy’s self-sovereignty, since he is controlling what is by definition only Amy’s to control. But if Amy consents to Hector performing this action, the act is not rights-violating. Amy allowing Hector to grab her arm and flail it is a *use*, not a violation, of her self-sovereignty. She can demand something in exchange from Hector, like similar arm-flailing rights, and if Hector agrees and they make a contract, then Amy now has partial ownership over Hector and vice versa – as defined by the contract. Notice that this contract is, by definition, each party using her absolute right to self-sovereignty, since Amy giving arm-flailing rights to Hector constitutes her using her body and similarly for Hector. Given that there are in the contract two acts of self-sovereignty, there is necessarily a prohibition on a third party (let’s call him Bill) preventing or prohibiting this contract. This can be expanded to involve agreements with any number of parties. Therefore, if we define a contract as an agreement consented to by all parties involved,

people have an absolute and irrevocable right to contracts.

*Precisely* libertarian rights emerge from self-ownership. If someone else (without my consent) destroys, damages or uses a portion of my body, she violates my right to own myself, for I no longer control (own) my actions. But other rights do not emerge. If you show me an image or make a comment to me, I can turn away and ignore you. I cannot do this if you stick a knife in my body. Even if I am strapped down and *cannot* look away, seeing the image is not in itself force. The change in my surroundings does not change *me* in the same way as sticking a knife in me does. I may *react* to the change in my surroundings and *my* reaction may change my mental state, may reconfigure the atoms in my body, but the extra light emerging from the television screen does not. Leaving a knife in me does damage to me directly. Any reaction to external situations is damage I do to myself. The same is true of “economic coercion” (even of the buying-the-land-around-my-house type): it does not damage the atoms in my body directly.

The natural right to self-ownership argument does a much better job than the liberty argument of defining precisely what counts as a rights-violation. But it has trouble establishing *why* self-ownership-defying actions are unjust. Ownership, as I have defined it, is a highly empirical concept; deriving moral requirements from it would prove tricky. We see this in the different possible interpretations of the statement that only Amy has the “power” to move her own arm; this could *either* refer to the empirical fact that only she is *able* to move her arm *or* it could mean that only she has the *normative right* to do it, but the argument ambiguously attempts to refer to *both* senses of the claim. Jumping the is-ought gap is, at least according to Nozick,<sup>96</sup> not such a problem for other, more liberty-like, arguments. Perhaps somehow liberty and self-ownership could be combined to generate a complete proof. I leave this potentially fruitless chore to future libertarians better grounded in metaphysics than I am.

### The Principle of Generic Consistency

Another proof is considerably more formal and specific than either of the two I have been discussing up until now. In the 1970s, Alan Gewirth developed a moral theory, known as the Principle of Generic Consistency, that he claimed was the fundamental principle of morality. Gewirth essentially argues that all action has the two generic features of voluntariness and purposiveness – all actions worthy of the designation are done willingly and towards some end of the agent. These features imbue action with rights-claims. An agent acting on somebody must see that the recipient of her action is also a potential agent like herself, and thus must act in accordance with the rights-claims she herself makes when acting. So, the PGC is (concisely stated): “Apply to your recipients the same generic features of action that you apply to yourself.”<sup>97</sup>

In 1979, Roger Pilon, Gewirth’s student, used the PGC to attempt to prove libertarian rights. He holds that voluntariness and purposiveness will generate claims to libertarian rights – and only to libertarian rights.<sup>98</sup> Pilon contends that if an agent must recognize that her recipient is also a *voluntarily* actor acting to *her own* purposes, she must respect the “voluntariness criterion” by obtaining her consent for any actions performed on her. So “the most basic right secured by the PGC – for it is logically prior to all other rights and generically most fundamental – is the right to noninterference.”<sup>99</sup> Pilon then proceeds to explain more fully what he means by a right to noninterference. He comes to a definition that closely mirrors the right of self-ownership: no one may use another’s person without her consent. This forbids direct harm (for example, beating someone up), coercion (threatening to kill someone), and breaking of contract (if I agree to do your taxes in exchange for you weeding my lawn and you weed my lawn but I fail to perform my

part of the bargain). But it does not forbid doing actions that might worsen another's situation, but do not constitute using that person's body (winning away another's customers or convincing one's husband to leave her).<sup>100</sup> Those actions can be consistently done while admitting the voluntariness criterion: for all I have done is to convince others to act voluntarily.

Pilon's attempt to derive highly specific rights from the quite general qualities of action that Gewirth identifies is a good one, though the project is a difficult one. It is fairly clear how Pilon arrives at his prohibition on coercion. But one may wonder what exactly about the voluntariness criterion forbids the use of force. How does kicking someone render their actions non-voluntary? Similarly, how does breaking an agreement prevent someone from acting voluntarily? The specifics of Pilon's argument certainly need to be worked out in greater detail – potentially an area of future scholarship.

Though Pilon's argument for libertarian rights may need some further work, Pilon's objections to other, positive, rights seem spot-on. Pilon contends that as critical as what the PGC says is what it does *not* say. "The PGC," notes Pilon, "does not require anyone to do anything. It is addressed to agents; but it does not require anyone to be an agent" and "even if he did act, the PGC is addressed to him only insofar as there is a recipient of his action. Acting in a way that involves no recipient would not violate the PGC."<sup>101</sup> *This* is the most fundamental reason why general positive rights cannot exist. Positive rights require action, but inaction is never unjust. Pilon offers several arguments to refute Gewirth's claim that the PGC sometimes entails general positive duties. Pilon points out the fundamental difference between recipients of one's actions and other persons to the PGC argument – the recipients are faced with the imminent threat of our actions and so we are required to think of our actions upon them as acts performed on moral agents, but others are not in the PGC radar, so to speak, so we have no duties towards them.<sup>102</sup>

Pilon also contends that positive rights must include considerations of the cost of fulfilling their obligations – and that this is a consequentialist factor inappropriate for a deontological theory.<sup>103</sup> But Pilon’s best argument against the notion that inaction can ever be unjust is the causality argument. Pilon contends that an agent cannot be held responsible for others “drowning or starving for reasons . . . unrelated to the agent” because “he is not the cause of their plight.”<sup>104</sup> Pilon spent a large portion of his essay earlier distinguishing clearly between action and inaction.<sup>105</sup> He plausibly argues that *refraining from assistance* is not action and cannot be said to “cause” bad effects.<sup>106</sup> Inaction does not *cause a relevant change in the world*. “Not doings are not changes. They cannot therefore cause changes, for there is nothing about them – no change about them – that could possibly serve to make of them causal events – they are causally inefficacious.”<sup>107</sup> Requiring action, however, *mandates* a change, an interference into the current chain of causation.<sup>108</sup> Therefore, says Pilon, inaction never violates the “supreme principle of morality,”<sup>109</sup> whereas forcing someone to act in spite of her wish not to would violate it.<sup>110</sup>

One critical feature of the Pilon-Gewirth argument is its use of dialectical necessity. Rather than arguing “directly” for libertarian principles, Gewirth-Pilon shows that agents *must necessarily hold them*, on pain of self-contradiction. This method more firmly establishes rights than, for example, the original position: an agent might simply, without contradiction, refuse to operate from the mindset of the original position.<sup>111</sup> Other theorists have adopted this powerful method, albeit in different ways, to attempt to prove libertarian rights.

### Estoppel

Stephan Kinsella works within the field of argumentation ethics for his justification of libertarian rights. Argumentation ethics, as Kinsella applies the term, is a way of deriving moral

principles (such as principles of justice) from *necessary* assumptions inherent in argumentation.<sup>112</sup> This method is very similar to the “action ethics” of Gewirth, which finds rights-claims in necessary assumptions inherent in action. Both use dialectical necessity to prove their claims.<sup>113</sup> Kinsella seeks to establish that a person cannot consistently deny libertarian rights – that a person contradicts herself if she attempts to deny them. Kinsella first asks exactly what libertarians mean when they say people have negative Lockean rights. Contrary to pacifists, libertarians contend that if a right is violated, the violator can legitimately be subjected to punishment (as determined by the principle of rectification). Thus, rights must be *enforceable*.<sup>††</sup> To say that I have a right that you not hit me is just to say that if you hit me, you can have force used upon you. *This* seems right, for it focuses on what justice is about: determining when it is legitimate to use force on someone.

Kinsella attempts to prove the enforceability of libertarian rights using the concept of *estoppel*.<sup>114</sup> Estoppel is “a well-known common-law principle that prevents or precludes someone from making a claim in a lawsuit that is inconsistent with his prior conduct, if some other person has changed his position to his detriment in reliance on the prior conduct (referred to as ‘detrimental reliance’).”<sup>115</sup> Kinsella uses estoppel to examine one particular discourse: that between aggressor and victim. In Kinsella’s scenario, the victim attempts to punish the aggressor for violating the victim’s rights. The aggressor complains about her punishment, about the victim using force upon him. But, says Kinsella, the aggressor has no right to object, for he has initiated force and would thus contradict himself by taking a pacifist stance against ever using force. “It makes no sense for him to object to punishment, because this requires that he maintain that the

---

<sup>††</sup> This is, arguably, a grave deficiency with the PGC-based proof. The Principle of Generic Consistency might forbid me from punishing someone who violated my rights. For the violator is still, I must admit, an agent imbued with the generic qualities of voluntariness and purposiveness, so the voluntariness constraint should still apply and I should still be forbidden from using force against him. One can view the estoppel argument as rectifying this omission; Kinsella shows why it is permissible to use force against aggressors.

infliction of force is wrong, which is contradictory because he intentionally initiated force himself.”<sup>116</sup> He is thus estopped from his complaint, and thus “an aggressor contradicts himself if he objects to others’ enforcement of their rights,”<sup>117</sup> so victims may punish aggressors for violating their rights.

Finally, Kinsella claims that the estoppel argument can be extended to anyone (not just an aggressor) who denies that people have libertarian rights. Kinsella holds that a rights-denier has to deny the right of a rights-holder to enforce his right – for example, your right to forcibly prevent me from stealing your Mercedes. The rights-denier assumes that *your* use of force needs justification, but he also has to claim that *I* have a right to use force against you (to take your Mercedes). One is thus placed into a performative contradiction every time one denies a right to non-interference:

If there are no rights, then there is no such thing as the justifiable or legitimate use of force, but neither is there such a thing as the unjust use of force. But if there is no unjust use of force, what is it, exactly, that a rights-skeptic is concerned about? <sup>118</sup>

Thus, no one can consistently deny the existence of libertarian rights of self-ownership.

This line of argument seems roughly plausible, but one can see a few potential flaws. The biggest is probably the lumping together of everything that constitutes “force.” As Kinsella notes, the critical assumption behind his argument is that “a person cannot consistently object to being punished if he has himself initiated force.”<sup>119</sup> But the aggressor could easily separate his act from many forms of punishment – he could punch someone and claim that nothing other than a punch back is legitimate in retaliation. In other words, we should worry that Kinsella’s argument merely solidifies the principle of an eye for an eye – and interprets it literally. It certainly does not seem to get Kinsella where he wants to go – to the general proposition that all libertarian rights are generally enforceable by a reasonable principle of rectification (presumably one that gives many different options for punishment other than simply doing the crime back to

the aggressor). Additionally, one might worry that the argument proves too much – that it extends into the personal realm (e.g. it proves that a husband may cheat on a cheating wife).

Perhaps, then, Kinsella's argument presupposes that there is something distinctive about those acts that libertarians would describe as force or coercion. Maybe he implicitly relies on the sort of self-ownership notions explained above. Combining self-ownership with Kinsella's argument may prove a fruitful avenue for future scholarship.

Generally speaking, Pilon's and Kinsella's arguments for the dialectical necessity of libertarian rights sound fairly compelling, but one might wonder how far they reach. Both Pilon and Kinsella focus on those who may deny rights to others to be free from force, yet assume to themselves their rights to act as they wish. Pilon and Kinsella show that such individuals are engaged in self-contradiction. Thus, libertarian rights can be "proven" to those who already hold some sort of belief in rights. But imagine someone who denies the existence of morality as a whole. This hypothetical person claims that no normative statements can be made at all. There is no such thing as "should" or "should not," but only blameless liberties. This individual, I believe, is unlikely to be convinced by Pilon or Kinsella. For the moral skeptic does *not* say, as Kinsella assumes, that an aggressor has the right to perform his action. Nor does the skeptic, as Pilon assumes, make any rights-claims by her actions; she agrees that she has no rights. This skeptic, I hold, would be more troubling to Pilon than to Kinsella. Kinsella only seeks to establish that it is not wrong to retaliate for force – that it is permissible to resist the tax collector. The moral skeptic does not deny this; Kinsella did even need to convince her. Pilon, on the other hand, attempts to prove the existence of libertarian rights to everyone. In the end, however, it appears as though he and Kinsella can only establish libertarian principles of justice to those that already believe that moral principles are possible.

## Property

Note that, so far, one critical aspect of libertarian rights has so far been totally left out of the analysis: property. (When I speak of “property” here, I mean ownership of the non-human universe, not one’s “property in oneself.”) None of the arguments so far offered for libertarian rights have established a right to property. Self-ownership says nothing about the ownership of other things. The voluntariness criterion does not explain what counts as “interference” in the world outside the bodies of particular persons. And estoppel merely shows that a victim is justified in punishing an aggressor; it does not define what counts as “aggression” in the world of property. Fairly different reasons will have to be given for holding that people have property rights. Arguing for property is, it seems to me, much more difficult than arguing for libertarian rights of *self*-ownership. In the real world, property will have vast importance for interactions between people. But it is much more difficult to establish rules about the world outside of human beings – all those other atoms in the universe not belonging to one or another’s body – precisely since they seem to have no *necessary* relation to human beings, whose actions are the sole subject of morality. Of course, self-ownership prohibits someone from sticking a knife in me, but constraints beyond this seem very difficult to derive from self-ownership.

I do not claim to have any wonderful – or even adequate – answer to how property rights can be established. This is the most critical task for libertarian political philosophy, as well as its weakest link. While I hope that property rights can, in the future, be proven by better philosophers than me, I can here only point out what it is about property rights that is fairly clear and what will be very difficult to establish. To do this, we must consider the exact nature of the question – precisely what needs to be justified, and what a world where property was not justified

would look like. It is difficult, if not impossible, to imagine a world *without property*. Every society I am ever aware of has had property and property rights. This is not to claim, with Adam Smith,<sup>120</sup> that people have any natural inclination to exchange those rights in any particular way. Nor does it refer exclusively to what has been termed “bourgeois” or “capitalist” or “private” property. It may very well be the case that societies existed where nothing was traded – for example a gift-based society. And it may very well be the case that societies existed where nothing, or at least not everything, was *fully* owned by any one person – for example various forms of collectives. But even communist states did not abolish property. It was still forbidden to steal from the government stores. There were particular rights over particular things, and the states claimed that their enforcement of those rights was legitimate. A democratic collective may make decisions about everything belonging to the collective by vote, but this is a decision-making procedure the outcome of which will be an enforceable right. A society may arise where each person gets to make *certain* decisions about particular items, but not *all* decisions about any one item: but this is just having *partial* ownership, even more particular rights, over things. Note that these alternate societies I have described do not exist without a system of property rights. They have property and are governed by the just rules of property; they just have different distributions of property than a capitalist society. I am not here looking for a justification for any particular initial distribution of property. That will be discussed in Chapter IV.

What needs to be established is merely the possibility of *owning property*. This limits the problem somewhat, but “owning property” itself is a broad category. Property has been conceived of as a bundle of separate rights: the right to use something in a certain way, the right to use it in another way, the right to prevent other people from using it, the right to give it to a consenting individual, etc. Property is not simply an *arbitrary* collection of separate rights over a

thing. It is a collection of *all* rights over a thing. Recall that to own something is to have total control over it, subject to constraints that allow others to own other things. To justify ownership, then, requires answering three questions. First, how can a person justly use atoms of the universe outside her body? Second, assuming that people can use non-human atoms, how can a person justly exclude others from using some of those atoms (thereby claiming them for herself – *owning* them)? Third, assuming that a person can use and exclude, how can a person transfer this right to another person? The first question seems fairly simple and uncontroversial. Nothing in the proofs we have just examined seems to prohibit human beings from using non-human atoms. Non-human atoms do not have any rights they can claim that can forbid humans from acting upon them. Further, it seems that using goods is *intrinsically tied* with human existence. Our atoms recycle all the time: we need new oxygen, carbon, nitrogen, etc. in order to continue existing. One cannot imagine a world where we could not procure those things from the world outside ourselves. A system of non-use is impossible.

The second question is much more difficult to answer: if people can use goods, how can it come to be that some people cannot use certain goods? The *excludability* constituent of ownership is the part that is so difficult to justify. It should be the first task of future generations of libertarian philosophers. I here note only a few suggestions for solving the exclusion problem. First, a world without excludability is as impossible to imagine as a world without use. In a world without excludability, anyone could use anything and no one could ever stop them. None would bother to improve any bit of nature, for it would simply be used by others and no one could rightfully stop them. But it is not simply *impractical*, for people exist simultaneously and would want to use various things simultaneously. These disputes are *impossible in principle* to adjudicate, for each has an equal right to use the thing. But there is yet a further reason why the

world without excludability is unimaginable. We have already established that people own themselves, yet atoms outside of themselves are constantly becoming part of themselves. Locke uses the example of an Indian eating an apple. That apple has become part of the Indian, and so he owns it completely. If he could not exclude others from the apple, he could not exclude them from himself.<sup>121</sup> Thus, the analogy that libertarians often make between self-ownership and property, claiming that one's property becomes *an extension of the ownership she exercises over her own body*, is not just a metaphor in the case of the apple: it is the literal truth. But for other pieces of property, which do not become part of anyone's body, the metaphor is still just a metaphor. For property rights to be truly proven, future libertarians will need to clarify and expand the metaphor (perhaps using arguments of consistency) from the apple to everything else.

Once the first two questions have been answered, responding to the third question will become easier. Recall that a contract about how something is to be used just *is* an expression of someone's ownership right; if I agree that you can lift my leg with your arm, I am determining what is to be done with my leg and you are determining what is to be done with your arm. The same would apply if we, for some reason or another, wished to make an exchange: my leg for your arm. I would take my leg off and give it to you – alienating and transferring that right, and you would do the same for your arm. I am determining what is to be done with my rights over my leg: namely, that you will now control those rights (if you consent). Once you possessed my leg (say superduper surgeons made it part of your body), you would own it in the same way as I did – it would become part of your body. The same is true for property. I can take something out of my set of holdings and, with your consent, put it in your set. You now own it, you have total control over it, in the same way as you have total control over what was my leg. It is yours. Note that your consent is required because you control your set of holdings; new things cannot

become part of that set without you. Thus, the principle of transfer is established. Note that nowhere in the argument did any concern with the *consequences* of exclusion or transfer come in; the rights established via this argument hold regardless of the benefits or costs they might impose on others. In the next chapter, we will see two related attempts to critique this way of looking at the demands of justice, by putting pressure on the libertarian notion of choice.

## Objections: Luck and Choice

Having explored a few potential ways of proving libertarian rights, I wish now to focus on two powerful objections, centered on the concept of choice, coming from liberal-egalitarians to the libertarian theory of justice I have just described. I chose two major responses that I believe have not been fully addressed by past work: that libertarianism impermissibly holds people responsible for things not under their control (for “brute luck”), in addition to the choices for which they really are responsible, and that libertarianism does not provide *real* “choice” or freedom from *real* “coercion.” In answering these objections, we shall learn more about libertarianism itself – that it is, in fact, strikingly divorced from the concepts of desert and choice which some of its political proponents invoke.

### Luck

First, I will discuss the views of a certain type of liberal-egalitarian, known as a luck egalitarian, that appears to share many similarities with the libertarian. In this context, I will often focus on one prominent luck egalitarian, Ronald Dworkin. But, I should emphasize, I am only using Dworkin as an example. As I mentioned in the introduction, I will be concerned with the general luck egalitarian *argument*, as it is relevant for libertarians. Luck egalitarians, like libertarians, do not have a preconceived distributional pattern that they seek to impose on society.<sup>122</sup> They believe that people should be responsible for their choices – including those choices that affect their holdings. As Dworkin says, his theory “requires that people pay the true cost of the lives that they lead.”<sup>123</sup> Luck egalitarians appear to agree with some version of the principle of transfer, the notion that people come to own things by choice.<sup>124</sup> Indeed, the only difference between libertarianism and luck egalitarianism seems to be which transfers are

legitimizing. Libertarians think that people can be entitled to what they receive as a result of their “endowments” of natural talents and social positions. Luck egalitarians claim that inequalities cannot be justified if they are caused by a person’s natural talents or social positions – things, they say, people are “born into” and have no control over.<sup>125</sup> We are not responsible for those unchosen “endowments,” so they cannot “justify inequalities” – meaning that one cannot own any holdings received because of one’s endowments.<sup>126</sup> Dworkin claims that it is sheer “brute luck”<sup>127</sup> that gives some valued skills and others none, that makes some born rich and others poor. One is not entitled to the results of these lucky outcomes; they must be redistributed to those who “lost” the natural lottery.<sup>128</sup> But this argument, which initially seems like a moderate modification of libertarianism (perhaps akin to left-libertarianism), in fact runs directly counter to the libertarian argument for self-ownership, which claims that we *own* our bodies, talents included. And, as we shall see, it conflicts with libertarianism at a more fundamental level as well.

First, we should tease out the implications of the moral luck argument. Luck egalitarians often come to quite different conclusions than other liberal-egalitarians. Indeed, they have been harshly criticized by some liberal-egalitarians, such as Samuel Scheffler<sup>129</sup> and Elizabeth Anderson,<sup>130</sup> for relying too much on the libertarian-sounding concept of choice. Dworkin argues that a distribution must be “ambition sensitive” – that is, it must “reflect the cost or benefit to others of the choices people make,” so those who make choices to work harder or invest more “must be permitted to retain” their gains.<sup>131</sup> But, to a luck egalitarian, the central problem with libertarianism is that it makes our holdings depend on natural talents and social positions, which are merely circumstances that we have not chosen – they are “brute luck,”<sup>132</sup> which should not affect our holdings.<sup>133</sup> Dworkin contends that while we want principles that make our holdings

sensitive to our choices, “we must not allow the distribution of resources at any moment to be endowment-sensitive.”<sup>134</sup> Dworkin begins by looking for a way to ensure that people come into the world with equal resources – that no one starts out richer than the rest. He devises, for this purpose, a model auction<sup>135</sup> that I will discuss more fully in the context of the principle of initial acquisition. “The point of the auction as a device to establish initial equality of resources” is, Dworkin claims, to ensure “that people should pay the price of the life they have decided to lead, measured in what others give up in order that they can do so”<sup>136</sup> – and that none should benefit from an unequal start. Dworkin then points out that people have different skills and handicaps, which is also a matter of brute luck. These differences in “genetic luck”<sup>137</sup> are another form of unequal start that illegitimately influences the resulting distribution. To fix this, Dworkin designs a model insurance scheme, where people before they are born can buy insurance against being born with a handicap or lacking in some skill. People would, Dworkin says, insure against being born with low earning potential. The state is to design a tax system that roughly resembles this model, taking what people would pay in premiums and giving out what the insurance would provide in benefits if people really *could* insure against getting genetically unlucky.<sup>138</sup>

Luck egalitarians like Dworkin attempt to fix what they see as a problem in mainstream liberal-egalitarian and libertarian theory: that people’s rewards do not correctly compensate them for their bad brute luck. The question, to both Rawlsians and libertarians, is not whether the holdings I end up with are the result of my hard work or my good luck, but whether I am *entitled* to them (which for libertarians depends on whether I got them in a just way). Dworkin wants to compensate for the inequalities of social positions and natural talents. If, as he claims, those social positions and natural talents should not influence in any way the holdings with which people end up, the libertarian claim that we absolutely own all of the holdings we have acquired

through consensual transfer will be undermined. Many transfers – and many outcomes – will be unjust. Thus, the luck egalitarian argument presents a direct challenge to the libertarian view and it is crucial for libertarians to refute it.

The luck argument is actually two arguments, however – the argument that it is unjust that our holdings depend on our “access to resources” or “social positions” and the argument that it is unjust that our holdings depend on our genetic codes. First, I will address the access to resources argument. That argument claims that it is wrong that some are born rich and others poor. People, supposedly moral equals, are denied an equal start in life. Donald Trump’s children do not have to earn their wealth; they are born fabulously wealthy. But a poor laborer’s children will not have any inheritance to give them a start; they are born horribly poor. This argument has enormous intuitive appeal – if some people *start out* rich, not even employing their greater talents to get rich, then this appears to undermine the liberal commitment to moral equality. For, it seems, it would be no more just that some were born rich and others poor than if some were born lords and others serfs. This may be the trouble that causes Dworkin to conceive of the auction. Dworkin contends that the auction would be unfair if people had “different amounts of money in their pocket” to spend in the auction.<sup>139</sup> While Dworkin does not make this explicit, one can view his project to achieve an initially equal distribution of resources a way to ensure that no one is born with a silver spoon in her mouth. People must not be born unequally wealthy if their holdings are not to be the result of brute luck.

But the social positions argument rests on an inaccurate description of what actually occurs. In fact, no one is born rich. Everyone is born in a state that by adult standards represents the nadir of poverty – owning literally nothing but our own bodies. This is the initial starting condition for every single human being of woman born. No one pops out of the womb wearing

an Armani suit, riding in a BMW Z8. No one is granted a set of goods and privileges at birth – or at any other time – from some omnipotent Distributor.<sup>140</sup> Instead, people come to acquire the goods that they own via a specific process – the operation of the principle of transfer. Individuals who have legitimate entitlements to their holdings exercise the rights that necessarily accompany ownership by voluntarily giving all sorts of goods – a bottle of milk, a college education, or even a LearJet – to others of their choice. (People also voluntarily give others the love, support, and care that is equally their right to give to whomever they want.) It is by altruism and exchange – by legitimate voluntary transfers – that some become rich and others poor. It is of no moral relevance how quickly this happens, how soon after birth Donald Trump’s children get to ride in that BMW. All start off, in the very beginning, with exactly the same amount of external goods: none.<sup>‡‡</sup>

Internal goods are a different matter. The realm of natural talents resembles much more closely the feudal system: some people are genuinely born with genes that make them stronger, smarter, and sexier. Those genes are not given voluntarily to a person from another person who has a prior entitlement to them;<sup>§§</sup> they are inherent. And the people whose genes make them stronger, smarter, and sexier will very likely profit as a result, while the people whose genes make them duller, dimmer, and dumber will very likely be worse off. This is an “unfair difference” in wealth, Dworkin says, since it is “traceable to genetic luck, to talents that make

---

<sup>‡‡</sup> Perhaps the claim is that it is wrong to give to others on the basis of morally arbitrary factors, like to whom you were born. But what factors are *not* morally arbitrary? If I may not give to my child because she is my child, may I give to my car dealer because she will give me a car in exchange? Is it not equally *arbitrary* that I chose the car dealer on the basis of my conception of value? I chose the car dealer because I wanted to maximize my happiness (by spending in the right proportion for the car I would receive). Similarly, I choose to give to my child because it will maximize my happiness, by allowing me to feel the warm glow of helping my progeny. Why is one more or less legitimate than the other? Nozick argues that the very nature of owning something is that we do not have to justify what we do with it. I do not owe anyone an explanation, Nozick says, for why I chose to go to one movie theater rather than another (Nozick, ASU, p. 223). To force me to justify that decision would be to destroy my freedom to do what I like with my holdings – and what are my holdings for, if not to use as I like (Nozick, ASU, p. 161)?

<sup>§§</sup> Though one could argue that a baby’s genes are the gift of its parents. But the parents did not give the baby their genes after the baby was already a moral agent, capable of giving and accepting property. Instead, it became a human being *with those genes already in place*.

some people prosperous but are denied to others who would exploit them to the full if they had them.”<sup>141</sup> Dworkin contends that “the laissez-faire labor market... is a violation of equality of resources when people are unequal in talent.”<sup>142</sup> The problem with Wilt Chamberlain keeping what he gets from consensual exchanges, Dworkin says, is that his “greater wealth, at the end of the process, is of course traceable mainly to his greater talent, and only in small part, we may assume, to the fact that he is willing to lead a life that others would not be.”<sup>143</sup>

But, one may ask, how do we know what portion of Chamberlain’s wealth comes from his endowments and what from his choices? Intuitively, it seems as though some cases are fairly clear: whether we are black or white is a result of our genetics (excepting Michael Jackson), but whether we decide to order the masaman curry or the tom yum gai is a result of our choice. But even this is far from obvious. Our preferences about food are shaped in part by our genetics and largely by the environment in which we grow up and even in the womb.<sup>144</sup> Both nature and nurture, however, are beyond our control; we are responsible for neither of them. Thus, this choice is a result of our endowments. It is a product of facts about ourselves at the time that we made the choice, facts for which we cannot be responsible.<sup>145</sup> In fact, all choices fit this description. We make all of our decisions because we were born with certain genetics and lived in particular surroundings. Dworkin admits this to some degree. He argues in other contexts that many of the things we normally think of as choices are in fact determined by endowment. In a piece on affirmative action, Dworkin argues that a plethora of characteristics are just as unchosen as one’s race. He notes:

It is true that blacks or Jews do not choose to be blacks or Jews. But it is also true that those who score low in aptitude or admissions tests do not choose their levels of intelligence. Nor do those denied admission because they are too old, or because they do not come from a part of the country underrepresented in the school, or because they cannot play basketball well, choose not to have the qualities that made the difference.<sup>146</sup>

That nothing is left in the realm of choice poses a significant problem for the moral luck argument. The argument is infinitely regressive. As Nozick notes, the fact that even our motivation to cultivate our talents and the particular choices we make are affected by genetics and environment and thus those choices cannot be legitimating leads to a complete destruction of responsibility. If we can't be said to be responsible for the choices we make, we could never *morally* justify punishing any criminal for her actions. Alternatively, we could justify punishing *anyone* (since what they have is solely a result of brute luck) for things that are not their actions, say by taking one of the legs of the "fortunate" person who was born with two and giving it to the "unfortunate" person born with none.<sup>147</sup> Moral responsibility for one's actions would have to be completely abandoned, under the moral luck argument, if it could be shown that all our actions were the result of unchosen factors. Thus would morality perish. One could not be morally blamed for stealing or beating someone up; of course, neither could the libertarian rebel who attacked the tax collector be morally blamed – we would simply live in Hobbes' state of "blameless liberty."

It should be obvious by this point what is really at stake in the moral luck argument. The argument really expresses an incompatibilist view about determinism and moral responsibility. It states that if something is the result of our genetics or environment – that is, if something is a result of the physical laws of the universe, as opposed to our free will – then we are not entitled to it. If determinism (or the closely related Causal Thesis<sup>\*\*\*</sup>) is true, then all of our choices fit into that category. Thus, if luck egalitarians want to establish *any* scope for morality, they are

---

<sup>\*\*\*</sup> Determinism states that if we knew all of the facts about the universe and the eternal laws of the universe at any one time, we could predict all of the facts about the universe at all times thereafter. Quantum mechanics undermines this hypothesis, by showing that some things are not perfectly determinable, but only a matter of probabilities. However, this aspect of random chance does not establish free will – a *causa sui* (cause of itself). The Causal Thesis states that every event in the universe is the result of the operation of the laws of the universe, not of any *causa sui* free will. This is scientifically plausible. (Scanlon, T.M. "Lecture 22: Free Will and Moral Responsibility." Harvard undergraduate course. Moral Reasoning 33, "Issues in Ethics." Cambridge, MA. 5 Dec 2006.)

committed to the view on causation known as libertarianism (not to be confused with the political philosophy I defend),<sup>148</sup> a view that is made quite implausible by modern science.<sup>149</sup> This proves problematic for the moral luck argument. Nozick argues that proponents of the argument have a problem getting from the argument's premises to its conclusions. Why, Nozick asks, does the fact that people have no responsibility for their genetic codes mean that the state should use force to correct the imbalances that result from those differential genetics? As Nozick notes, luck egalitarians *assert* that "differences in holdings due to differences in natural assets ought to be nullified,"<sup>150</sup> but never logically explain why this must be so. Nozick considers a range of arguments that luck egalitarians could use to get from the statement that our natural assets are simply the product of brute luck to the claim that the state needs to use force to correct for them. The overarching theme of his responses<sup>151</sup> is that the luck argument conflates what one has chosen or worked for with what one is entitled to. His reply to the argument is a sort of compatibilist one. A person may not have done much – or anything – to make her morally worthy of the particular goods and services she ends up with. That is, she might not have been a kind, understanding, talented, polite, virtuous, or helpful person, yet she might end up possessing many things that many people consider valuable (like the skills required to be an excellent investment banker). But this does not mean that she is not *entitled* to hold those skills. Few deny that a person should be able to use her skills as she sees fit, but Nozick points out that more is at stake in this question. "Whether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them."<sup>152</sup> It is important to understand what Nozick means by "what flows from" a person's natural assets. Nozick does not claim that the possession of scarce and valued natural assets makes a person *intrinsically* worthy of receiving more holdings. Rather, a person is entitled to her holdings if she acquired them

legitimately – if the prior owners, for whatever reasons of their own (they might not care if she is virtuous or kind), voluntarily transferred those things to her. Whether or not on aggregate people treat those with different genetic codes differently – for example, whether people will pay those born taller more to play basketball than shorter players – can have no effect on the legitimacy of the operation of the principle of transfer; the tall players still own their holdings. Nozick simply contends that the fact that some ended up with more highly-prized natural talents than others is not an evil that can legitimately be rectified with force; people are entitled to what they end up with as a result of the principle of transfer, the moral luck argument notwithstanding.

Fundamentally, this is because people own themselves. One can legitimately make contracts about the things that one owns. Because Wilt Chamberlain owns his body, he has an absolute right to make a contract with any willing participant to use his body to play basketball for whatever terms both parties agree to. It is only if Wilt did not own his body that he could be said to not be entitled to make contracts about it, or to have those contracts subject to some sort of limitation (such as a requirement to compensate the less-lucky if the contract results in inequality). Luck egalitarianism necessarily opposes the libertarian conception of self-ownership, because self-ownership produces endowment-generated inequality. As Dworkin says, “if Adrian is treated as owning whatever his talents enable him to produce, then Claude envies the package of resources, including occupation, that Adrian has over his life considered as a whole”<sup>153</sup> and so equality of resources has been violated. Thus, people cannot be treated as owning their talents. Libertarianism refutes this suggestion. A person, self-ownership acknowledges, is a collection of atoms that obey the laws of the universe. But *I am* those atoms; they *are* me. We are one in the same. To say that various laws of chemistry and physics caused those atoms to move in a certain way is the same as to say (under some circumstances, at least) that *I chose to move in that way*. A

person is thus responsible for every action that she performs. As we saw in Chapter II, this is what it means to own something – to be able to do with it what you want, to control what happens to it, consistent with other people owning other things. Thus, I may use my hands and my knife to cut my carrot on my cutting board, but I may not use my hands and my knife to cut *you*, or even your carrot (without your permission). People own themselves. They have control over their bodies – not in some *causa sui* sense, but in the sense that their will (which is, it is true, nothing more than chemicals and currents in their brains) determines what happens to their bodies. Ownership of one’s body also means being responsible for what it does. Therefore, even though it is in some sense just an *accident* of the laws of the universe that Wilt was born with genes that allow him to shoot baskets very well, even though it is mere *luck* for Wilt that good-throwing genes are scarce and valued highly by others, and even though Wilt did not *choose* or *earn* those genes, Wilt *is* those genes and all the other properties that make him who he is and he is thus *entitled* to them. One cannot justify stealing from Wilt on the basis that his basketball-playing genes are at least partially responsible for his fortune.

Thus, self-ownership is itself a form of compatibilism; it in itself *justifies* assigning responsibility. So, in this sense, the libertarian conception of entitlement is close to conceptions of moral desert. But though libertarian entitlement – unlike Rawlsian entitlement – is pre-institutional (it holds independent of the existence of just institutions), it is still *entitlement* and not *desert*. That is, as we shall see, it has *nothing* to do with whether one can be said to have “really chosen” her actions (and thus whether she “deserves” praise and blame in the normal sense of the words) and *everything* to do with whether she had rights that *entitled* her to perform those actions.

## Choice

To make this clear, we must explore a related objection – one involving how libertarians *define* “choice” and “coercion.” Choice and coercion are central elements in libertarian political philosophy. According to libertarianism, one should be responsible for one’s choices, good or bad. Libertarians would have the state defend contracts that many think unconscionable. Libertarians believe that people should be allowed to keep those things that others have chosen to give to them, even if great inequalities result. And, according to libertarianism, coercion is always wrong except when used as an appropriate punishment for violating rights. Libertarians hold that the state may not coerce people to pay taxes, refrain from racial discrimination, or serve in the military. Indeed, one may accurately say that the choice/coercion dichotomy lies at the heart of libertarianism. But “choice” and “coercion” are fairly vague words, without any obvious single definition. This imprecision in critical terms leaves great room for disputes which strike at the core of libertarian philosophical thought.

Libertarians’ statements that one should be responsible for one’s choices, but that one should not coerce, open the door to many questions, some broad and some more specific. What actions count as coercion? What constitutes a voluntary choice? What does it mean to be held “responsible” for a choice – for example, do people have an obligation to fulfill their contracts? If A coerces B, is B responsible for his coerced action? Libertarianism provides a unified response to some of these questions. For others, the libertarian answer (if there is one true libertarian answer) is less clear.

Before examining these issues, however, it is important to set out working definitions<sup>†††</sup>

---

<sup>†††</sup> I say “working definitions” because (once again) in defining the terms, I do not mean to present what the terms *truly* mean. I just mean to describe how libertarians use those terms – and, in particular, how I use them. If someone cares to argue that “coercion” really means something other than I say, I can admit the validity of that definition; it

for some of terms being used. First, it is important to understand what libertarians mean by being “responsible” for one’s actions. “Responsibility” is probably too broad and indeterminate a notion for what is meant. To say that “A is responsible for an action” can mean simply that A performed the action and is thus liable to be praised or criticized for it. T.M. Scanlon uses the example of a bank teller getting robbed. If she follows procedure and hands over the money, she may be praised at her performance review.<sup>154</sup> But this is not the conception of responsibility I will be discussing here. Libertarianism is not a *personal moral* philosophy.<sup>155</sup> It says nothing about whether a person is rightly subject to praise or blame for her actions. Rather, libertarianism is a *political philosophy*, a theory of *justice*. It is concerned with a different meaning of responsibility – whether the bank teller’s actions legitimately transferred the money to the robber. Does the robber now own the money, since the teller made a choice to give it to her? Is her action legitimating? Thus, when in this essay I will say “A is responsible for his action,” I will mean that A’s action generates special rights and duties.<sup>156</sup> These rights and duties depend on the action taken. There are roughly three ways in which an action generates special rights and duties. First, if A violates B’s rights, then A may be punished (as specified by the principle of rectification); he has alienated his rights not to be punished. By “punishing A,” libertarians mean using force upon A – violating A’s would-be rights (if A had not alienated his rights by so acting). Second, if A makes a contract with B, then A has granted B special rights such that if A fails to comply with the contract, then A may be punished as specified by the principle of rectification. And, third, if A transfers some piece of his property to B, then the right that A formerly had for no one to use the property without his consent changes into a right that B now has for no one to use the property without *her* consent. These are the ways in which an action

---

will just mean that I should have picked a better term to describe what I meant. The *concept*, in other words, is what is important, not the word I choose to signify it.

that an agent is responsible for can change the sphere of rights.

So, this essay is concerned with under what circumstances an action can have *legitimizing* effects. When does an action generate special rights and duties? When does an action justify an outcome? One might think that actions are legitimating when they are “voluntary” or “chosen.” But Scanlon’s teller example shows that this is not always correct: the bank teller chose to give the money to the robber, but that choice did not legitimate the consequence, namely the robber having the money (because she was coerced). Voluntariness is neither a necessary nor a sufficient condition for moral responsibility to libertarians. As a special example of the legitimating power of choice, we can speak of punishment. One can be punished for involuntary actions (e.g. involuntary manslaughter) and one cannot be punished for mere *intent* to violate another’s rights. Indeed, as we have just seen, ultimately everyone’s actions are the result of the laws of the universe; there is no *causa sui* free will that could make someone’s actions *ultimately* voluntary. There is no *fundamental* distinction between “voluntary” and “involuntary” actions. Rather, the question whether one’s action is legitimating can be answered by asking whether one was *wrongfully* deprived of choices; if A’s choice has been removed by B acting within her rights, then A’s action is still legitimating (as shall be explained later in this section). Nonetheless, what punishment is appropriate may depend on the voluntariness of that action. That is, A’s unintentional damage to B’s property may only cost A the damage done to B (which is to be paid to B as compensatory damages). But if A intentionally damaged B’s property, A may also have to pay some punitive damages – presumably both to punish A for her *will* (whereas the compensatory damages were just to compensate B for her loss) and to serve as a deterrent for future crimes (since there is no point in trying to deter involuntary actions). But still, the basic question whether *any* punishment is appropriate is answered by determining

whether A's choice was wrongfully taken from her.

What if A is *coerced* into acting? Is this a wrongful deprivation of A's choice?

Answering this question requires defining coercion. C coerces A into performing action X if C threatens to perform some unjust action unless A does X, and then A does X.<sup>\*\*\*</sup> Coercion is

generally considered wrong by libertarians, though it is not self-evident how a prohibition on threatening to violate rights can be derived from a prohibition on violating rights. I leave this

important issue to future political philosophers. The question I address now is: If C threatens to violate A's rights unless A violates B's rights, and A violates B's rights, can A be punished?

Libertarianism does not give a clear answer. On the one hand, a libertarian might argue that one should be responsible for *all* of one's actions (even those made when one has been wrongly

deprived of choices). The Principle of Intervening Action in Chapter I seems to indicate that responsibility for one's actions cannot be diminished by the causes of those actions. So, C is

responsible for her action of coercing A and A is responsible for his action of violating B's

rights. Since A's action "intervened" between C's action and the result on B, C cannot be held

responsible for the ultimate result, only the results she caused prior to any intervening action. But

this is not obvious. In Gewirth's terrorist example (where terrorists give a kidnapped son a

choice: torture your mother or we blow up a city), used to set up the Principle of Intervening

Action in Chapter I, A is *not* coerced. But in the case we are discussing here, C has committed an

action libertarians argue is wrong: coercion. C's wrongful action deprives A of a choice. This is

---

<sup>\*\*\*</sup> One may wish to clarify the exact nature of the threatened unjust action. If C threatens A that she will violate D's rights unless A acts, has she coerced A? A is the target of the coercion in one sense – namely, that it is A who C wants to act – but D is the target in another sense – namely, that it is D whose rights C is threatening to violate. One can imagine situations that would make "third-party coercion" a difficult concept. Barbara threatens John "I will steal Ronald's wallet and give it to you unless you beat up Sam." John can hardly be said to be *coerced* into beating up Sam; indeed, Barbara is giving John an incentive *not* to beat up Sam. On the other hand, one would imagine that someone threatening to kill your wife unless you perform some action is coercing you to act. It is unclear whether to count third-party coercion. The answer may ultimately depend on whether the threat or the intended action is the more important aspect of coercion.

not to say that A literally has *no* choice. Obviously, A could still choose not to be coerced by C and not to violate B's rights. Indeed, this may be the morally best choice; and A may be rightfully blamed for not making that choice. But she no longer has the choice to not be coerced *and* not have her rights violated. If we took the view that A's coerced actions are legitimating – and thus that A can appropriately be punished for her coerced actions – then we would put A in a double bind. She would have a choice between i) refusing to violate B's rights and, in consequence, having her rights violated by C or ii) complying and being liable to be punished by the state. In an efficient system of justice, A (who began perfectly innocent) would face the certainty of having force used upon her either way she chose. (Though in a perfectly efficient system of justice, if A chose not to violate B's rights and so had her rights violated by C, she would be compensated.) It is unclear whether the double bind argument conclusively refutes the contention that one is responsible for one's coerced action or whether it is simply tough that there will be situations where an originally innocent person is guaranteed to have force used upon her. Libertarianism does not provide a clear answer to the question of responsibility for coerced actions. Both views are plausible.

But choice and coercion do not simply bring out unresolved issues within libertarianism. For libertarian definitions of choice and coercion and libertarian notions of responsibility may not be correct. One powerful objection to libertarianism contends that libertarianism relies on false assumptions about the importance of choice. Libertarians believe that a person should be liable for all of her choices (except maybe those made under coercion), but some choices do not have the same value as others. Scanlon argues that “a judgment of substantive responsibility depends on more”<sup>157</sup> than the simple fact that a person has made a choice. Libertarians can agree with this; it also depends on whether the person had a right to make such a choice (e.g. one has

no right to choose to use her knife to stab some innocent person) and perhaps on whether her choices were wrongfully limited by coercion. But Scanlon says that a judgment of substantive responsibility also depends on “the costs that this assignment of responsibility imposes” on the agent, “the alternatives,” and “the implications, for this person and for others, of assigning responsibility in some other way.”<sup>158</sup> So we cannot immediately say that a person picking between working for a Nike factory and starving has made a choice for which she should be held responsible, in the sense that her choice generates rights and duties in the same way as every other choice. In other words, libertarians ignore the importance of *conditions* for choice. They assume that every choice, made under every situation (except possibly being coerced), should be ascribed to that person and should not be prohibited. This is far from obvious. It may be that actions other than force and threats of force render actions non-legitimizing, for they wrongfully deprive a person of choices. For example, my buying all the land around your house and refusing to let you or anyone else through may substantially impair your ability to lead your own life.<sup>159</sup> And it may be that some force and threats of force do not render actions totally non-legitimizing. For example, stealing \$20 from a rich woman’s long-forgotten bank account may not impair her ability to lead her own life; coercing her with a threat to do this may not remove many choices from her broad range of capacities. And forcibly giving someone something they have a great desire for, while forcibly taking an insignificant payment,<sup>160</sup> may actually *assist* someone in pursuing their ends. So, the “choice objection” states that libertarianism misdefines which choices are legitimizing and which are not.

How does a libertarian respond to the choice objection? Libertarians have generally given formal-sounding, but fundamentally intuitionist, responses to the objection. Charles Murray asserts that “absent physical coercion, everyone’s mind is under his own control... There is no

such thing as intellectual or emotional or economic *force*.”<sup>161</sup> Murray, however, offers no evidence as to the degree to which a person’s mind is under his control when faced with physical coercion as compared to other sorts of action. Nozick spells out Murray’s intuition a little more. He first contends that “facts of nature”<sup>162</sup> – things other than human action – do not *wrongfully* limit your choices, even when those facts of nature have greater option-limiting effects than human actions. Nozick does not defend this claim (perhaps Murray’s intuition is also Nozick’s), but one can see its rationale. For facts of nature are morally neutral. Who is the agent that is wrongfully preventing the paraplegic from walking or all of us from flying? No one can be held responsible for this fact.<sup>§§§</sup>

Nozick also claims that certain human actions, even ones that worsen others’ situations, do not render anyone’s actions non-legitimizing. Nozick asks us to imagine a group of individuals seeking to marry another set of individuals. Each marriage that takes place limits the choices and worsens the situations of the unmarried individuals, all the way down to the last couple to marry, which had no other option but to remain single. Nozick contends that “the fact that their only alternative is (in their view) much worse, and the fact that others chose to exercise their rights in certain ways... does not mean that [the last couple] did not marry voluntarily.”<sup>163</sup> So, Nozick argues, “a person’s choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.”<sup>164</sup> But note that Nozick has not here *argued* anything. Essential to his argument is that fact that my actions, which limited your choices, were within my rights. But this is exactly the point of contention! We are trying to *figure out* what rights people have by reference to what renders their actions non-legitimizing; to do that by claiming that only rights-violating actions render someone’s choice non-legitimizing

---

<sup>§§§</sup> Note the similarities between this argument and the one made in Chapter II against general positive rights.

is to engage in circular reasoning.\*\*\*\* So Murray's and Nozick's intuitionist appeals will not do.

This point becomes more obvious when we formally spell out the argument that lies behind Nozick's intuitions. The argument goes like this: Some claim that the libertarian specification of coercion as the only action that can render one's actions non-legitimizing is too narrow. They contend that things other than threatening to steal or beat up or otherwise violate one's libertarian rights can wrongfully limit your choices and thus "force you to act." Recall the definition of coercion: A person C's action Y is coercing another person A if and only if C is making a threat to do some unjust action Z on A. Y is coercion and unjust because Z is unjust. Only threatening to do an unjust action is unjust. Libertarians contend that Z can only include violating A's right to own himself and his property. Z is unjust because it violates the boundaries of A's rights. If Z were defined as C acting solely outside of the boundaries of A's rights, it would not be unjust.

Now we see more clearly the assumptions of those who claim that a set of actions than  $Y_{lib}$  (what libertarians count as coercion) destroy the legitimating power of choices. Let us say that the set of actions that can wrongfully deprive someone of choice consists of both  $Y_{lib}$  and  $Y_{other}$ . For this to be true, not just  $Z_{lib}$  (what libertarians count as wrongful or unjust), but also  $Z_{other}$ , must be unjust. If  $Z_{other}$  is unjust, then A must have had a right to not have  $Z_{other}$  done to her. Thus, this whole argument is predicated upon and presupposes a system of rights necessarily more extensive than the libertarian conception.

The libertarian then needs to defend why  $Z_{other}$  is not rights-violating. One could attempt

---

\*\*\*\* This point, that consent cannot itself be a justification of rights, has implications beyond Nozick's marriage example. Certain types of social contract theorists claim to find principles of morality on (hypothetical) consent. But consent cannot itself establish what rights people have, for exactly what consent means and when it is legitimating cannot be determined without reference to rights. I cannot claim to consent for *you* to work in a coal mine, but we know this because I have no right to make you work in a coal mine. Rights define consent; consent does not define rights.

to appeal to some sort of empirical fact about how many, and how good, choices are available when faced with  $Z_{\text{other}}$  and  $Y_{\text{other}}$ , as compared to  $Z_{\text{lib}}$  and  $Y_{\text{lib}}$ . This debate might begin well for the libertarian. Libertarians often respond to claims that  $Z_{\text{other}}$  is something like “offer a job when A is in a bad situation.”<sup>165</sup> Does A have a right to not be offered jobs when in dire straits? This, as Nozick points out, *expands* A’s options and often gives him an option better than any of those he had before.<sup>166</sup> But, often, this response does not get at the heart of the criticism. Libertarians need to respond to liberal-egalitarian and utilitarian philosophers who offer schemes that would result in many people having a lot more and better choices than they would under a libertarian scheme. Take van Parijs, mentioned in the last chapter, for example. When he argues that “if I have no option but to starve or to accept a lousy job, I am not really free to turn the latter down,”<sup>167</sup> he is not making the simplistic sociologist argument above. Rather, he is pointing out that under *an alternative scheme*, such as one that gave him a decent income every year, he would have many more options than starving or accepting a lousy job. This is why David Kelley’s response to van Parijs that “the employer is not putting a gun to my head. If I do refuse, I am no worse off than if the employer had had no job to offer in the first place”<sup>168</sup> is inadequate. The point is that van Parijs’s different system of rights, where some people could be taxed more heavily, but everyone was guaranteed a minimum income, would result in *more and better* choices on aggregate than a libertarian system. (The same can be said for a scheme of rights requiring easements when a person buys all the land around another’s house.)

Libertarians can, I believe, admit the truth of this argument. As we have seen in Chapter II, libertarians do not justify their philosophy based on the amount of real or moral freedom it provides. Similarly, the complaint that they count *all* of a person’s choices, even those made under bad circumstances, does not phase libertarians, for their theory is not based on some

*substantitive* conception of choice. Choice is not a *value* or a *good* for libertarians. Some choices can legitimate outcomes; others cannot. The correct system of rights will make choice legitimating in some circumstances; thus, choice is really *derivative*, not *fundamental*, for libertarianism. But why believe in libertarianism if it is a system that results in less *real* choice than alternatives? Why make formal choice, but not real choice, a central concept in one's theory of justice? Chapter II provides an answer: self-ownership. A person owns her actions, in the sense that she can, by acting, generate special rights and duties. Recall that *precisely* libertarian rights emerge from self-ownership – only  $Z_{lib}$ , and not  $Z_{other}$ , is prohibited. This is because self-ownership involves ownership of one's *body* – the atoms that make one up. So only intrusions on one's body and (by extension) one's property are unjust. People cannot beat, murder, rape, enslave, or imprison others without their consent, for that would violate their self-ownership. Thus, one cannot threaten to do those things, for that would be coercion. One may, however, close down one's own business, marry someone desired by another, hire only those individuals one wishes, protest, or with the consent of others enter into legitimate agreements that create an economic and social system uncondusive to the real freedom or real choice of some. Such actions may not be nice, but they are not unjust either.

The choice objection, however, serves to show a critical point in the libertarian argument: much rests on the precise method in which libertarian rights are proven. Defeating the conception of self-ownership libertarians present and prop up with the PGC or discourse ethics would tear down the whole system. Without a solid proof of *precisely* libertarian rights, a proof that depends on *formal* rather than *real* aspects of choice, the choice objection would be damning. In the next chapter, we shall see that even a full proof of a complete theory of libertarian rights may have implications quite different than most libertarians imagine.

## Implications of the Libertarian Argument

So far in this essay, I have been contrasting libertarianism with liberal-egalitarianism in order to get a better sense of what libertarianism is. I have showed that it is deontological, in proof and application, that it consists of general negative rights and specific positive rights, that it provides a compatibilist answer to the question of moral responsibility and determinism, and that it is a theory of justice and not of liberty. Though I have been making different arguments and in different terms from many other deontological libertarians, so far the picture of libertarianism I have created does not differ greatly from that of Nozick or Pilon. In this final chapter, I wish to explore some differences between Nozick's standard version of deontological libertarianism and my own views. In the process, I will show what implications the principles I articulate have for the real world. For the most part, libertarianism gives definitive answers to policy questions.<sup>††††</sup> Redistributive taxation is unjust. The government may not outlaw prostitution. One cannot be punished with force for failing to save a child from drowning. Still, many questions are left open by libertarian theory: How can crime prevention and self-defense be justified if people are only entitled to punishment after they have committed a crime? Is intellectual property really property or just a state-enforced monopoly? What are the moral statuses of children, the mentally ill, and animals? What punishments are appropriate according to a just theory of rectification? I have provisional answers for some of these questions; for others, I have none. But I wish to focus on a couple of other questions: the content of the principles of rectification and initial acquisition, the problem of historical injustice, the question of inheritance, and the extent of state sovereignty. My analysis of these issues will, I hope, not

---

<sup>††††</sup> This is not to say that it easy for a libertarian to pick which way to vote on particular bills in Congress; much legislation has both pro-libertarian and anti-libertarian parts. Deontological libertarianism offers little guidance on "second best" questions like vouchers vs. public schools. But the *ideal* it posits is fairly clear.

simply enter on one or another side of never-ending debates within libertarianism. Rather, I intend to show the differences between my view and mainstream libertarian positions – or, rather, what I think are the *true* implications of libertarian theory.

### Initial Acquisition

First, I wish to probe slightly into the oft-ignored components of a complete libertarian theory. As Nozick pointed out, a libertarian theory of justice has three parts: justice in initial acquisition, justice in transfer, and justice in rectification.<sup>169</sup> Justice in transfer gets talked about the most, as it appears to be at the center of the question of which actions people today could perform are just. But the other two principles are equally critical for a complete theory and many questions of justice cannot be answered without reference to those two. Justice in acquisition has received some scrutiny, following its limited treatment in *ASU*. Nozick broadly adopted the principle put forth by his predecessor, John Locke. Locke and Nozick argued that the world was initially unowned, and that people came to acquire land<sup>\*\*\*\*</sup> from the unowned state by mixing their labor with it, though each of them put restrictions on how much could be taken out of the unowned pot.<sup>170</sup> The contention that mixing one's labor with an unowned object makes it hers has been rightly challenged by many. Will Kymlicka, for example, contends that neither Locke nor Nozick give much justification for their interpretation of the initial state of the world.<sup>171</sup> Kymlicka contends that, rather than viewing the world as unowned and ripe for appropriation by the first to get there, we could see the world as commonly owned by all.

Indeed, I believe, this fits better with the strict rights-egalitarianism of libertarianism.

---

\*\*\*\* In this chapter, I use the term “land” in the economic sense: to refer to any unimproved non-human natural product (not just soil, but also the metal in the ground, the air in the skies, the water in the oceans, the animals and plants, etc.). There is land in every real item on earth. Every atom not part of some person is a natural product; nothing has been made by anyone *de novo*.

People, as moral equals, each have an equal right to the (non-person) atoms on the earth (and maybe in the universe). A person is born with an *equal* entitlement to the objects in the world that are up for grabs. If the first person who gets to a particularly fertile stretch of land can simply add a bit of labor to it and so become entitled to the whole thing, that person has added a little value (the value of her labor) to the land and received not just her added value but the value of the unimproved land as well. She has not simply taken what was hers, but what was not hers as well. In a sense, the Lockean analogy of the mixture of land and labor is quite apt. Imagine a bowl filled with blue beads, representing land. A person comes and mixes her red beads, her labor, with the blue ones – but then takes the whole bowl! This is patently unjust.<sup>172</sup> Rather, since no one can be said to *deserve* or be *entitled* to unowned land (no one created it and it is not part of anyone's body), it should be viewed as the equal property of all. Each person is entitled to an equal piece of it.

It is important to clarify exactly what is meant by this. It does not mean that the world is *jointly* owned. It cannot be the case that everyone has a veto over every use of every unowned atom. This would clearly be impossible, as no one would ever be allowed to (say) eat an apple, for someone would always question why that person should be allowed to eat something she had only a miniscule share in. This may present itself as merely a practical, empirical problem, but the issue is much more fundamental. It cannot be said that Rachel has an equal *entitlement* to the unowned earth if she cannot use *any* of it without the permission of everyone else. She has no *entitlement* to anything. She *owns* nothing. This cannot be. It is, as noted in Chapter II, incredibly difficult to find a justification for anyone being able to *own* land, to claim a monopoly on control of it. But if such a justification can be found, then it must be the case that each piece of land,

each atom on the earth, has a system of specific private ownership rights over it.<sup>§§§§</sup>

So, we need a way to divide up property while giving each person an equal share. This could be done arbitrarily: give each person a certain section of the earth. But this has two problems: first of all, there is a problem with assessing the value of the property. If each person gets 400 acres, and my 400 acres are all arid New Mexican desert and someone else's 400 acres are in a lush part of Provence, I got the worse lot. Secondly, we need to account for the different values people place on different land. In other words, we want people to at least partially be able to choose which land they get (maybe someone else really *wanted* that New Mexican desert), instead of getting stuck with some arbitrarily-selected plot.

Ronald Dworkin offers an attractive solution to these problems. Dworkin proposed this theory as an ideal model for distribution of wealth *after* initial acquisition (thus, as an end-state theory, falling prey to the “manna from heaven” mindset and ignoring the rights of people to their holdings<sup>173</sup>), but it is clearly much more useful for describing how to deal with what *really* amounts to manna from heaven – the commonly owned, pre-property world. As described by Kymlicka:

Dworkin asks us to imagine that all of society's resources are up for sale in an auction, to which everyone is a participant. Everyone starts with an equal amount of purchasing power – 100 clamshells, in his example – and people use their clamshells to bid for those resources that best suit their plan of life. If the auction works out – and it can always be rerun if it does not – everyone will be happy with the result, in the sense that they do not prefer anyone else's bundle of goods to their own. If they did prefer a different bundle, they could have bid for it, rather than the goods they did bid for.<sup>174</sup>

This model appears to achieve both of the goals I outlined, while solving both of problems with an arbitrary grant as well. It splits the world up, while guaranteeing that each person will have an equal share (since they came to the auction with the same amount of purchasing power) and they get exactly what they want. Perhaps most attractively, it does not rely on any external, arbitrary

---

<sup>§§§§</sup> Perhaps this does not need to be true of the air or the seas or any part of the universe outside the earth; a system of common ownership works *reasonably* well for these, though conflicts arise and it is often necessary to treat these objects as the property of some government or intergovernmental body.

assessment of value to decide how much each acre of land is worth, but allows each person to choose for themselves what they want: in the end, it is the preferences of each person that give the resultant bundles their equal value.

### Historical Injustice

Unfortunately, as opponents of libertarianism correctly point out, this model was never followed. The auction was never held. Instead, as Kymlicka notes, “natural resources came to be someone’s property by force.”<sup>175</sup> Each piece of property that someone owns now was at some point illegitimately taken from the unowned state. People simply claimed ownership to things, without having followed the procedure of the Dworkinian auction to establish who had a claim to what. In other words, there has been massive injustice in initial acquisition. This is true not only of justice in initial acquisition, but justice in transfer as well. There has been massive injustice in the past. People killed other people. People forced other people to work for them as slaves. People stole the lands and property of others. It is quite possible that every speck of property owned now was at one point acquired or transferred inappropriately – whether because it was stolen by some petty thief or because it was land belonging to the original inhabitants of the Americas. This is potentially a major problem for a libertarian theory that attempts to justify present holdings. I will refer to this problem as the “historical injustice” objection to libertarianism. However, what implications this widespread past injustice has is far from clear. Kymlicka contends that injustice has been so widespread that to rectify it all would surely require a state that looked much more than minimal. He suggests that we just forget about trying to sort out all the messiness and think about justice in an end-state way.<sup>176</sup> Nozick himself makes the suggestion of using an end-state principle to sweep away all past injustices and start the slate

clean. He argues that “past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.”<sup>177</sup>

Some libertarians, known as “left-libertarians,”<sup>\*\*\*\*\*</sup> have a different view. Left-libertarians take the problem of injustice in initial acquisition seriously. They believe that the unowned earth should have been divided up equally amongst all, so they seek to ensure that the benefits from the unimproved earth go to all equally. Left-libertarians argue that there should be a Land Value Tax, a tax on the value of unimproved land in each person’s holdings. One would not pay the value added by any labor done to transform the product from land into good; the tax on an iPhone would only be the minimal value of the metal and silicon in the ground and there would be no tax on savings in a bank account, but the tax on a natural forest would be its whole value. The proceeds from the tax would then be divided equally amongst all people.<sup>178</sup> This is a powerful theory, and would clearly be the right principle of justice if private property could not be justified and land should be viewed as owned by all.

However, this is not the case. The historical injustice objection to libertarianism has within it a hidden assumption – an assumption that does all of the normative work of the argument, yet can easily be challenged. Mass injustice has no doubt occurred; the question, however, is whether the little-discussed principle of rectification requires us to do anything about it. The historical injustice argument assumes that the answer to this question is “yes.” It *assumes* it, but does not *prove* it. Kymlicka makes no attempt to even spell out, much less defend, a principle of rectification that would require correcting all past injustices. And even Nozick, the great articulator of deontological libertarianism, admits that he has not found a principle of rectification. Seventy-nine pages before he asserts that historical injustices might make a more

---

<sup>\*\*\*\*\*</sup> Here, I use the term “left-libertarian” to refer specifically to the Georgist position that I describe. Other theorists call themselves “left-libertarians,” as described by Barbara Fried (“Left-Libertarianism”), but these theorists use the concepts of self-ownership and liberty too teleologically to count as deontological libertarians.

intrusive state legitimate, Nozick says on the question of how to rectify historical injustice that he does “not know of a thorough or theoretically sophisticated treatment of such issues.”<sup>179</sup>

It is thus crucial to flesh out what the principle of rectification would have to say in order for the historical injustice argument to be true and to determine whether it or a different principle is correct. We get the clearest idea of the necessary principle from examining Kymlicka’s most complete articulation of the objection. To Kymlicka, “the corollary” of the theory that if a “previous title was legitimate, then any new distribution which results from market exchanges is just” is “that if previous title was illegitimate, so is the new distribution. The fact that the new distribution arose from market transactions is irrelevant, since no one had any right to transfer those resources through market exchanges.”<sup>180</sup> According to Kymlicka, then, the taint of injustice must follow the good that is being exchanged. I call this the “tainted title” theory. This version of a historical-entitlement theory of justice is historical *all the way back*. To figure out whether I legitimately own something, I must ask about *the object’s* whole history, going back to its first appropriation by human hands. Under the tainted title theory, if I purchase an apple from a grocer who got it from a farmer who grew it from land that she got from her father, who inherited it from his father, who purchased it from a pioneer, who illegitimately stole it from some Native Americans, I do not own that apple and am not entitled to eat it because it is tainted with injustice (the title to it was not legitimate).

Contrast this view with what I call the “unjust agent” theory. According to the unjust agent theory, the taint of injustice does not follow the *object* that was stolen. It follows the person who stole the object. The *thief* owes the *victim* compensation. But someone who has only acquired what she has through mutually consensual transactions has not violated any rights and her property cannot justly be taken from her. The legitimacy of her title to the object is

established by the way in which she acquired it. If she acquired it without *her* using force, it was a legitimate transaction. (Note the similarities between the unjust agent theory and the bona fide purchase principle in contract law.)

The two theories rely on very different assumptions. Under the tainted title theory, the main question is the moral status of the *object*. Under the unjust agent theory, the principal issue is the moral status of the *agent*. Under the unjust agent theory, ownership is primarily an empirical concept, defined by control over an object, with some normative content. But the rights of ownership of an object do not come from the object itself; they come from the actions of the person that owns them. The unjust agent theory is concerned not with labeling particular pieces of matter “good title” or “bad title,” but with punishing those *people* who have committed injustice. For this reason, the unjust agent theory fits better with libertarianism’s status as a theory of just and unjust *action*, not of end-states. Further, the unjust agent theory better integrates with the libertarian conception of rectification (e.g. as described by Kinsella). To a libertarian, the *particular* object in question is not important for rectifying injustice. If I stole your car, I can rectify the situation by giving you back the car (probably plus paying other damages) or I can rectify it by paying you back the value of the car, plus other damages. What is crucial is that I am sufficiently punished and you are sufficiently compensated. The theory of tainted title, on the other hand, must assume that rectification for theft is impossible except by returning the car, since even if I pay you back its value and more, the car has still been stolen and so its title is no longer valid. But according to the unjust agent theory, the person from whom the object was stolen has not a general right that her object be returned to her, regardless of who currently owns it, but that the *rights-violator* compensate her. The most fundamental tenet of libertarianism is that the innocent never deserve punishment. The unjust agent theory looks only

at an agent's actions, not the actions of others who handled objects she now possesses, to determine whether she is innocent. Thus, the unjust agent theory fits better with the Principle of Intervening Action described in Chapter II. Under the unjust agent theory, it is of no relevance that the owner of the object at the time of the transaction should not have been that object's owner.<sup>††††</sup> All that matters is that victims are compensated, perpetrators are punished, and no new victims are created.

This has enormous implications for the historical injustice argument. If the principle of rectification states simply that rights-violators must be punished and victims must be compensated, then the vast majority of past injustices cannot be corrected. This is because all parties – the perpetrators and the victims<sup>‡‡‡‡</sup> – are dead. Dead people cannot be punished or compensated. They no longer have rights or culpabilities. Moreover, those rights and culpabilities do not magically transfer to someone else; they vanish. As Edwin Locke argues, using force on “one group in order to compensate a second group to correct injustices caused by a third group who mistreated a fourth group at an earlier point in history... is absurd on the face of it and does not promote justice; rather, it does the opposite.”<sup>181</sup> Guilt does not transfer through heredity; nor does victimhood. To see this more clearly, imagine a different scenario, one involving violations of bodily integrity, not property. Say a serial murderer had a son. The murderer was so nefarious as to be able to get away with her crimes, fleeing the country and leading the rest of her life in luxury on some remote island. Now that she is dead, should we attempt to punish her son by locking him in jail or even – if the death penalty is legitimate – by killing him? If the son contractually took on, in a mutually consensual agreement, her mother's

---

<sup>††††</sup> One might argue that the seller of the stolen good was not its “true” owner at all. This is wrong. Recall that the definition of ownership is simply one of factual control. The seller did *own* the good, just not *rightfully*.

<sup>‡‡‡‡</sup> Except in the sense that all present and future persons are all victims of injustice in initial acquisition, since all persons ever to be born had a right to an equal share of land, but it was unjustly appropriated (by people who are now dead and whom we cannot punish).

guilt, then punishing him would be justified; but without consent to undertake that burden, there exists no justification whatsoever for transferring guilt from one person to another distinct individual.

The same argument applies to the question of benefiting and losing out from injustice. Simply because the son is possibly better off now than if his mother had been punished – and maybe even better off than if she had not committed the crime in the first place – there is no reason to punish the son. All that matters, for a libertarian, is whether the person you intend to punish actually violated someone else's right. Measuring how much someone benefited – how additionally happy someone was made – by a certain state of affairs has no implications for political philosophy. The same applies for those who are likely worse off because their parents had fewer goods to transfer to them. We cannot base a system of justice on whether a property owner would likely have transferred his property, had it not been stolen, to someone else. If someone steals my car, which I might have sold to Mike – making Mike better off – we should not compensate Mike for my loss, simply because it is possible or even likely that I would have given the car to him. Only our actual decisions matter.

### Inheritance

While it is true that we cannot rectify injustices committed by past generations, the egalitarian principle of initial acquisition has ramifications in the present day, notably for inheritance. Nearly all libertarians oppose taxes on inheritances. To them, a will represents an agent's decision about what to do with her property. She may legitimately give it to whomever she likes; she cannot be forced to give a portion of it to the government or anyone else. It is perfectly within her rights to bequeath *her* property, in whatever distribution *she* chooses, to

*whomever* she wants (and who agrees to take it) via a will – just as it is perfectly within her rights to do so a second before she dies.

To evaluate whether this standard analysis is correct, we can consider two different types of cases. In the first, the agent dies without a will. In the second, the agent dies with a will. In the first situation, there is no one to whom the holdings should go. They should not automatically arbitrarily go to some particular person or group of persons (for example, her children). If heredity and friendship are not enough to automatically generate claims to a person's holdings when she is alive, they are not enough when she is dead either. Instead, her holdings simply no longer have an owner at all. They pass into an unowned state. As we have just seen, this means that everyone has an equal right to them. They must be auctioned off and the proceeds divided equally among all humankind. (This includes, one should note, her body. She is no longer an owner of *anything*, including what was once herself. So the bodies of the dead should be sold to the highest bidder, which may be the victim's family or it may be medical researchers or it may be necrophiliacs. From the standpoint of justice, it does not matter.) A libertarian government could certainly do this, though hypothetically *anyone* could as long as they sold the items in such a way as to maximize the amount they received for them (and thus reflect their true value, their greatest value to any living person or combination thereof) and distributed the proceeds equally. While the current tax system certainly does not distribute its revenues equally amongst all humankind, it does a better job than transferring *all* the property to any *single* individual or small group thereof would. It is thus less unjust for the money to go to the government, even the present one, than to the dead person's children or spouse.

Now consider the second case. The person dies, but a will she wrote when she was alive specifies how she wished her holdings to be distributed. Does the person have a right to decide,

while she is alive, how her holdings are disposed of when she is dead? When she is dead, she is no longer a self-owning moral agent. There is no self to own, no actions to require agency, no person anymore: just a lump of non-human atoms that were formerly part of a human, just as many, many other atoms once were. A dead person has no rights, just as all non-existent entities have no rights. Not respecting her will would not violate her rights, for she has none. She no longer owns her holdings, as we established with the person who died without a will, so she cannot transfer those holdings. Once again, when the agent who once owned property ceases to exist and thus no longer owns anything, those holdings pass into an unowned state.

What if the person dies with liabilities – debts to be paid, rights-violations to be rectified? For the same reasons outlined above, the debts cannot be paid out of the dead person's former holdings. Once the rights-violator is dead, she can no longer owe compensation. And no one else owes compensation – including the people who are entitled to her holdings. The people who end up with her holdings (everyone) were not responsible for the crime, and so they owe no compensation. The taint of injustice does not follow the property, but the person, who is now dead and has no responsibility or ability to pay. Besides, it may be required for the state to compensate victims when the perpetrator cannot be found or cannot pay; in this case, with a libertarian state distributing the perpetrator's property equally, then taxing everyone equally to pay for (among other things) the victim's compensation, it ends up a wash.

### Borders

Having explored libertarianism's strange-sounding implications for inheritance, I wish to turn now to another area in which libertarian justice makes even more unusual demands: borders. Assume that an apparently libertarian state exists. This state would protect its citizens from

violence, theft, coercion, and breach of contract. It would punish rights-violators, compensate victims, and do nothing else. It would treat its citizens equally. Its treasury would be filled by an equal tax (say, each citizen pays \$500 per year). And, according to Nozick, it would have borders.<sup>182</sup> It might have totally open and free immigration, but it would claim sovereignty over a particular territory. That is, everyone that existed within a certain geographical space, delineated by the minimal state's<sup>§§§§§</sup> borders, would be subject to its laws. This state, the minarchist's dream, would necessarily be rights-violating.<sup>183</sup> To see why this is so, imagine that some followers of anarcho-capitalist philosopher Murray Rothbard live within the minimal state. These Rothbardian anarchists find it objectionable that the state forces them to pay for the protective services it offers. They find it immoral that the state forces them to give up their property – which libertarian principles claim they are absolutely entitled to – without their consent. Even if the state was financed solely by voluntary donations or punitive damages or legitimate ownership of land, some would still have legitimate objections to it. Objectivists (those whose personal morality forbids them from acting altruistically or accepting altruistically-given assistance) might rather not have the state provide them with protective services, preferring to go it alone. And pacifists might object to the state using force on their behalf. These people want to choose states more to their liking, or to not be a member of any state at all. The minimal state forcibly prevents these people from leading the lives they choose, by forcing them to obey the laws of the state even when they exist solely on their own land (or land used with the consent of the owners).

So the objectors should be free to opt out of the minimal state. They must be allowed to

---

<sup>§§§§§</sup> I use the terms “minimal state” and “minarchist” instead of “libertarian” here because, I argue, minarchism is not necessarily related to true libertarianism at all. As I will argue, a minimal state that claims sovereignty over a geographical region is not libertarian at all, whereas an intrusive state that defines its sovereignty by choice is fully libertarian.

refuse to abide by the laws of the minimal state. But what exactly does this mean? Perhaps it means opening the state's borders to anyone who wants to leave. Anyone who does not wish to abide by the laws of the state may go somewhere where she does not have to. This is, indeed, the correct principle when discussing voluntary communities. If I live on an organic farming collective owned by the Worker's Cooperative, I may leave the land owned by the Cooperative, but I may not demand that the Cooperative carve out a piece of its property for me to live on without being subject to its rules. However, the state, unlike the Cooperative, does *not* own the land the objectors live on. The objectors own their land and so they should have full rights over it; they should be allowed to do whatever they wish with it (without violating others' rights), even if those actions conflict with the laws of the state. The objectors cannot be forced to move off their own property. So opening the borders to physical exit is not enough. Instead, a person must be able to opt out of the laws of the state (not individually, unless the state allows that, but as one package), without having to move. So sovereignty should not be defined territorially. Rather, it must be defined by choice. It is unjust for a state to force people living on their own property to obey its laws; but it would be just for someone to *consent* to obey the laws of a state. So a true libertarian state would not – could not – be delineated by a map on the globe. It would, rather, be an *agreement* between all those who *chose* to live by its laws.

And, indeed, those laws need not have any particular content (other than ensuring that the state claims only choice-based, rather than territorial, sovereignty). A just state could very well be redistributive. It could say, "If you choose to be a citizen of this state and you make more than \$100,000, you will have to give half of it to the state." Similarly, a just state could outlaw "homosexual acts." Presumably, any person would be able to choose between many – hundreds or thousands – states with different laws, including a minimal one. And it seems unlikely that

gays and lesbians would join (and thus be subject to) the anti-homosexuality state. But it may be likely that many rich individuals would join redistributive states, either because those states provide them with a better package of services at a lower cost than a minimal state or because their moral beliefs dictate that they should help the poor through their state. What is essential is that everyone who is a member of the state has actually consented. Their agreements to the state, under the choice system, have the same force as contracts in their private lives – so they are bound to them to that degree. If the more-taxed individuals are feeling exploited by their redistributive state, they can – without moving an inch or leaving behind their jobs, families, friends, houses, and lives – leave it for a less-redistributive one. A person may choose her own lifestyle by choosing her own state. Even a minimal state, if it defines itself territorially, cannot guarantee this. It forces people who do not want to be associated with the minimal state to pay for its protective services. State choice (as I call my alternate conception of sovereignty), on the other hand, grants total freedom to lead one's life as one chooses, as long as one does not violate another's libertarian rights, a freedom that can be expressed not only by choosing to live in a limitless variety of different communities, but a limitless variety of different states.

Nonetheless, state choice is far from perfect. I will here discuss two sorts of objections to state choice: that it is simply an impossible ideal and that it would result in irreconcilable conflicts between the choice-defined states.

One might argue that state choice is a nice theory, but it is practically impossible. It simply could not be done in the real world. This is true in two senses. First, state choice would never be politically viable. No state would ever give up its claim of territorial sovereignty, for this would in one fell swoop remove all of the power it can exercise by any means other than persuasion. No doubt many of its present citizens would opt out. And few visitors to the former

territory would choose to obey the laws. If every other state was still territorially-defined, the lone switcher would have effectively ceded its territory to anarchy or perhaps to a territorially-defined state that saw an opportunity to claim yet more territory as under its sovereign jurisdiction. So the collective action problem is, to put it mildly, unimaginably vast. Second, state choice would be terribly costly to implement. A state that wanted to provide even minor services, like roads, to its citizens would find the task impractical. It would be nearly impossible to exclude free riders from many services (even vaccinations!). Even a choice-based minimal state (call it Minarchia) would have to enforce the rights of its citizens all over the globe; it would have to punish a murder in Dubai while trying a burglar in Juarez. Any argument that attempts to downplay this difficulty (citing, for example, a decline in transportation and communication costs with globalization) fundamentally misunderstands the scope of the problem. And yet neither of these facts are really objections from the point of view of justice. Indeed, these are the same problems traditional libertarianism faces: it is very difficult to get status quo political units to implement it and it would not result in a utilitarian-best outcome. Neither problem means it *should not* be done, though the first means that libertarians should be pessimists. Still, state choice is not literally *impossible*, in the same way as it is literally *impossible* for the physical laws of the universe to be violated. State choice *could be* implemented: one can imagine a world in which no state defined itself territorially and people chose their own states from their own homes (just as they choose from which restaurant to order delivery). So one should not dismiss what state choice has to tell us about justice; it gives us an ideal to work towards (unlike, for example, an ideal that objects should fall up).

Another objection to state choice involves conflicts between states. Imagine two choice-defined states, Minarchia (a minimal state) and Interferia (a more-than-minimal state). Mia is a

member of Minarchia and Ingrid is a member of Interferia. Interferia prohibits employers from paying workers less than \$10 an hour; Minarchia has no such law. Ingrid works in Mia's factory for her; they have a contract whereby Mia pays Ingrid \$8 an hour for her work. Interferia wants to prosecute Ingrid for "exploiting" Mia, but Minarchia says that it will forcibly stop Interferia from so doing if it tries. What do proponents of state choice make of this case? In this case, Interferia is wrong. So, ideally, Interferia would withdraw its complaint. It can punish Ingrid for signing the contract, but not Mia. If it is more important to Ingrid to work for Mia than to be a citizen of Interferia, she can leave Interferia and join Minarchia (or become stateless). But this will likely not happen. Interferia believes in the *justice* of its claim; that is, Interferia believes that force can be used to punish Mia. So it seems like some third party is needed to resolve the dispute. That third party would be a libertarian World Supreme Court (whose budget would have to come from voluntary contributions, possibly from minimal states), whose task is to hear disagreements between states and ensure the justice of rules of exit. The World Supreme Court would rule in favor of Mia in this case, and leave it up to Ingrid whether she wishes to accept Interferia's punishment and remain a citizen or if she wants to renounce her citizenship. Of course, if the crime Mia had committed upon Ingrid was beating her or stealing her things, the World Supreme Court would instead rule for Interferia and Ingrid (a decision that, in this case, both Ingrid and Minarchia would welcome). This suggests that countries in a state choice system lack some standard aspects of sovereignty, including defining what rights its citizens have. How much scope is allowed for states to set the contours of libertarian rights – what shall count as property, how much punishment is appropriate, etc. – is an open question, as is the critical issue what sort of opt-out provisions are required (a problem that requires applying to principle of rectification to contract violations, an interesting subject I have neither the time nor the training

to tackle).

Assuming some resolution of these issues is plausible, the result is clear: libertarianism supports not so much one particular conception of what a state should do, just as it does not support any particular business or community, or even a conception of what a state should *be* or *mean to people*, but an ideal of *entrance and exit* from states. Libertarianism is not about making states *minimal*; it is about making them *voluntary*.

### Conclusion

The radical conclusion that sovereignty must be choice-based is the last in a series of striking aspects about the libertarian's conception of justice I have endeavored to show in this essay. To the libertarian, people are moral agents in the fullest sense of the word. They are both the subjects of and subject to justice. That is, they are both protected by and bounded by the constraints that justice imposes. They have both rights and responsibilities. This is the true meaning of that vague term, self-ownership: that people are *wholly responsible* for their actions – they own them. This is the message of the Principle of Intervening Action, introduced back in Chapter I. Human beings have the unique power of morality; only we can have musts and must nots assigned to our actions. To a libertarian, justice judges *actions*, not *end-states*. Justice can tell us whether what we did is permissible or not; it cannot tell us whether a particular outcome is good or not. When we act, we are either acting as we must, as we may, or as we must not. This choice is ours. We bear the benefits and the costs of that, and every other, choice – every action that we take. This is not because we act with some god-like *causa sui* free will. We do not; libertarianism takes determinism seriously but holds it compatible with moral responsibility. Rather, we are moral agents because we are human. There are properties about us, properties that

are difficult to describe and even more difficult to identify biologically, that make us different from the external world of things. Humans can own everything else; but humans cannot be owned except by themselves. Humans are all *equally* human, equally entitled to the unowned universe and equally entitled to proper treatment by their government. From these facts come the constraints that justice imposes, always binding and always absolute. Those constraints limit all actions that people may take, whomever they represent and for whatever purpose they act. They set the boundaries on what the state can do, for the state is not above the morality that applies to ordinary people; the state *is* ordinary people, ordinary people entrusted with the terrible power of using force. Those people must obey the rules that justice sets forth, just like everyone else.

*Fiat justitia ruat caelum.*

---

<sup>1</sup> Nozick, Robert. *Anarchy, State, and Utopia*. Cambridge, Mass.: Basic Books, 1974. p. ix.

<sup>2</sup> Whitehead, Alfred North. *Process and Reality*. New York: Free Press, 1979. p. 39. The actual quote is “The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.”

<sup>3</sup> Dworkin, Ronald. “Rights as Trumps” in Waldron, Jeremy, ed., *Theories of Rights*. Oxford, Oxford University Press. 1984. pp. 153-67.

<sup>4</sup> Nozick, ASU, p. 150.

<sup>5</sup> Nozick, ASU, p. 150-3.

<sup>6</sup> Nozick, ASU, p. 151.

<sup>7</sup> Nozick, ASU, p. 198.

<sup>8</sup> Nozick, ASU, p. 33.

<sup>9</sup> “What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus. The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state’s fundamental coercive power has.” Nozick, ASU, p. 6.

<sup>10</sup> Nozick, ASU, pp. 169-74.

<sup>11</sup> For a fairly comprehensive review, see Fried, Barbara. “Begging the Question with Style: *Anarchy, State, and Utopia* at Thirty Years.” *Social Philosophy and Policy*. Vol. 22, No. 1. 2005.

<sup>12</sup> Nozick, ASU, pp. xii-xiv

<sup>13</sup> Barbara Fried, “Begging the Question with Style,” pp. 221-54.

<sup>14</sup> Rawls, John. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press, 1971. p. 74.

<sup>15</sup> Rawls, p. 75.

<sup>16</sup> Rawls, p. 75.

<sup>17</sup> Nozick, ASU, p. 152.

<sup>18</sup> Nozick, ASU, p. 29.

<sup>19</sup> Rawls, p. 10.

<sup>20</sup> Rawls, p. 11.

<sup>21</sup> Rawls, p. 11.

<sup>22</sup> Lyons, David. “Rawls Versus Utilitarianism.” *The Journal of Philosophy*. Vol. 69, No. 18. October 5, 1972. p. 540. Lyons notes that in thinking about possible theories in the original position, “each party must reason from the same premises; so, if any one forms a preference, universal agreement on that point is presumably guaranteed.”

---

Rawls himself says that in the original position “all are similarly situated.” (Rawls, p. 11.) It is difficult to imagine how the agents in the original position are *at all* different, if they lack (knowledge of) any history of living in a society, a conception of the good life, and any genetically-given natural talents. What is left to distinguish one person from another in any meaningful way?

<sup>23</sup> Rawls, p. 123.

<sup>24</sup> Rawls, p. 123.

<sup>25</sup> Rawls, p. 222.

<sup>26</sup> In his later book, *Political Liberalism*, Rawls claimed that justice as fairness and the original position that supports it were just a reasonable comprehensive doctrine that compete with other similarly reasonable conceptions. "John Rawls." *Wikipedia, The Free Encyclopedia*. 3 Dec 2006, 02:18 UTC. Wikimedia Foundation, Inc. 6 Dec 2006 <[http://en.wikipedia.org/w/index.php?title=John\\_Rawls&oldid=91705435](http://en.wikipedia.org/w/index.php?title=John_Rawls&oldid=91705435)>.

<sup>27</sup> In *A Theory of Justice*, Rawls claims that “one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice.” Rawls, pp. 15-16.

<sup>28</sup> Nozick, ASU, p. 201.

<sup>29</sup> Nozick, ASU, p. 201.

<sup>30</sup> Nozick, ASU, p. 198.

<sup>31</sup> Nozick, ASU, p. 160. Rawls himself makes this clear when he claims that in a society made up of individuals, the set of goods “to be allotted is not the product of these individuals... there are no prior claims on the things to be distributed” (Rawls, p. 77).

<sup>32</sup> Nozick, ASU, p. 202.

<sup>33</sup> Rawls, p. 53.

<sup>34</sup> Rawls, p. 63.

<sup>35</sup> Arneson, Richard. “Against Rawlsian Equality of Opportunity.” *Philosophical Studies*. Vol. 93. 1999. p. 82.

<sup>36</sup> Nozick, ASU, p. 238.

<sup>37</sup> Rawls, p. 65.

<sup>38</sup> Rawls, pp. 72-3.

<sup>39</sup> Nozick, ASU, p. 195.

<sup>40</sup> Nozick, ASU, pp. 153-174.

<sup>41</sup> Nozick, ASU, p. 163.

<sup>42</sup> Nozick, ASU, pp. 160-4.

<sup>43</sup> Nozick, ASU, pp. 167-8.

<sup>44</sup> Nozick, ASU, p. 169.

<sup>45</sup> Nozick, ASU, p. 170.

<sup>46</sup> Nozick, ASU, p. 172.

<sup>47</sup> Nozick, ASU, pp. 171-2.

<sup>48</sup> Nozick conclusively refutes H.L.A. Hart’s version of this argument, which he calls the “principle of fairness,” by pointing out that even if society has given us much, we are not thereby required to do anything for society. (Nozick, ASU, pp. 90-5.) “You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on... One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this... So the fact that we partially are ‘social products’ in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long-forgotten people... does not create in us a general floating debt which the current society can collect and use as it will.” (Nozick, ASU, p. 95.) Nozick also refutes Rawls’ version of the argument by pointing out that many different cooperative arrangements are possible and that each person has a choice not simply whether to cooperate or live as a hermit, but whether to cooperate with a few, with more, or with all. Further, it is not clear why *cooperation* raises distributive claims that would not exist in its absence. Additionally, “cooperation” is really a collection of separate individual agreements that already specify how their products are to be distributed – agreements like stocks in corporations, contracts, etc. And, finally, a scheme based on cooperation would need to be justified to *all*, since *any* could leave to form a less-extensive form of cooperation at any time, so focusing justification on the worst-off and virtually ignoring the problem of justifying a scheme of cooperation to the most talented will not cut it. (Nozick, ASU, pp. 183-9.)

<sup>49</sup> Nozick, ASU, p. 160.

<sup>50</sup> Nozick, ASU, p. 235.

<sup>51</sup> Nozick, ASU, p. 154.

- 
- <sup>52</sup> Rawls, p. 24.
- <sup>53</sup> Rawls, p. 24.
- <sup>54</sup> Rawls, p. 25.
- <sup>55</sup> Nozick, ASU, pp. 32-3.
- <sup>56</sup> Nozick, ASU, pp. 42-5.
- <sup>57</sup> Nozick, ASU, p. 32.
- <sup>58</sup> Fried, Charles. Right and Wrong. Cambridge, Mass: Harvard University Press. 1978. p. 14.
- <sup>59</sup> Nozick, ASU, p. 32.
- <sup>60</sup> Rawls, p. 26.
- <sup>61</sup> Lyons, p. 544.
- <sup>62</sup> "Deontological ethics." *Wikipedia, The Free Encyclopedia*. 12 Dec 2007, 00:30 UTC. Wikimedia Foundation, Inc. 13 Dec 2007 <[http://en.wikipedia.org/w/index.php?title=Deontological\\_ethics&oldid=177329874](http://en.wikipedia.org/w/index.php?title=Deontological_ethics&oldid=177329874)>.
- <sup>63</sup> Rawls, p. 26.
- <sup>64</sup> Rawls, p. 174.
- <sup>65</sup> Rawls, p. 174.
- <sup>66</sup> Rawls, p. 175.
- <sup>67</sup> Cohen, G.A. "Where the Action is: On the Site of Distributive Justice." *Philosophy & Public Affairs*. Vol. 26, No. 1. Winter 1997. pp. 17-23.
- <sup>68</sup> Murphy, Liam. "Institutions and the Demands of Justice." *Philosophy & Public Affairs*. Vol. 27, No. 4. 1999.
- <sup>69</sup> Even more individualistic forms of consequentialism are subject to this objection, though less obviously. For example, under T.M. Scanlon's contractualism, a large aggregate benefit made up of small benefits to many others does not make up for a large loss suffered by one person. So, for example, if a man is crushed under equipment that is broadcasting the World Cup and we must turn off the equipment in order to prevent his death, Scanlon contends that we must take this action. (Scanlon, T.M. What We Owe to Each Other. Cambridge, Mass.: Belknap Press, 2000. p. 235.) But the point still holds: a large benefit to one person can outweigh a small loss to another. So a person who can help a drowning child may be forced to do so, since the benefit to the child will be greater than the loss to the rescuer. Nozick's argument applies: it is the *rescuer's* only life to lead, and no benefit to anyone else can be compared in such a way as to outweigh her loss.
- <sup>70</sup> Nozick, ASU, p. 33.
- <sup>71</sup> Nozick, ASU, p. 154.
- <sup>72</sup> Nozick, ASU, p. 29.
- <sup>73</sup> In a short section labeled "What are Constraints Based upon?" (Nozick, ASU, pp. 48-51), Nozick lays out his argument. He first contends that humans are uniquely capable of forming a long-term plan of life and carrying it out. He then argues that this fact has moral significance. "A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for a meaningful life." (Nozick, ASU, p. 50). Nozick then contends that the notion of a meaningful life "has the right 'feel' as something that might help to bridge an 'is-ought' gap; it appropriately seems to straddle the two." (Nozick, ASU, p. 50). This is because the fact that performing an action would render your life meaningless is always a conclusive reason not to do it. (Nozick, ASU, pp. 50-1.)
- <sup>74</sup> "Deontological ethics." *Wikipedia, The Free Encyclopedia*. 25 Apr 2007, 01:55 UTC. Wikimedia Foundation, Inc. 25 Apr 2007 <[http://en.wikipedia.org/w/index.php?title=Deontological\\_ethics&oldid=125697211](http://en.wikipedia.org/w/index.php?title=Deontological_ethics&oldid=125697211)>.
- <sup>75</sup> Gewirth, Alan. Human Rights: Essays on the Justification and Applications. Chicago: University of Chicago Press, 1982. p. 229.
- <sup>76</sup> Gewirth, p. 230.
- <sup>77</sup> Nozick, ASU, 238.
- <sup>78</sup> Pilon, Roger A. *A Theory of Rights: Toward Limited Government* (unpublished Ph.D. dissertation, University of Chicago, 1979). pp. 90-93.
- <sup>79</sup> Nozick, ASU, 238.
- <sup>80</sup> Nozick, ASU, 238.
- <sup>81</sup> Nozick, ASU, 238.
- <sup>82</sup> Nozick, ASU, 238.
- <sup>83</sup> See Barbara Fried, "Begging the Question with Style," p. 222.
- <sup>84</sup> Nozick, ASU, p. ix.
- <sup>85</sup> Nozick, ASU, p. 9.

---

<sup>86</sup> It should be noted that atomistic hermits and Objectivists are, contrary to what some critics of libertarians imply, not the only two sorts of individuals one might find in a libertarian state. The fact that nearly all more-than-minimal states would prevent atomists and Objectivists from leading the lives they choose, by forcing them to pay taxes to support others and interfering when they use their own property in ways the state prohibits, does not mean that libertarianism relies on a belief in the virtue of atomistic and Objectivist moral views. Libertarianism, a philosophy of *justice*, is neutral between atomistic, Objectivist, and other ways of living one's life. (Indeed, it is interesting to note that Objectivists critique libertarians for refusing to take a stance on the question of the good life. Schwartz, Peter. "Libertarianism: The Perversion of Liberty" in Rand, Ayn. The Voice of Reason: Essays in Objectivist Thought. New York: NAL Books, 1988. pp. 313-314.)

<sup>87</sup> Nozick, ASU, pp. 320-323.

<sup>88</sup> Freeman, Samuel. "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View." *Philosophy & Public Affairs*. Vol. 30, No. 2. Spring 2001. pp. 125-131.

<sup>89</sup> Van Parijs, Philippe. Real Freedom for All: What (If Anything) Can Justify Capitalism?. USA: Oxford University Press. 1997. pp. 4-5.

<sup>90</sup> Kagan, Shelly. "The Argument from Liberty" in Jules L. Coleman and Allen Buchanan, eds., In Harm's Way: Essays in Honor of Joel Feinberg. New York: Cambridge University Press, 1994. pp. 16-40.

<sup>91</sup> Kagan, pp. 23-4.

<sup>92</sup> Kagan, pp. 28-9.

<sup>93</sup> Otsuka, Michael. "Self-Ownership and Equality: A Lockean Reconciliation." *Philosophy & Public Affairs*. Vol. 21, No. 1. Winter 1998. p. 66 citing Nozick, ASU, p. 171.

<sup>94</sup> Otsuka, p. 67.

<sup>95</sup> Nozick, ASU, p. 171.

<sup>96</sup> In a short section labeled "What are Constraints Based upon?," Nozick offers a potential proof of rights, one that – I argued in an earlier paper – may be based upon his "framework for utopia" in Part III. Nozick first contends that humans are uniquely capable of forming a long-term plan of life and carrying it out (Nozick, ASU, p. 49). He then argues that this fact has moral significance. "A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for a meaningful life" (Nozick, ASU, p. 50). Nozick then contends that the notion of a meaningful life "has the right 'feel' as something that might help to bridge an 'is-ought' gap; it appropriately seems to straddle the two" (Nozick, ASU, p. 50). This is because the fact that performing an action would render your life meaningless is always a conclusive reason not to do it. (Nozick, ASU, pp. 50-1). So, Nozick appears to be assuming, libertarian rights uniquely allow a person to shape her life in accordance with some overall plan. This sounds much like a particular argument from liberty, working with a definition of "real liberty."

<sup>97</sup> Pilon, p. 101.

<sup>98</sup> Pilon, pp. 131-154.

<sup>99</sup> Pilon, p. 131.

<sup>100</sup> Pilon, p. 139.

<sup>101</sup> Pilon, p. 130.

<sup>102</sup> Pilon, pp. 137-9.

<sup>103</sup> Pilon, p. 139.

<sup>104</sup> Pilon, p. 139.

<sup>105</sup> Pilon, pp. 47-60. See my second footnote in this chapter.

<sup>106</sup> Pilon, pp. 139-41.

<sup>107</sup> Pilon, p. 142.

<sup>108</sup> Pilon, pp. 143-4.

<sup>109</sup> Pilon, p. 100.

<sup>110</sup> Pilon, p. 131.

<sup>111</sup> Brown, Stephen. "Alan Gewirth: An Obituary." *Studies in Social Thought and Political Theory*. Online at <<http://www.sussex.ac.uk/Units/SPT/journal/archive/pdf/SSPT.10-Brown.pdf>>. p. 89.

<sup>112</sup> Kinsella, Stephan. "New Rationalist Directions in Libertarian Rights Theory," *Journal of Libertarian Studies*, Vol. 12, No 2. Fall 1996. <[http://www.mises.org/journals/jls/12\\_2/12\\_2\\_5.pdf](http://www.mises.org/journals/jls/12_2/12_2_5.pdf)>. p. 314.

<sup>113</sup> Kinsella, "New Rationalist Directions in Libertarian Rights Theory," pp. 324-6.

<sup>114</sup> Kinsella, Stephan. "Punishment and Proportionality: The Estoppel Approach," *Journal of Libertarian Studies*. Vol. 12, No. 1. 1996. pp. 51-73.

<sup>115</sup> Kinsella, "Punishment and Proportionality: The Estoppel Approach," p. 53.

- 
- <sup>116</sup> Kinsella, "Punishment and Proportionality: The Estoppel Approach," p. 53.
- <sup>117</sup> Kinsella, "New Rationalist Directions in Libertarian Rights Theory," p. 317.
- <sup>118</sup> Kinsella, "New Rationalist Directions in Libertarian Rights Theory," p. 320.
- <sup>119</sup> Kinsella, "Punishment and Proportionality: The Estoppel Approach," p. 54.
- <sup>120</sup> Smith, Adam. An Inquiry into the Nature and Causes of the Wealth of Nations. Online Edition. Adam Smith Institute. 1995-2005. <<http://www.adamsmith.org/smith/won/won-b1-c2.html>>. Book One, Chapter II.
- <sup>121</sup> Locke, John. Second Treatise of Government. Indianapolis: Hackett Publishing Company. 1980. p. 19.
- <sup>122</sup> See, e.g., Dworkin on how his theory is unlike the difference principle. Dworkin, Ronald. "What is Equality? Part 2: Equality of Resources." *Philosophy & Public Affairs*. Vol. 10. No. 4. Autumn 1981. pp. 339-344
- <sup>123</sup> "Equality of Resources," p. 295.
- <sup>124</sup> Dworkin emphasizes that his theory is compatible with the principle of transfer expressed in Nozick's Wilt Chamberlain example. Dworkin, "Equality of Resources," pp. 336-7.
- <sup>125</sup> Scheffler, Samuel. "Choice, Circumstance, and the Value of Equality." *Politics, Philosophy, and Economics*. Vol. 4, No. 1. 2005. p. 6.
- <sup>126</sup> Scheffler, p. 12.
- <sup>127</sup> Dworkin, "Equality of Resources," p. 293.
- <sup>128</sup> See, e.g., Dworkin on taxing the skilled to give to the unskilled. Dworkin, "Equality of Resources," pp. 323-334.
- <sup>129</sup> Scheffler, pp. 5-28.
- <sup>130</sup> Anderson, Elizabeth. "What is the Point of Equality?" *Ethics*. Vol. 109, No. 2. January 1999.
- <sup>131</sup> Dworkin, "Equality of Resources," p. 311.
- <sup>132</sup> Dworkin, "Equality of Resources," p. 293.
- <sup>133</sup> Kymlicka, Will. Contemporary Political Philosophy. New York: Oxford University Press, 2002. pp. 74-5.
- <sup>134</sup> Dworkin, "Equality of Resources," p. 311.
- <sup>135</sup> Dworkin, "Equality of Resources," pp. 283-290.
- <sup>136</sup> Dworkin, "Equality of Resources," p. 294.
- <sup>137</sup> Dworkin, "Equality of Resources," p. 313.
- <sup>138</sup> Dworkin, "Equality of Resources," pp. 296-334.
- <sup>139</sup> Dworkin, "Equality of Resources," p. 289.
- <sup>140</sup> Nozick, ASU, p. 149.
- <sup>141</sup> Dworkin, "Equality of Resources," p. 314.
- <sup>142</sup> Dworkin, "Equality of Resources," p. 312.
- <sup>143</sup> Dworkin, "Equality of Resources," p. 337.
- <sup>144</sup> Kennedy, Natalie. "Learning to taste and food preferences begin in the early years of childhood." The San Francisco Chronicle. 12 January 2005, online edition: <<http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2005/01/12/FDGFVAN3T81.DTL>>.
- <sup>145</sup> Strawson, Galen. "The Impossibility of Moral Responsibility." *Philosophical Studies*. Vol. 75, Nos. 1-2. August 1994: 5-24.
- <sup>146</sup> Dworkin, Ronald. A Matter of Principle. Cambridge, Mass.: Harvard University Press. 1985. p. 301.
- <sup>147</sup> Nozick, ASU, p. 214.
- <sup>148</sup> Scheffler, pp. 12-13.
- <sup>149</sup> Joshua Greene and Jonathan Cohen. "For the law, neuroscience changes nothing and everything." *The Royal Society*. Updates 26 Nov. 2004. Accessed 11 Dec 2006. <<http://www.wjh.harvard.edu/~jgreene/GreeneWJH/GreeneCohenPhilTrans-04.pdf>>.
- <sup>150</sup> Nozick, ASU, p. 227.
- <sup>151</sup> In particular, Nozick separates the "positive" and "negative" versions of the moral luck argument. The negative argument merely contends that moral desert does not provide an independent justification for owning one's holdings. This argument is non-responsive to libertarianism, which does not ground justice in desert. The positive argument contends that in a libertarian system, the fact that our holdings depend on endowment undermines the justice of that system. Nozick shows that such an argument cannot be grounded on distribution according to desert, on the empirical fact of correlation between holdings and endowment, on the empirical fact of endowment partially explaining holdings, or on some presumption of equality and the notion that deviations from that starting point can only be justified by choice, not endowment (this last position most closely resembling Dworkin's). Nozick, ASU, pp. 216-227.
- <sup>152</sup> Nozick, ASU, p. 226.
- <sup>153</sup> Dworkin, "Equality of Resources," p. 312.

- 
- <sup>154</sup> Scanlon, T.M. "Lecture 24: Moral Blame and Its Preconditions." Harvard undergraduate course. Moral Reasoning 33, "Issues in Ethics." Cambridge, MA. 12 Dec 2006.
- <sup>155</sup> For more on the distinction between personal morality and political morality – and on libertarianism's nature as a theory of political morality – see Harris, Alex. *Personal Morality and Political Morality* (unpublished term paper, Social Studies 98id, "Issues in Ethics," Harvard undergraduate course, 2007).
- <sup>156</sup> Pilon, p. 91.
- <sup>157</sup> Scanlon, T.M. "Justice, Responsibility, and the Demands of Equality" in Synowich, Christine (ed.). The Egalitarian Conscience: Essays in Honour of G.A. Cohen. New York: Oxford University Press, 2006.
- <sup>158</sup> Scanlon, "Justice, Responsibility, and the Demands of Equality."
- <sup>159</sup> Nozick, ASU, p. 55.
- <sup>160</sup> For some excellent examples and discussion, see Nozick, ASU, p. 95.
- <sup>161</sup> Murray, Charles. What it Means to Be A Libertarian. New York: Broadway Books. 1997. pp. 19-20.
- <sup>162</sup> Nozick, ASU, p. 262.
- <sup>163</sup> Nozick, ASU, p. 263.
- <sup>164</sup> Nozick, ASU, pp. 263-264.
- <sup>165</sup> see, e.g., Kelley, David. A Life of One's Own: Individual Rights and the Welfare State. Washington, D.C.: The Cato Institute. 1998. pp. 68-73
- <sup>166</sup> Nozick, Robert. Socratic Puzzles. Cambridge, Mass.: Harvard University Press, 1997. pp. 23-26.
- <sup>167</sup> Van Parijs, Philippe. Real Freedom for All. Oxford: Oxford University Press. 1955. p. 22.
- <sup>168</sup> Kelley, p. 73.
- <sup>169</sup> Nozick, ASU, pp. 150-2.
- <sup>170</sup> Nozick, ASU, p. 174.
- <sup>171</sup> Kymlicka, pp. 113-121.
- <sup>172</sup> Kymlicka, p. 120.
- <sup>173</sup> Nozick, ASU, 198.
- <sup>174</sup> Kymlicka, p. 75.
- <sup>175</sup> Kymlicka, p. 111.
- <sup>176</sup> Kymlicka, p. 112.
- <sup>177</sup> Nozick, ASU, p. 231.
- <sup>178</sup> Fried, Barbara. "Left-Libertarianism: A Review Essay." *Philosophy & Public Affairs*. Vol. 32, No. 1. 2004. p. 68.
- <sup>179</sup> Nozick, ASU, p. 152.
- <sup>180</sup> Kymlicka, p. 112.
- <sup>181</sup> Locke, Edwin S. "The Only Cure for Racism." Capitalism Magazine. April 23, 2006, online edition: <<http://www.capmag.com/article.asp?ID=4644>>.
- <sup>182</sup> See, e.g. Nozick, ASU, p. 23. "Writers in the tradition of Max Weber treat having a monopoly on the use of force in a geographical area... as crucial to the existence of a state."
- <sup>183</sup> For a similar argument that focuses more specifically on Part I of *Anarchy, State, and Utopia*, see Rothbard, Murray. "Robert Nozick and the Immaculate Conception of the State." Vol. 1, No. 1. 1977. pp. 45-57.