

**PERSONS, PROPERTY, AND MORALITY:
A DEFENCE OF POLITICAL LIBERTARIANISM**

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ABSTRACT

This dissertation adopts as its starting point the beliefs that moral truths can be known and that political philosophy is a branch of ethics.

The author identifies three variants of libertarianism on the basis of their different treatments of the right to private property, which all three consider to be the cornerstone of political libertarianism. The author evaluates the arguments of Robert Nozick, Murray Rothbard, John Hospers and Ayn Rand for the moral foundations of libertarianism and finds them to be methodologically inadequate. None is able to furnish libertarianism with the moral foundations it requires. Following the example of Jan Narveson in his recent defence of the libertarian idea, the author adopts as the correct metaphysic of morality the method of hypothetical contract. The contractarian method is capable of determining both the nature and the extent of moral obligation. From application of the method of hypothetical contract the author concurs with the above-mentioned authors that morality is a system of rights and duties, i.e. deontological in character, and that persons are indeed bearers of moral, non-conventional rights. One of these rights is the negative right to equal social liberty. The author differs, however, in finding that contractarianism favours also a positive right to basic, standard welfare. Recognition of this latter right commits the author to a form of moderate or Lockean libertarianism that endorses the in-principle justice of coercive redistribution to meet persons' basic welfare. Consequently, the orthodox libertarianism advocated by Nozick, Rothbard, Hospers, Rand and Narveson which recognises only negative moral rights is rejected by the author.

All of the libertarians cited accept in one form or another John Locke's labour theory of appropriation. However, the author eschews the standard reading of Locke they are wedded to. The standard reading premisses the labour theory on a

person's ownership of himself. This reading is rejected on the grounds that the idea of self-ownership is insufficiently determinate to act as a sure basis for establishing property rights in things one has mixed one's labour with. A reconstructed defence of the moral right to private property through labouring which avoids this difficulty is given. That defence is premised not on self-ownership but on the right to equal social liberty. Save for the requirement to meet basic welfare there are no limits to the extent of acquisition.

The author argues that, despite his avowals to the contrary, Nozick in fact endorses a positive right to welfare, and that this positive right is one that is co-extensive with the right to basic welfare established by the method of hypothetical contract. Two arguments are given. The first argument draws on Nozick's Lockean proviso that an act of appropriation not worsen the position of others. The second is based upon the application to an envisaged society of libertarian-rights bearers of Nozick's clause that permits the violation of rights in order to avoid catastrophic moral horror. This latter argument the author believes to be successful against any libertarianism that is wedded to absolute property rights. Redistribution to meet the demands of basic welfare necessitates taxation. Taxation is to be levied proportionately and not progressively, and is to be coupled with a system of private social insurance.

None of the three variants of libertarianism identified, and which the author maintains sustain redistribution as a matter of justice, is ostensibly committed to redistribution more extensive than required to meet persons' basic welfare. Ernest Loevinsohn's argument to the effect that libertarians are - by the very principle they defend as libertarians - committed to more far-reaching welfare and redistribution is examined and rejected. Because Loevinsohn's argument is directed against a consequentialist defence of libertarianism and not a deontological version it is misplaced. Furthermore, it fails to establish the conclusion Loevinsohn supposes it

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does. Also rejected are the avowedly non-libertarian arguments in favour of an equal or more equal distribution of wealth advanced by John Rawls and Bernard Williams. The author concludes that no greater equality is required in the name of justice than is achieved by observance of the positive right to welfare.

The author examines the anarchist libertarian contention, defended by Rothbard, that the state's monopoly of coercion is not necessary for the protection of persons' libertarian rights. The anarchist libertarian believes that protection, including protection of the right to welfare, can be provided on the competitive market, where no-one has nor claims to have a monopoly on enforcement. The author shows that the anarchist case is not without plausibility. In the light of this, Nozick's derivation of the minimal state with a monopoly on coercive enforcement from the failure of a market in protection services is decidedly moot. Even if the minimal state is indeed derived the author contends that Nozick's principle of the compensation of prohibited enforcers of rights may create free-riders whose existence might lead, via an invisible-hand process, to the dissolution of the minimal state.

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INTRODUCTION

'Property is theft' declared Pierre-Joseph Proudhon - and nevertheless cuffed a pickpocket for attempting to relieve him of his wallet. Moreover, Proudhon was wrong: theft presupposes property and cannot be identical with it. Suppose, however, Proudhon to have said, 'Property is a right, and it is a right a person has as a result either of his appropriating from nature or by process of just transfer traceable, ultimately, to someone who had so appropriated.' Would Proudhon have been wrong? Political libertarians answer not, and in answering thus are not to be thought culpable of gross intellectual error. So at any rate I shall argue in this dissertation.

This dissertation defends the distinctive libertarian claim that a person has a moral, non-conventional private property right in those naturally situated, i.e. unowned, resources he mixes his labour with. This is a strong claim: it says that resources can be unilaterally acquired, i.e. without requiring the consent of others, including the consent of those who would be adversely affected by his acquisition, and that once acquired the owner is at liberty to enjoy them as he will, if needs be to the exclusion of others. If the claim is to be defensible the libertarian will have to show two things. One, that persons have moral rights. And two, the success of the project to justify moral rights granted, that the right to resources one has mixed one's labour with is one of them.

It has not gone unnoticed that *Anarchy, State, and Utopia*, Robert Nozick's seminal contribution to the politics of libertarianism, is without foundation.¹ Nozick maintains that persons have natural rights, and that one of the natural

¹ Nagel, 'Libertarianism Without Foundations', p.193; Ryan, 'Yours, Mine, and Ours: Property Rights and Individual Liberty', pp.335-6; Waldron, *The Right to Private Property*, p.4; Narveson, *The Libertarian Idea*, p.xii; Rothbard, *The Ethics of Liberty*, p.246.

rights they have is that to private property. Nowhere does Nozick present a positive argument for natural rights, nor *eo ipso* for the natural right to private property, and admits as much, conceding that much of what he says 'rests upon or uses general features' a theory of individual rights would have were it worked out.² Locke too has no satisfactory *secular* argument for natural rights. He tends to treat the question of whether persons have them or not as decided self-evidently in favour of their having them.³ Murray Rothbard does no better, unabashedly citing as the well-spring of libertarianism an axiom of non-aggression.⁴ The critics who complain that libertarianism is without foundation are, then, correct.

The vision of property rights libertarians are wedded to as presented above is perforce imprecise. It represents, in its imprecision, the attempt to distil the very minimum of common ground upon which the distinct libertarian identity is forged: one that, internal differences apart, the libertarian theorists with whom I am most concerned are agreed on.⁵ Disagreement arises over the interpretation of just transfer, a disagreement which has its origins in opposing views about the nature of rights, including that to property, or in dissension as to what rights persons are deemed to have.

There are three distinct positions. The first and the most uncompromising is what I term the *orthodox* libertarian position, the other two are non-orthodox positions the hallmark of both such that they are best captured, in contradistinction to orthodox libertarianism, by the appellation 'Lockean' libertarianism. Orthodox libertarianism is defined by three theses: (1) that persons have moral rights; (2) that one moral right persons have is that to property justly acquired; and (3) that the moral right to private property is based on either appropriation from nature

² Nozick, *Anarchy, State, and Utopia*, p.xiv.

³ Locke, *Second Treatise*, p.134.

⁴ Rothbard, *For a New Liberty*, p.8.

⁵ Barry thinks Friedman's *Capitalism and Freedom* a libertarian tract: *On Classical Liberalism and Libertarianism*, p.3. Rothbard is adamant Friedman is no libertarian at all: *For a New Liberty*, p.310.

through labouring or process of just transfer, where just transfer, traceable ultimately to appropriation from nature, is transfer effected non-coercively or voluntarily, i.e. with the freely given consent of the property rights bearer. To have a right is to have an enforceable claim, and property is a right, in this sense, to some use or benefit of a thing. Orthodox libertarians are more austere Lockeans than Locke. They accept the spirit of his labour theory of appropriation whilst discarding the letter of the 'enough and as good remaining' proviso regulating appropriation, and the two limits of term to property Locke believed enjoined by natural law, namely the spoilage proviso and the duty of charity. Because the libertarianism defended in this dissertation upholds something akin to Locke's duty of charity, to term it Lockean is apposite.

Orthodox libertarians maintain (3) is exhaustive. The only just transfer is a voluntary, non-coercive transfer. The first of the two Lockean libertarian positions differs from that of the orthodox owing to its differing understanding of the nature of rights. Unlike orthodox libertarianism - which treats rights, property rights included, as moral absolutes never overridable for reasons of general welfare or utility but only alienable by the unforced consent of the rights bearer - this Lockean position adopts the view that all rights are *prima facie* and not absolute. In principle then, property rights can be overridden and this means that, again in principle, property is open to transfer that does not satisfy the non-coercive condition of thesis (3) above. Whilst in agreement with orthodox libertarians over what rights persons have, this version of Lockean libertarianism allows in principle for teleological considerations to be sometimes defeasing of rights. Exactly why this is deserving of the epithet 'Lockean' will become clear when the juncture at which teleology takes over from rights is explicated in the case of the right to property.

The second variant of Lockean libertarianism differs from this and from orthodox libertarianism over the issue of what rights persons have. Where the orthodox libertarian endorses the absolute rights to property in one's own body and previously unowned resources transformed by one's labour, and recognises no other property rights, this Lockean libertarianism recognises a positive right to property. When appropriation from nature is not possible and when not engaged in the nexus of voluntary exchange and transfer a person may claim as his right a share drawn from the surplus of others. Included within the ambit of just transfer is the coercive redistribution of property in order to fulfil this right. Instead of considerations of general welfare defeating rights, this version has the positive right to welfare alter whatever distribution has been effected in accordance with appropriation and voluntary transfer and thus trigger redistribution. The outside limit to fulfilling this right is that there be a net decrease in the number of claims to welfare to be fulfilled. If redistributing property to you will cause me to in turn claim as my rightful due a redistributive share, which but for transfer to you I would not, then redistributing from me to you is not required by justice in transfer.

The orthodox libertarians - John Hospers, Ayn Rand, Jan Narveson and Rothbard - maintain that no person's legitimately acquired property may be used, consumed or in any other way alienated by any person other than the rightful owner for any reason, where the owner does not freely consent. As Rand puts it, individual rights are 'not to be alienated by majority vote or minority plotting'.⁶ Exclusive control is exclusive in the strongest sense. For orthodox libertarians the justification of property is complete quite independently of any pattern distribution assumes. If I justly have everything and you none, so be it. Hence their rejection of the 'consensus' view, that the standing or situation of others

⁶ Rand, *Capitalism: The Unknown Ideal*, p.138.

enters into the determination of ownership.⁷ Property rights are therefore absolute or indefeasible.⁸ Responsiveness to needs, say, would not be required of libertarian rights bearers on this view. Nozick is not wholly allied with the orthodox camp. Nozick hesitates to reject *tout court* the consensus view and instead allows for the violating of property rights when moral catastrophe, great and present danger, threatens unless such rights are violated.⁹ Consequently, to classify Nozick as orthodox on a strict reading of that term, the reading that has 'exclusive' read 'exclusive - come what may', is a mistake. His is ostensibly a libertarianism of the first Lockean kind. In fact, when the conditions under which property rights may be violated are specified Nozick's is effectively, but for different reasons, a libertarianism of the second Lockean variety. Furthermore, I argue that his proviso on appropriation, i.e. that no-one be made worse off by it, yields the same conclusion. In Nozick's case there are two ways to skin this particular cat.

All libertarians accept that mixing their labour with unowned resources grants persons a property right in what they have thus appropriated.¹⁰ More than anything the theory propounded and defended in this dissertation is libertarian because of this, the labour theory of appropriation. The classic formulation of this is, of course, Locke's.¹¹ Titling it a *theory* is perhaps too flattering, for the labour theory of appropriation has been criticised for failing to satisfactorily *explain* why labouring should grant title. Calling it a theory is possibly misleading too if it suggests a monotypic account.¹² The former complaint is the more

⁷ Ryan, *Property and Political Theory*, p.177.

⁸ Rothbard, *For a New Liberty*, p.77; *The Ethics of Liberty*, p.59; Rand, *The Virtue of Selfishness*, pp.96-7; *Capitalism: The Unknown Ideal*, p.26. Narveson, *The Libertarian Idea*, pp.100-101.

⁹ Nozick, *Anarchy, State, and Utopia*, p.30.

¹⁰ Waldron says Nozick rejects Locke's argument completely: *The Right to Private Property*, p.256. I concur with O'Neill (and most readers), *pace* Waldron, that despite his ambivalence Nozick's principle of just acquisition is Lockean: 'Nozick's Entitlements', p.311.

¹¹ Locke, *Second Treatise*, pp.133-46.

¹² Becker identifies at least three distinct arguments: 'The Labor Theory of Property Acquisition', pp.653-5.

serious, touching as it does upon the glaring lacuna at the heart of libertarianism, to wit, the absence of foundations. For reasons that will become apparent, in the absence of a cogent defence of libertarian rights any argument to bridge the gap between labouring and entitlement cannot but prove 'perennially elusive'.¹³

Libertarians are wont to talk of persons having rights and of the rights they have as being natural rights. Natural rights are formally defined as those rights one has in virtue of one's nature. As such they are universal, i.e. held by all *qua* sharers of the identified nature. In addition, the traditional conception of natural rights holds them to be paramount, which is to say higher than or superior to those rights bestowed by custom or convention or law, and that they are knowable by persons. This is the conception of natural rights Locke embraces and libertarians following him. Libertarians' tendency to follow Locke leads them to make the same mistake Locke makes. That mistake, in short, is to treat the assertion that persons have natural rights as known to be true and to then employ this knowledge in support of libertarianism - without ever furnishing anything like an argument to show that persons do indeed have such rights. If persons have natural rights in virtue of being persons then these rights are both universal and paramount. This is to say no more than that natural rights are, by definition, this sort of right. Talk of non-universal, non-paramount natural rights held by all persons would be conceptual confusion.¹⁴ The bone of contention, though, is not the logic of natural rights talk but the epistemological claim that we can know - indeed that we do know - persons have natural rights. The whole libertarian enterprise appears radically question-begging.

Locke thought the right to original property, that property a person has a title to through first appropriation from

¹³ O'Neill, 'Wozick's Entitlements', p.314.

¹⁴ Some natural rights may be non-universal, i.e. not held by all persons: see Lemos, 'The Concept of Natural Right', pp.137-8.

nature, was epistemologically unproblematic because deducible from something akin to a self-evident truth. His supposed truth is, however, not self-evident, and furthermore suggests that Locke is guilty of confusing owning with using. The confusion arises with his taking men to have a natural right-based property in their person. It involves Locke's illicitly slipping from a descriptive concept of person to a normative one. The substantive normative judgement of self-ownership as opposed to mere self-use, self-control or self-direction is not easily drawn from a descriptive wielding of the concept of a person.¹⁵ Rothbard falls, most explicitly, into the same confusion.¹⁶ Rights in one's body are presumed and then pressed into service in justifying rights in things. We are back once more with the familiar complaint: the lack of foundations for rights in general, and for the right to property in particular. In rather slavishly embracing Locke on natural rights libertarians do themselves a grave disservice. They cannot just help themselves to talk of natural rights and expect others to follow them as they short-sightedly follow Locke. They do themselves a greater disservice by not looking beyond the *Second Treatise* and the natural rights tradition of the seventeenth and eighteenth centuries it embodies. That tradition cannot deliver the goods the libertarian wants and needs, and is open to easy and decisive refutation.

Not only are natural rights, and perhaps especially the right to property through appropriation, not self-evident, some critics object, in a Benthamite 'nonsense upon stilts' fashion, to the very propriety of invoking them at all. The failure of libertarians to articulate their adherence to natural rights is, so this line of reasoning goes, assured. Any attempt to base a political philosophy on spurious entities cannot but fail. Talk of natural rights fails to refer and hence is fictional. Alasdair MacIntyre presses exactly this objection, dismissing natural rights as

¹⁵ See Locke's account in his *An Essay Concerning Human Understanding*, p.171.

¹⁶ Rothbard, *Power and Market*, p.176; *The Ethics of Liberty*, p.31.

fictitious and not to be confused with those rights 'conferred by positive law or custom', saying that 'The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.'¹⁷ The nub of MacIntyre's objection is epistemological, and so targeted against the third of the precepts thought to be constitutive of natural rights: those who invoke natural rights cannot give good reason - and they cannot rather than have not - why we should believe that persons have natural rights. On the traditional view, that to claim that right *R* is a natural right is *ipso facto* to claim that all clear-minded persons will or do see or perceive that right *R* is a right held by all persons,¹⁸ MacIntyre's objection is decisive. Too many clear-minded people just do not perceive natural rights where they are purported to be perceptible. And because the only criterion admitted of in demonstrating the existence of natural rights is that they be perceived the traditionalist can move no farther in defence of his theory. To his credit Narveson looks elsewhere to make libertarianism tenable.¹⁹ By turning to contractarianism Narveson embraces the only viable grounding for libertarianism (and I think moral-political philosophy in general).²⁰

In what follows I will illustrate the manner by which two libertarians have begged the rights question. It is I believe a salutary exercise. Of libertarianism, Rothbard writes that 'The crucial axiom of that creed is: no man or group of men have the right to aggress against the person or property of

¹⁷ MacIntyre, *After Virtue*, p.67.

¹⁸ Lloyd-Thomas calls this, for him questionable, Lockean view the 'perceived' natural rights view because it claims that rational persons will 'see' the connexion between the possession of a certain characteristic which implies that a person has a right and his having the right: *In Defence of Liberalism*, p.5.

¹⁹ Narveson, *The Libertarian Idea*, pp.131-84.

²⁰ LaPollette takes libertarianism to require an individual's consent to the restriction of his liberty, a condition he thinks it does not meet: 'Why Libertarianism Is Mistaken', p.197. If hypothetical consent be admitted, then a contractarian basis for libertarianism would meet this condition.

anyone else.²¹ Though called an *axiom* the right to be free from aggression is not itself foundational. What lies beneath is 'the basic axiom of the "right to self-ownership".'²² In positing the axiom of the right to self-ownership how can Rothbard defend himself against MacIntyre's sceptical charge that there is no such right as this, and that to believe there is is nothing but an arational at best, otherwise irrational, article of faith on a par with belief in the existence of unicorns? Or against the less positivistic charge that though there may be such rights how does Rothbard know that there are? Unfortunately, Rothbard goes no distance to show he is not arational or irrational in cleaving to the right of self-ownership, and neither does his chosen methodology equip him to face down the second charge.

Rothbard largely avoids formal argument and instead seems to rely more on an attempt to refute, or make sufficiently unattractive so as to be untenable, rival moral theories competing for the same logical space, thereby, so he seems to think, leaving a rights-based libertarianism as the only candidate for reasonable assent. His positive programme of grounding the axiom in a doctrine of natural law is unsatisfactory. It is an exercise in exposition.²³ Once set out his procedure of elimination is open to two telling objections: one, that it begs the question against the rival theories, and two, that not even successful elimination can vindicate Rothbard's preferred deontology. Showing his chosen opponents are in error is not to show he is not. Besides, substituting iteration for argument is intellectually disingenuous. Beware! Lest one straw man slips in to occupy the place of a knocked-down other.

'If the central axiom of the libertarian creed is non-aggression against anyone's person and property, how', Rothbard asks, 'is this axiom arrived at? What is its

²¹ Rothbard, *For a New Liberty*, p.8. Other orthodox libertarians likewise put freedom from aggression as the foundation stone of libertarianism. See Hospers, *Libertarianism*, pp.4-5; Rand, *The Virtue of Selfishness*, p.32.

²² Rothbard, *For a New Liberty*, p.26.

²³ Rothbard, *The Ethics of Liberty*, pp.3-24.

groundwork or support?'²⁴ By eliminating what he takes to be the two rival justifications for the axiom, namely emotivist libertarianism and libertarianism advocated on the grounds of utility, Rothbard supposes the natural law justification is left the victor in the field. (It seems not to have occurred to him there might be reason to reject the axiom other than the inadequacies of its emotivist and utilitarian bases.) The former we learn is non-rational and thus beyond the realm of moral discourse. Apart from missing the mark with the rationality stipulation, emotivism fails not because one cannot get others to leave off aggressing, for obviously one can, but because it is not an explanation of moral discourse or language at all. Emotivism is a theory of sentiment, taste and propaganda masquerading as normative.

Utilitarian libertarianism is dismissed on two grounds. First, the rejection of the consequences of action x as morally undesirable raises the question 'May there not be something about an act itself which, in its very nature, can be considered good or evil?'.²⁵ In his headlong endeavour to emasculate utilitarianism Rothbard most assuredly begs the question. A utilitarian need only reiterate that all that counts morally are the consequences of action, and that there simply is nothing intrinsic to any act that determines whether it is good or evil. Rothbard's second criticism of utility as the touchstone of morality, namely that it fails to provide 'an absolute and consistent yardstick to apply to the varied concrete situations of the real world',²⁶ is equally misdirected. Utilitarianism makes no virtue of consistency in the way Rothbard has in mind: the same act can be right in one situation and wrong in another. Is it right to return borrowed goods, and to give directions? Usually, yes. Is it right to return a weapon to a deranged friend or tell a prospective murderer the whereabouts of an innocent fugitive? The

²⁴ Ibid., p.23.

²⁵ Ibid., p.24.

²⁶ Ibid., p.24.

utilitarian is not bound to answer affirmatively. Turning now to the more positive enterprise of establishing the non-aggression axiom, Rothbard holds that natural rights are embedded in natural law, where natural law is the insight we have into man's specific nature and his environment such that 'each individual person must, in order to act, choose his own ends and employ his own means in order to attain them.... Since men can think, feel, evaluate, and act only as individuals, it becomes vitally necessary for each man's survival and prosperity that he be free to learn, choose, develop his faculties, and act upon his knowledge and values.'²⁷ To interfere with this process 'violates the natural law of man's needs'. Proceeding from the more basic axiom of self-ownership via the right to perform free from aggression those activities needed for survival and prosperity, Rothbard maintains a person has a right to all unowned resources he mixes his labour with, the implication being, presumably, that to interfere with his control of these resources is equivalent to a violation of a person's right to bodily integrity because the resources are a part of the person, have become body, as it were, 'a veritable extension of his own personality'.²⁸ The problem with all of this, as has been seen, is that the right of self-ownership, to control one's body free from coercive interference, adds nothing to the axiom of non-aggression. Explaining an axiom in terms of another that has no independent justification of its own is pointless. Foundations remain elusive.

Rothbard writes that men 'can only survive and flourish by grappling with the earth.... Man, in other words, must own not only his own person, but also material objects for his control and use.'²⁹ First, the sense of *must* here is not a moral one, and its invocation signals confusing owning with using or controlling. Secondly, whilst it is true that we have to

²⁷ Rothbard, *For a New Liberty*, p.26.

²⁸ *Ibid.*, p.30.

²⁹ *Ibid.*, p.30.

grapple with resources to get by this is not at all the argument Rothbard needs for either axiom to prove aggression a violation of the indefeasible right to unlimited property. It cannot explain why resources laboured upon come under the protective cover accorded a person's body, nor why persons' bodies have this cover. Even were the foundation of the right of self-ownership to be the necessity of such ownership for the ends cited, the most it could establish would be a right to what we need to survive and flourish. It is hard to see how this should legitimate absolute rights and unlimited acquisition, i.e. to things that cannot plausibly be taken, on even the most expansive of construals, to be pre-requisites to flourishing, let alone survival. A fancy imported sports car, for example. Rothbard's task is hopeless. He cannot get to where he wants to go using the method he has chosen to go by. For all that he says about natural law, Rothbard is an intuitionist, and intuition is no way to arbitrate in questions of moral-political philosophy.³⁰ Rand and Hospers, putting non-aggression at the core of libertarianism, fare no better.

Nozick's libertarianism has come under fire for its lack of foundation. Nozick begins his defence of libertarianism with the bare assertion that individuals have rights, and these rights delimit morally sacrosanct ground around their bearers, placing constraints on the range of action open to others. 'Individuals have rights', opens Nozick, 'and there are things no person or group may do to them (without violating their rights).'³¹ One of these rights is that to property justly acquired. Nozick lifts the labour theory of appropriation from the *Second Treatise*. One of the three suggestions of a defence of libertarian rights I can discern in his book is fallacious anyway. Nozick appears to make a retroactive or backward-legitimizing case for the right to property: from the worked-out implications of the rights back to those rights. (The

³⁰ Rothbard levels the charge of intuitionism against Nozick: *The Ethics of Liberty*, p.246.

³¹ Nozick, *Anarchy, State, and Utopia*, p.ix.

rights are shored-up by being allied with intuitions many undoubtedly share, but which are as yet only intuitions.³²) If we find the entitlement theory of justice and the depiction of the minimal state attractive then we are liable to concede to Nozick the rights they are premised on. We are in danger of committing the fallacy of affirming the consequent, of being psychologically seduced, as it were, into believing Nozick has rested libertarianism on secure foundations when he has done no such thing. Nozick's omission has not gone unnoticed. Martin Gardner points out that Nozick's entitlement theory 'rests on a whopping metaphysical posit: that the right to acquire and keep money and property is one of the most inviolable of all human rights.'³³ 'Nothing is easier', continues Gardner (echoing MacIntyre), 'than to make contrary posits about human rights.'³⁴ Bernard Williams notes how Nozick proceeds and criticises him accordingly, saying: 'In particular, he has tried - using, obviously, much ingenuity in the attempt - to get to his destination while avoiding any general discussion of a notion central to his views: property.'³⁵

Nozick is not to be construed as forwarding a rule-utilitarian justification of the rights he posits, no matter that his book manifests a retroactive argument. Though the best consequences may result from adherence to deontological rules - and libertarians defend capitalist political economy in this way³⁶ - the reasons Nozick will have us abide by rights are not utilitarian, rule or otherwise, but outrightly deontological in nature. Outcomes might be identical across a rule-utilitarian and deontological ethic. However, the ordering is different and makes a difference. With libertarian rights we have this situation: respect these rights, and if the best possible consequences, along some or other dimension,

³² For instance, the distinctness of persons as morally basic: *ibid.*, p.33.

³³ Gardner, *The Whys of a Philosophical Scrivener*, p.130.

³⁴ *Ibid.*, p.131.

³⁵ Williams, 'The Minimal State', p.32.

³⁶ Rand, *Capitalism: The Unknown Ideal*, p.20; Rothbard, *For a New Liberty*, p.41.

follow, then all to the good. It is quite otherwise with rule-utilitarianism which would tolerate the abandonment of rights in favour of other rules which lead to the best possible consequences. Frequently, what the deontologist says it is right (wrong) to do the rule-utilitarian says it is good (bad) to do. Occasionally there will be a parting of ways. Sometimes what the deontologist says it is wrong (right) to do the rule-utilitarian says it is good (bad) to do. If it is a generally beneficial rule that admirals with insufficient dead men to their credit be shot as an encouragement to others why should the rule-utilitarian not adopt it? A rule of this sort may very well instil the desired martial spirit. Whilst the results of respecting rights may be co-extensive with the outcome of adopting rule-utilitarianism, where and why they part ways is of the greatest importance. When they part and utility and rights conflict the ordering matters.

To stress the point once more: if we fail to intuit or perceive self-evident truths where Rothbard and Locke do, or refuse to presume rights for exegetical purposes with Nozick, they cannot hope to convince us. We need to know why persons own themselves in a normative sense, and why mixing labour joins, again in a normative sense, resources and the self. To merely assert that 'In a free society, any piece of nature that has never been used is *unowned* and is subject to a man's ownership through his first use or mixing of his labor with this resource',³⁷ begs these important questions. Mere assertion is not enough. And libertarians have done little more than assert. Until shown otherwise we should treat assertions to the effect that persons have rights, especially the right to property through appropriation from nature, as at best provisionally true. This is either on the grounds that persons cannot be shown to have such rights in the way libertarians think, or because moral truths cannot be determined by process of strange powers of apprehension.

³⁷ Rothbard, *Man, Economy, and State*, p.147.

Rothbard and Nozick fall foul of the first (and possibly the second) charge, and Locke the second.³⁸

A man's ability to appropriate is limited in an obvious, weak way by his inability to mix his labour with all he may wish to. A man cannot do the labour of ten men or be in two places simultaneously.³⁹ Locke, however, imposes stronger, prescriptive restrictions to appropriation and holding. There are two provisos. One applies to appropriation - the notoriously disputed enough and as good remaining proviso - and the other to holding property, the spoilage proviso. The duty of charity is different again, though it is effectively a limit to holding, to the continued exercise of exclusion.

A man has a just title in a previously unowned resource (Locke has land primarily in mind) where his appropriation of it leaves enough and as good remaining for others.⁴⁰ The traditional interpretation of this proviso holds it to be a necessary condition for appropriation. Only if this proviso is met then 'As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in.'⁴¹ Considering the provisos together, it transpires a holding is just only if appropriating it left enough and as good remaining and that what is appropriated does not perish uselessly.⁴²

On the traditional interpretation the enough and as good proviso imposes a blanket bar to all appropriation.⁴³ This is sufficient reason to reject this interpretation.⁴⁴ If it were not the provisos are anyway prone to charges of impracticableness. Locke does not furnish any suggestions as to how they might be observed in practice. Should a man mistakenly cultivate and produce more than can be kept from spoiling owing to ignorance, miscalculation and the like, he

³⁸ Locke, *Second Treatise*, p.133. Locke's powers are 'natural reason' and 'revelation'.

³⁹ Proxies can compensate for these limitations: Locke, *Second Treatise*, p.135.

⁴⁰ *Ibid.*, p.134.

⁴¹ *Ibid.*, p.136.

⁴² *Ibid.*, p.144.

⁴³ See Thomson, 'Property Acquisition', p.666; Rothbard, *The Ethics of Liberty*, p.240.

⁴⁴ As does Waldron, 'Enough and as Good Left for Others'.

has violated the law of nature in failing to abide by the proviso. Would anyone who punished the transgressor really be acting within his rights as Locke asserts?⁴⁵ Could he in good faith take possession of what was already appropriated?⁴⁶ A hunter kills a deer for meat, hide, etc., but cannot use all the animal before it begins to putrefy (whatever *all* might meaningfully be said to include). A hunter kills a deer not knowing he leaves only nine deer as good as remaining in the woods for a further ten hunters, who will not violate any provisos as it happens. Must the tenth hunt other animals? Maybe the known availability of similar animals, a moose perhaps, legitimates the initial kill? Or can the tenth hunter justly punish the others? All of them? The first hunter? Only the ninth? The last Mohican pursuing the last red squirrel cannot leave enough and as good remaining, and he eats the squirrel. Are turnips as good as squirrels? In the futuristic film *Soylent Green* Charlton Heston steals the last steak in New York. Does he violate a proviso? Does he rather punish a proviso-violator, or both?

An intentionality clause might be a way round these proviso difficulties. What Lockean agents intentionally do is what matters. Something like the following: 'I can foresee that my appropriating (non-spoilable) resource *r* will leave you without enough and as good. Because this is an unintended consequence of my intentionally appropriating *r* I may legitimately appropriate *r* and you may not punish me.' Locke does not need to make use of it. Neither does he need to take the course that the appropriation and use of more land than leaves enough and as good for others betters the position of those left without, for by his labour the appropriator increases, not lessens, the common stock.⁴⁷ Of this Locke is sure, citing the relative prosperity of an English day-labourer over 'a king of a large and fruitful territory' in

⁴⁵ Locke, *Second Treatise*, pp.124-5.

⁴⁶ *Ibid.*, p.140.

⁴⁷ *Ibid.*, p.139.

America.⁴⁸ Neither the communal ownership of land nor an aliquot part for all is required. If there is not enough and as good land there is enough and as good, better even, of a living for them.⁴⁹ Why need Locke not turn to either or both of these to circumvent his proviso difficulties? Because the enough and as good proviso is redundant in the light of the right men have to charity, 'to so much out of another's plenty as will keep him from extreme want where he has no means to subsist otherwise.'⁵⁰ As seen, orthodox libertarians do not acknowledge any limits: no provisos constraining appropriation, no rights constraining holding. For reasons to do with avoiding horribly deleterious consequences, Nozick opts for a weaker version of the proviso, and one that is not unproblematic in the context of his theory. If it is to be successful it has to show that under a regime of exclusive private ownership none will go completely without. Whilst the distribution of property exclusively in private hands may be optimally productive and lead to the creation of plenty, there are bound to be circumstances when abundance is subverted, not least when the Four Horsemen ride through. Will those unable to work in this régime be fed, lodged and clad as well as Locke's New World king? Locke can answer 'Yes' unequivocally for the right to charity guarantees it. Nozick cannot for ostensibly he has no such guarantee.

Locke's famous labour theory of appropriation was a response to two objections of Robert Filmer's to Hugo Grotius. If property is a right and everything was originally held in common, how, asks Filmer, could a men lose their right to the common stock - as they must have done in a régime where what was common is now private - without freely alienating it? Secondly, how could consent - unanimous consent even - reached at one time be binding later on those not party to the agreement? Locke's purpose was to thread a justification of

⁴⁸ *Ibid.*, p.141.

⁴⁹ This is the course taken by MacPherson, *The Political Theory of Possessive Individualism*, pp.211-13.

⁵⁰ Locke, *First Treatise*, p.34. Locke repeats this in his *Second Treatise*, pp.123-4. This is the Locke of the *Two Treatises*. Locke the Commissioner for Trade is a different creature. See Cranston, *John Locke: A Biography*, pp.424-5.

private property between these two poles, to show 'how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.'⁵¹

Locke's discussion of property opens with his reiterating the original commonality of resources. Reason and revelation inform us that the earth is given to mankind in common.⁵² This is not a condition of joint ownership but of no-ownership, the absence of any exclusive claims.⁵³ To the secularist this is to say that resources in their natural condition are unowned. The way is open to show how the common could be parcelled into mine and thine. We have no choice but to engage with the natural world through labour for the penury of our condition necessitates it and our wants force it.⁵⁴ Even in a land of milk and honey a man must labour to draw milk and collect honey. Two themes, then, are run side by side: that resources in their natural condition are unowned and that man has to labour with resources if he is to survive and improve his lot. When coupled with the (presumed) natural right of self-ownership the ingredients needed for a secularist construction of Locke's labour theory of appropriation are all present.

Locke commences with self-ownership, and from it argues, in a deceptively simple manner, that a man gains rightful possession of those resources he mixes his labour with, for in labouring he has joined them to his body, which he has an 'unquestionable' property in.⁵⁵ 'Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath

⁵¹ Locke, *Second Treatise*, p.134.

⁵² *Ibid.*, p.133.

⁵³ Ryan, *Property and Political Theory*, pp.29-30.

⁵⁴ Locke, *Second Treatise*, pp.136&138; see also Rand, *Philosophy: Who Needs It?*, pp.39-40; Rothbard, *The Ethics of Liberty*, p.30.

⁵⁵ Locke, *Second Treatise*, p.134.

mixed his labour with, and joined to it something that is his own, and thereby makes it his property.'⁵⁶ In syllogistic form the bare schema is this: a man owns his labour; naturally situated objects are unowned; therefore, in labouring on unowned objects a man joins them with what he owns, removing them from their unowned condition.⁵⁷

The labour theory is controversial on a number of grounds. There are many who would justly query the supposedly unquestionable, self-evidently true first premiss, that each has a (prior) property in his person. Why do persons have a right of self-ownership? Were the truth of the premiss conceded the argument is all the same too quick in establishing the strong proto-libertarian conclusion it purports to. Though frequently invoked by libertarians,⁵⁸ the right of self-ownership does not serve them unequivocally.⁵⁹ Why does the syllogism not conclude that the labour a man mixes is lost to the common? Why is mixing what I own with what I do not a way of gaining ownership rather than a way of losing what I own?⁶⁰ The syllogism presumes that something that has joined to it what is mine becomes mine. And does this presumption support the strongly counter-intuitive implication that a person owns a lake because he pours back water he has drawn from it?

Herbert Spencer levels a burden of proof objection against the proponent of the labour theory of appropriation. Pointing to the conceptual gulf between labouring and gaining title, Spencer asks (from the mouth of the cosmopolite to some backwoodsman): "Still you have not shown why such a process makes the portion of earth you have so modified yours. What is it that you have done? You have turned over the soil to a few inches in depth with a spade or a plough; you have scattered over this prepared surface a few seeds; and you have gathered

⁵⁶ Ibid., p.134.

⁵⁷ For Rothbard's version of the syllogism see his 'Justice and Property Rights', p.109.

⁵⁸ For instance by Mack, 'Self-Ownership and the Right of Property'.

⁵⁹ See Cohen, 'Self-Ownership, World-Ownership, and Equality'.

⁶⁰ Nozick, *Anarchy, State, and Utopia*, pp.174-5.

the fruits which the sun, rain, and air, helped the soil to produce. Just tell me, if you please, by what magic have these acts made you sole owner of that vast mass of matter, having for its base the surface of your estate, and for its apex the centre of the globe? all of which it appears you would monopolise to yourself and your descendents for ever."⁶¹ Spencer's challenge deserves an answer.

To found their philosophy libertarians need to look elsewhere. Narveson turns to contractarianism to fill this lack. Contractarianism is, I believe, the correct approach to adopt. Not only can contractarianism provide compelling answers to the question 'Why should I be moral?', but it can yield substantive moral principles. I disagree with Narveson over the matter of which substantive rules are generated. In the second chapter I defend a contractarian argument for two foundational or basic moral rights: to liberty and to welfare. Narveson denies there is a right to welfare because he denies that there are any positive rights. Because they are foundational moral rights they share with natural rights the features of universality and paramountcy. And they are rights persons know they have, not because they somehow perceive this but because they are rational. Moral rights are knowable not by any peculiar faculty of intuition or apprehension but in the same way any other conclusion of practical reasoning is known. And there is nothing fictitious or witch-like about the conclusions of practical reasoning. Contractarianism is not susceptible to epistemological problems of this kind, and against its derivation of moral rights MacIntyre's positivistic argument cannot get purchase.

For libertarianism to be viable it needs rational foundation and an argument for the labour theory of appropriation. Two steps must be taken. The first into a morality of rights and duties that would provide the right sort of underpinning for libertarianism, and the second from this to a morality of private, exclusive rights of ownership

⁶¹ Spencer, *Social Statics*, p.117.

of things. The first foundational rule establishes a robust régime of rights-based liberty which is tapped to justify appropriation through labouring, and so meet Spencer's challenge.

The project of the second chapter, then, is to furnish libertarianism with the foundation it requires if the idea that there are moral rights, including to property, is to be credible. As a possible foundation of libertarianism the Kantian notion of persons-as-ends is examined and an argument that a libertarian could accept is constructed. In the final analysis though, the argument founders on the posit of intrinsic value. Taking the step into a morality of rights and duties by *positing* intrinsic value casts grave doubt on the whole enterprise. Persons may contract to behave as though persons were ends-in-themselves, but that is a different approach altogether. Contractarianism is capable of generating moral rights. As a background informing the hypothetical contract I defend four features universal to the human condition, which together with the fact that persons are rational utility maximisers, are jointly sufficient to determine the essential nature of the rules and motivate the 'signing' of the contract. At this most fundamental level there are only two rules utility maximising parties would contract to: the one a rule of equal social liberty and the other the rule enjoining welfarism. The principal of equal social liberty is co-extensive with the orthodox libertarian non-aggression axiom and the Nozickean view of rights as side constraints, and establishes a moral right to liberty. Contractarianism provides the foundation for Lockean libertarianism of the second kind. The moral right to liberty serves as the jumping-off point for a defence of a derivative right to property in those unowned resources persons mix their labour with.

The task of the third chapter is to render the labour theory of appropriation as cogent as possible, if not outright compelling, by showing how the theory is plausibly the basis

for persons establishing a right to private property. It sets itself the task of meeting Spencer's challenge, i.e. to bridging the gap between labour and entitlement. Without such an argument libertarianism is radically incomplete. All libertarians believe that labouring on an unowned resource grants the labourer a title to that resource, as they have to if their entitlement theory is to work and if the substantive conclusions they draw regarding the justified activities of the state are to be warranted. What is more, such an argument is far from redundant. For example, if international waters are today's equivalent of the seventeenth-century commons then he who catches the fish in them owns them. Can I not own the water frozen in an iceberg if I take it in tow?

The undertaking is contentious. The principle of equal social liberty is the basis for demonstrating how labouring is a method of extending a person's moral right to liberty or freedom of action into or over things in the natural world to include them. Locke's insight that property is an extension of the morally safeguarded self is, it is maintained, fundamentally sound. The connexion is forged by the assimilation of resources into purposeful activity. The right to liberty and the labour theory of appropriation together show why mixing labour with unowned resources grants the labourer a property in them. The rendition of the theory justifies unlimited maximum appropriation and holding. There are no upper limits as to how much may be appropriated but there is limit of term.

The defeasibility conditions of the right to property form the subject of the fourth chapter. Orthodox libertarians hold that there are no limits of term at all on the holding of property. The indigent are reliant on charity. Where they wholly discount the consensus view, Nozick largely ignores it. He imposes two constraints, one a proviso to appropriation and the other on term. The former is his weak reading of Locke's enough and as good proviso, which stipulates that an appropriation is just providing it does not worsen the

position of others. The second is the injunction to avoid catastrophic moral horror, which allows for teleology to take over from deontology in order to avert catastrophic moral horror. Nozick does not say when this is to happen, only that it does at some moment. Rendering his moral catastrophe clause precise leads to the conclusion that Nozick is, appearances to the contrary notwithstanding, a Lockean libertarian. Nozick I criticise to the effect that whilst he knows he is not orthodox he is Lockean and thinks he is not. Making workable sense of the moral catastrophe clause in the context of a libertarian rights-governed society where all tangible property is privately owned but where some are completely without, has the clause justify coercive redistribution for reasons quite parallel to Locke. Application of Nozick's proviso, under the same conditions, to the case of a person excluded from the nexus of exchange and transfer justifies the same conclusion. The law of nature, Locke tells us, obliges every man, when his own preservation is not at issue, 'as much as he can, to preserve the rest of mankind'.⁶² His proviso and the reading of moral catastrophe I give show the same to be true of Nozick. The remainder of the fourth chapter is devoted to some of the normative implications of Lockean welfarism, namely the kind of welfare state to be adopted, the standard of contributory justice and the scope of coercion legitimated by redistribution as a tenet of just transfer.

Chapter V signals a move away from developing Lockean libertarianism and turns to the issue of substantive equality as an article of distributive justice and deflects some familiar contentions from egalitarian quarters against entitlement theories. An invisible-hand, libertarian rights-preserving derivation of equality of outcome is possible, however unlikely. In view of this slight likelihood, 'trumping' arguments for equality overriding an historically created distribution have to be advanced. I consider and reject the argument that it is inconsistent, and hence

⁶² Locke, *Second Treatise*, pp.123-4.

irrational, to treat equally deserving cases unequally before examining John Rawls's argument for greater egalitarianism.

The argument from the amoral natural distribution of endowments fails Rawls because it proves too much. It shows that considerations of desert are double-edged swords: such considerations cannot undermine entitlement theories without also undermining Rawls's preferred distribution. Another argument, drawing on Rawls's anti-utilitarianism, defends the distribution effected in accordance with the labour theory of appropriation and justice in transfer, redistribution included, against the more egalitarian distribution the difference principle warrants. The thrust of this argument is that the considerations favouring the difference principle, in combination with the principle of justice across generations, might - empirically might - favour instead a system of natural liberty as the system which benefits most the least well-off group. Such a system is more aligned to the unfettered markets libertarians favour than it is to the redistributive equality advocated by Rawls.

Afterwards, a paper by Ernest Loevinsohn is critically evaluated. Loevinsohn thinks that far-reaching redistribution can be justified on libertarian grounds. He says that the liberty to use and consume goods is to be maximised by placing them in the hands of those who would otherwise not be free to use and consume them because barred by property rights. This he believes libertarians - because they are champions of liberty - are committed to. I think Loevinsohn is wrong on a number of grounds. First, no libertarian is, nor has to be, committed to liberty in the way he says. Secondly, the notion of the maximisation of liberty (as opposed to the minimisation of interference with liberty) is obscure. My primary objection is that his consequentialist argument fails against a deontological libertarian. He is barking up the wrong tree. What is more, the property rights view he likens to libertarianism may not unreasonably be held to be the view his own argument, though ostensibly directed against it, in fact

vindicates. As in the objection to Rawls's difference principle when combined with the principle of justice across generations, this is an empirical matter, as befits utilitarian arguments. It is not obvious that the calculations do or will favour the wholesale redistribution of goods as Loevinsohn maintains.

The sixth chapter returns to mainstream libertarianism and centres on the debate between the anarchist wing of libertarianism, as represented by Rothbard, and the minimal statism of Nozick and the other orthodox libertarians. Both sides are agreed that persons' rights require protection, i.e. that coercion to this end is necessary, and justified. They differ on two grounds: on the morality of the state providing protection and on the question of the most efficient provision of this good. The first part of *Anarchy, State, and Utopia* is directed - against the anarchist - at showing that the state and the state's enforcement of rights is morally legitimate, and that only a state can provide the kind of good that protection is. Rothbard pursues the libertarian's commitment to the free market to its logical conclusion by maintaining that the protection of persons' rights, currently performed monopolistically by the state, should be provided by firms operating within the competitive market. He thinks the state both immoral in terms of orthodox libertarian rights and the less efficient provider.

Nozick's derivation of the minimal state proceeds on default of the anarchist scenario. I suggest that Nozick is too quick in concluding it does default and I make a case for the anarchist in this respect. This task is complicated by having to include the enforcement of the positive right to welfare in a society where there is no single rights-enforcing body, a problem not faced by a minimal statist. My second concern is with the derivation and stability of the minimal state. Assuming the default to occur, neither the movement to the minimal state nor its future stability is as assured as Nozick thinks. Not only is the derivation not just in all its

stages, as Nozick says it must be if the state is to be legitimate, but the mechanism by which the derivation is made, namely the principle of the compensation of risky private enforcers of rights, leaves the minimal state liable to possible dissolution.

The argument for its possible dissolution turns on the principle of compensation. Specifically, this principle may generate free-riders who choose to have the dominant protection association or state prohibit their private enforcement of their rights and receive the compensation (in the form of protection) the state is obliged to give. A demand for independence (anarchism) is created. Sufficient demand undermines the financial viability of the state and leads it into dissolution. The dissolution of the minimal state, given its origins, would be nothing less than a collapse back into anarchism.

II

FREEDOM FROM CONTRACT; WELFARE TOO

A free man need not be moral, but a moral man has to be free. A world without free men is a world without morality. A point made by Rousseau, who remarks that 'to remove all liberty from his will is to remove all morality from his acts'.¹ The thrust of Rousseau's remark, that morality presupposes freedom,² is not unfamiliar. If a state of affairs is to be just or unjust it must be the result of the actions of free men.³ The connexion between freedom and morality is ordinarily thought so intimate that the only alternative to 'free and moral' is 'not free so not moral'.⁴ I shall not argue the case that morality requires freedom for it is too large an undertaking. Nor shall I argue for the following outline of the conception of morality I think correct. This conception is, however, informed by the rights I believe persons have and the nature of those rights. The two questions 'Why should we be moral?' and 'What are we to do (or not do) to be moral?' are answered.

To step into a morality of rights and duties is to assume duties in order to gain rights. If a man is to rationally take that step he will have to stand to benefit more through gaining rights than he loses by assuming duties. Herein lies the clue to answering the first question: virtue is not its own reward, though the virtuous man is rewarded. As to what one is to do, or not do, in order to behave morally - besides, trivially, respecting rights and fulfilling duties - this can

¹ Rousseau, *The Social Contract*, p.8.

² The converse does not hold. It is possible that there be a world of non-moral agents. A world populated by recluses would be one such.

³ Miller maintains that a state of affairs not the product of human action though changeable by it can be unjust: *Social Justice*, p.18. I disagree.

⁴ One of the more famous expressions of this point is Clarence Darrow's: 'I am firmly convinced that a man has no more to do with his own conduct than a wooden Indian. A wooden Indian has a little advantage for he does not even think he is free'. From a debate with G.B. Foster, reprinted in *Little Blue Book*, No.1286.

only be answered once the notion of virtue's rewards is explicated. Let it be noted, though, that the touchstone of morality and of being moral is that it requires we sometimes do what we do not want to do, i.e. it demands duty over inclination when inclination tempts us in the direction of the dereliction of duty.

A person who has a right to perform action *x* is free to *x* and none may justly prevent him. A person who has a right to *x* is free to not *x*, and none may justly compel him. Those against whom he has this right have a duty not to interfere with his right to *x* or to not *x*. Rights demarcate the bounds of the permissible; duties the extent of the obligatory. That I have a right to *x* means I am free to *x*. That I have a duty to *x* means I am not free to not *x*. Duties are enforceable. A man may waive the right he has to *x*, or release another from the obligation the other has to fulfil the man's right to *x*. Rights are *infringed* when the correlative duty is not fulfilled. The unjustifiable infringement of a right is its *violation*. To justifiably infringe a right is to *override* it. Rights that can be overridden are *defeasible*; rights that cannot be overridden are *absolute* or *indefeasible*. What is not prohibited is permissible: a person has a right to do it. What is prohibited it is obligatory to not do: a person has a duty to not do it. Furthermore, our obligations are enforceable against us.⁵ The moral person, then, resists inclination when it conflicts with his obligations and fulfils his duty. The goodness or badness of persons is reducible to their being disposed to resist inclination and perform those actions constitutive of their duty, or being disposed not to perform them, respectively. Mother Teresa is good and Pol Pot is bad because Mother Teresa is disposed to do right actions and Pol Pot to do wrong ones.

⁵ We might say that a duty justifies enforcing action. Or we can derive the enforceability of duties from the logical fact that a man 'has a right to whatever may be necessary to prevent infringements of his right': Narveson, 'Pacifism: A Philosophical Analysis', p.72. Failure to fulfil one's duty infringes someone's right.

What is permissible is, from the moral point of view, discretionary, to be done or not done *ad libitum*, as inclination prompts. Of the actions we may permissibly perform but are not obliged to a tripartite division is comprehensive. (Comprehensive for the purposes of moral-political philosophy that is. Someone concerned with the freedom of the will would categorise differently.) Some of what we do affects others for good, some affects them for ill, and some of what we do completely passes them by and does not affect them at all. My bathtime rendition of *America the Beautiful* passed everyone by. Its public airing affected all who heard it for the worse. My paying Pavarotti to sing it would have enchanted listeners one and all. When a person acts so as to benefit others and his action involves considerable sacrifice then he performs an act of supererogation. A person only does *wrong* by being derelict, and hence to not perform otherwise permissible actions that would benefit others is no transgression of duty, whether this requires but little of them or not. Strictly speaking, an act of supererogation is no more right than any other discretionary action, but is one which is deserving of praise and commendation. Giving up my seat in the last lifeboat leaving the *Titanic* is supererogatory. It is not required of me that I give you the time of day, and if I do I do not perform an act of supererogation. Beyond the duty to fulfil one's obligations one cannot - promissorial arrangements to one side - be bound to develop these virtues, be that kind of person, etc. Virtues are to be approved of and vices disapproved of, and there are good reasons for this. All round, things are best for it. All the same, virtue is discretionary. Vices are not moral wrongs, but may play a causal role in the generation of them. Vices fall into the realm of usually disvalued traits of character. Room has to be made for the person who is not nice but is moral, and his counterpart the nice but immoral person. Scrooge is not nice (compassionate, generous) but neither is he immoral. Nice but immoral persons are, admittedly, harder to find. No-one has

ventured so bold as to say that the virtuous man always does the virtuous act.

Denying that inculcation of the virtues is the business of the moral enterprise entails denying that morality is concerned with a human *telos*, a norm of good or flourishing. Fostering good and promoting flourishing are beyond the province of morality. They are discretionary, non-enforceable values. Communities may be multiply realised. Some will prefer community with contemplative Christians, others community with hard-living atheists.

Finally, along with the denial of a human *telos* is the denial of objective value. This has far-reaching ramifications as to how the institution of morality in the broadest sense is to be conceived, brought out more emphatically later when I turn to the task of providing libertarianism with foundations. Care has to be taken with *objective* in such a context, but I will have it understood as the rather tame thesis that there is no property *p* intrinsic to any thing or state of affairs that makes it valuable, such that all things that are valuable or are to be valued possess *p*, and are valuable because of *p*. Value is not 'out there' in the world. There are only the valuing that agents *make* and act upon. We talk of values as though they were objective, and our encounter with broad uniformity in morals undoubtedly reinforces the false belief that they are.⁶ To understand morality we should look not to the created world but to the nature of persons as agents, for it is only because we are agents - agents of the particular kind we are - that we are moral. Consider the case of Princip.

'Princip ... was standing disconsolately on the pavement about to go home when an open car, with Franz Ferdinand in it, stopped right in front of him. The driver had taken a wrong turn and was now about to back. Princip stepped on to the running-board, killed Franz Ferdinand with one shot and, mistakenly, the Archduke's wife with the other - he had hoped

⁶ To deny objective value is to put forward an 'error theory' of morals: Mackie, *Ethics: Inventing Right and Wrong*, p.35.

to kill the governor of Bosnia.⁷ Princip assassinated the Archduke as he purposed to, and the Archduke's wife as he had not. What conditions must have prevailed for Princip to be able to do this, for anyone to be able to effect his purpose? To effect my purposes I have to act. To act I have to move my body appropriately.⁸ The freedom I have to move my body we may call my natural freedom. The necessity of routing our actions into the world through movement of our bodies makes our freedom (of bodily movement) of the first importance to us. Unlike God we need to move our bodies in order to effect changes in the world beyond our skins, and are dependent on the causal laws governing the physical world to effect our intentions. This much is a philosophical commonplace, though a very important one. Our natural freedom extends as far as we have a dispositional ability or power to do as we will. A paraplegic is not naturally free, because not able, to dance the rumba. 'Your money or your life!', barks the highwayman - and you are free to choose. 'Wag your ears or die!', is not a choice situation. A man is free to do wrong in this, the broadest sense of free. We can suffer drastic diminution of our natural freedom. I could be paralysed in a motor accident and cease to be able to do much that I currently am able to. Whether or not we can come to do things not previously in our power, and so extend the boundary of our natural freedom, is doubtful. As we are talking here of new bodily movements *per se* (and not new admixtures of them, say in learning to ride a bicycle) if we can the extension is but slight.

Natural freedom is necessary but not sufficient. Not everything we try to do or accomplish comes to pass. This is an everyday commonplace. As Thomas Carlyle remarked, 'Between vague wavering Capability and fixed indubitable Performance, what a difference!'⁹ Not only must we be dispositionally able to perform a bodily movement, that it be in our action

⁷ Taylor, *Europe: Grandeur and Decline*, p.186.

⁸ Davidson says that all we ever do is move our bodies and that the rest is up to nature: 'Agency', p.59.

⁹ Carlyle, *Sartor Resartus*, p.124.

repertoire, but we must be free from constraint too. Purposes can be frustrated by external physical circumstances. Though dispositionally able to move his arm, which raises the revolver that shoots the Archduke, Princip cannot move his arm if it is broken, for example. On the other hand, some purposes are frustrated because prevented by the actions of others. Though he is not paralysed Princip cannot raise his arm if an Austro-Hungarian patriot holds it down, and Princip cannot assassinate the Archduke if knocked down by a trolley-bus on his way to his designated vantage point. In the former example Princip is intentionally prevented from shooting the Archduke by the intervention of the patriot, and in the latter he is prevented by the intentional action of the driver who unwittingly intervenes. Interference is not the same as intervention, though what was intended as interference may turn out as intervention, and vice versa. Intervention stops a person doing what he wants by either preventing him from doing it or by doing it for him, whilst interference, by contrast, hinders or helps, but falls short of preventing or securing the goal. Tying you down prevents you; tying one hand behind your back hinders you. Giving you what you want secures it for you; giving you half the cost of what you want helps you get it.

Non-intervention is a necessary condition of action because intervention entails, in the weak sense of entails governed by the connective of material equivalence, the non-performance of that action. I will make this an analytic truth. If the Austro-Hungarian patriot intervenes it means that Princip is prevented from assassinating the Archduke. Analytically, interference cannot prevent. It is self-contradictory to say 'He intervened in my doing x though I did x all the same', but not to say 'He interfered with my doing x though I did x all the same'. Agents can intervene and interfere with one another's actions, and they may do this intentionally or unintentionally, the difference being marked by the intentionally-prevented and prevented-by-intentions

distinction. I shall use henceforth the weaker 'interfere' and not 'intervene', and mean by it the unjustified, deliberate hindering of a person.

Two illustrations will make this distinction clear. I am at a cocktail party which I am enjoying very much, but somehow I never manage to get a drink. Other people's actions somehow together blindly conspire to thwart my best endeavours to lay my hands on a drink. For instance, as the waiter begins to make his way to me the drinks on his tray are deftly removed by my fellow partygoers. Obviously I am not alone in wanting a drink or two. Like incidents occur throughout the evening which is in consequence frustratingly dry. Lady Luck is against me. There is no conspiracy, merely an outcome well-accounted for in terms of one. The second case is much the same as above. I am at a party and want a drink but, as in the previous case, never get one. However, the reason why not is quite different. There is a peculiar-looking man attired in a brown suit who deliberately thwarts my best endeavours to imbibe. He never lays a finger on me but all the same I never get a drink because of him. Try as I might he is always one step ahead of me, and the evening is disappointingly dry.

What the first case provides is an outcome brought about by purposive actions of others where that outcome was no part of anyone's intention in acting as they did. They wanted to drink just as I did only they were more successful. My drinklessness was the unforeseen and unintended consequence of their foreseen and intended drinking. The invisible hand at work. The man in the brown suit on the other hand is the direct, non-accidental cause of my drinklessness: he plays out the role of hidden hand.

If interferences are properly the concern of moral-political philosophy so too must interventions be. And interferences are. Certainly this is true of libertarianism, concerned very much as it is with personal liberty, and likely true of any morality grounded in rights and duties. If libertarianism is the political philosophy of rights-based

freedom par excellence, we need - as previously appreciated - reason to accept that theory and its placing the individual so definitively centre-stage. What reasons do we have?

Despite the critics' complaint that his is a libertarianism without foundation, Nozick does hint at how it might be founded. Apart from the dubious retroactive argument touched on in the preceding chapter two strands of possible argumentation are discernible. One is suggested when Nozick writes that side constraints 'reflect the underlying Kantian principle that individuals are ends',¹⁰ and their being ends imposes a libertarian constraint prohibiting aggression.¹¹ There is some textual evidence to suggest that Rand, by no means sympathetic to Kant, is similarly aligned.¹² The other strand (and I think that it is different) is one that starts with the distinctness of persons.¹³ Again, Rand says something suggestive of this possible line of argument when writing that man's life means 'the single, specific, irreplaceable lives of individual men'.¹⁴ Where the first says that persons have intrinsic value the second draws on the fact that a person's life, how his life goes, matters to him, but eschews, or at least need not make, the posit of intrinsic value. Not only do I think them distinct because of this, but I think that the latter is the key to making sense of the former.

One criterion for ascertaining whether a person has been, or will be, used as a means in disregard of his value is if his rights have been, or will be, violated. This is the thrust of Nozick's view that rights impose side constraints to action. Any action *x* is permissible providing no-one's rights are violated in doing *x*. Any state of affairs *s* is just providing no-one's rights were violated in moving to *s*.¹⁵ This will not do. Libertarian rights are being presumed in

¹⁰ Nozick, *Anarchy, State, and Utopia*, pp.30-1.

¹¹ *Ibid.*, p.33.

¹² Rand, *The Virtue of Selfishness*, p.27. For Rand's hostility to Kant see her *Philosophy: Who Needs It?*, pp.100-13.

¹³ Nozick, *Anarchy, State, and Utopia*, pp.33-4. Hart takes this to be Nozick's argument: 'Between Utility and Rights', pp.82-3.

¹⁴ Rand, *The Virtue of Selfishness*, p.83; *Capitalism: The Unknown Ideal*, p.23.

¹⁵ Nozick, *Anarchy, State, and Utopia*, pp.150-3.

explication of the side constraints. It may be a logical feature of rights that they impose side constraints but it is not a logical feature of rights that the side constraints they impose are the panoply of libertarian ones. To reduce 'using persons as resources' to 'violating side constraint c' might be formally acceptable. To then cash out 'violating side constraint c' as, substantively, 'violating a person's property right in self and things', or something similar, is going to need argumentation. Identifying side constraints with libertarian rights is sleight of hand. Another line will have to be pursued.

The first Nozick-Rand way of founding libertarianism would be through a wielding of the theme of persons-as-ends, as ultimate and primitive repositories or *loci* of intrinsic value. It is Kant who famously implores us to act only in such ways that we treat humanity never solely as a means but always at the same time as ends,¹⁶ and libertarians echo Kant. Nozick knowingly invokes the Kantian principle of never using persons solely as means, and elsewhere asserts that a right is a basis for demanding or enforcing compliance towards one's 'basic moral characteristic(s)',¹⁷ which are intrinsically valuable.¹⁸

Adopting the persons-as-ends dictum in support of libertarianism might go something like this: persons are ends in themselves, they have intrinsic value; it is morally wrong to treat persons in ways incompatible with respect for their being ends in themselves; as ends in themselves persons are to be free to act as they choose providing only they always act in ways compatible with respect for intrinsic value; to deliberately constrain a person's intrinsic value-respecting actions is to aggress against them; therefore, no-one may aggress against any person on pain of moral wrongdoing.

Whether the argument in the above form works need not concern us (I hazard it only as a conjecture). Validity to one

¹⁶ Kant, *Groundwork of the Metaphysic of Morals*, p.96.

¹⁷ Nozick, *Philosophical Explanations*, p.451.

¹⁸ *Ibid.*, p.730.

side, there are a number of telling objections to it, the last of them to my mind decisive. First is the objection, levelled by John Exdell, that the Kantian imperative does not clearly entail the right to own land and natural resources, as libertarians would want it to. As G.A. Cohen thinks of the precept of self-ownership, so Exdell does of the Kantian imperative: it does not unambiguously exclusively favour the libertarian's conclusion. Land and natural resources may not be unowned prior to appropriation because society or mankind may have a moral right to them, so the right not to be used as a means does not entail a right to property in them.¹⁹

Secondly, even if it is true of the Kantian imperative that 'upon reflection most of us would count it among our firmly held convictions',²⁰ we want to know if we should. That we do count it amongst our convictions reports a piece of sociology. We want to know if its inclusion in our belief system is defensible. The imperative is not self-evidently true, and Kant's own vindication of it is threatened with circularity.²¹

But the decisive objection is against the presumption of intrinsic value. Simply, value is not in the realist's world of mind-independent properties. Value is not an intrinsic property of actions, things or states of affairs, and to suppose it is is metaphysical extravagance, making the world ontologically far stranger than it is and needs to be to adequately account for morality. Anyone who rejects intrinsic value cannot accept the argument in this form.

The second possible argument suggested by Nozick and Rand, given below, is also intended in the spirit of conjecture. The distinctness of persons argument does not make the posit of intrinsic value. It says that to use others solely as means fails to treat them as individuals with their own lives to enact. This I think can be developed so as to underpin the persons-as-ends dictum, repudiating as an error the positing

¹⁹ Exdell, 'Distributive Justice: Nozick on Property Rights'.

²⁰ Ibid., p.142.

²¹ See Haezrahi, 'The Concept of Man as End-in-Himself', p.297.

of intrinsic value but explicating that we have reason to act as *though* persons possessed intrinsic value. Persons do not possess intrinsic value and we know they do not, yet we are constrained to behave in ways co-extensive with their (counterfactually) having it. In this it presages the contractarian argument.

The distinctness of persons construction begins with the fact that, from the point of view of the person whose life it is, how his life goes is of especial importance to him. A person who has any preferences at all cannot be unconcerned as to how his life goes; there is no logical room for the driving of a wedge between a man and his (first and second order) preferences after which one could say 'Here is the man and here are his preferences, and the man cares not for them'. How someone's life goes is judged by him in terms of the preferences he is able to satisfy or have satisfied.²²

As a generalisation about persons this is true. I am not you, your preferences are not mine, the death of me is not the death of you. We all naturally have this first-person perspective on the world, the view from somewhere. Whatever my preferences the mere having of them prompts me to seek their satisfaction. My preferences matter to me in a way that yours do not, though yours matter to you in the same way mine matter to me. Whilst necessarily concerned with how my life goes I am but contingently concerned, if I am at all, with you and how your life goes. I care how my life goes if I have any preferences at all; I care about you only if I have preferences that make reference to you as the intentional object of them. So much is philosophical anthropology. Further excursion into which reveals another equally significant difference, this time over how you stand to me as the or an intentional object of a preference of mine.

Persons are a central part of our lives and how we enact them. They are so intimately connected with preferences we

²² Lomasky pursues a similar line, contending that the value-preserving interchangeability of producers of impersonal value founders on the rock of personal projects: 'Personal Projects as the Foundation for Basic Rights'.

have - if not constitutive of them - that how their lives go affects how ours fare. Call this concern *for* others, with the way their life goes for them. Often our concern in others is substitutable, i.e. it fixes on substitutable properties they exemplify or rôles they fulfil. Call this concern *with* others. Providing these properties or rôles are preserved through substitution of person the way our life goes is unchanged. We are not concerned with their first-person perspective at all, nor with the content of it. It does not matter who in particular exemplifies the property or fulfils the rôle provided only that someone does. It does not matter who picks up the regimental colours though it matters that the colours are retrieved. Who, precisely, is to be the first man on the moon is not important as long as someone lands before the Russians. When we are looking to the occupier of some or other designated rôle or function, as here, our concerns are instrumental and not about the preference-bearing person who occupies the rôle. We do not take into account how he sees it from the inside, how his being substituted is not indifferent to him.

The fat man in the bright swimwear lying prone on the beach is my landmark, and I use him to fix my position. As a ship uses a lighthouse I use the fat man. But I use the fat man in a morally acceptable manner. Even though I treat him as a means I still do not fail to treat him as though he were an end in himself. The Kantian imperative enjoins us to act so that we never treat persons *merely* as means but always at the same time as ends.

Using a person solely as a means is to treat him as an instrument for the satisfaction of a preference of mine, in a manner that encroaches non-consensually on his first-person perspective; in making my life go well from the inside I cause his to fare ill from his perspective. I value you instrumentally in so far as I value you only for your use-value in accomplishing my purposes, and I use you solely as a means in so far as I override your living your life in order

to enact mine. A premiss to the effect that no-one is to enact his life by causing others to not enact theirs is missing, and required. Without it the argument is incomplete.

To my mind the signal advantage of this argument lies in making sense of the Kantian imperative without positing intrinsic value. For that reason alone it represents a good start. The question of course is *why* we ought never to treat others solely as a means. Why should the fact that my life will go better only if I make yours go worse constrain me? An answer to this question will have led us into a morality of rights and duties. It is to this that I now turn.

I will propose a contractarian argument in favour of a principle of equal *social* freedom or liberty. It is an argument for a principle co-extensive with the (unargued for) orthodox libertarian axiom of non-aggression. More than that, the principle establishes a functional equivalent to the more basic axiom of self-ownership which underpins the non-aggression axiom. The contract to the principle is not for civil obedience or political authority but for morality. I will not argue separately the case that contractarianism is the correct or most plausible metaphysic of morality, but will argue, from the assumption that it is, to a particular, reasonably precise contractual outcome. Contractarianism explains in an acceptably naturalistic this-worldly manner why there is an institution of morality at all, why there is this corpus of rules rather than that, and why we should be moral. Morality is for man, not man for morality. Anything more leads into metaphysical extravagancy, romantic speculation or intolerable relativism. The contractual outcome has two components, the principle of equal social liberty being one, and the duty persons have to meet one another's fundamental needs the other.

Contractarian theories suppose that every rational person, were he to hypothesise himself into the pre-moral condition, would agree to hold himself duty-bound to certain rules constraining his behaviour because observing these rules would

be in his individual long-term best interest. Persons' interests are best served by their recognising constraints to indulging their inclinations, i.e. self-interest is overruled by morality, and being moral is in each person's interest. This is not self-contradictory because *interest* is used in two different ways, the former refers to our long-term or enlightened interest, and the latter to our short-term interest. The hypothetical contract is a device for determining what rules we ought to abide by and hence also for the present examination of the rules we actually have. Contractarianism stands to extant moral corpuses as an acid test. Juxtaposed against man's pre-moral condition contractarianism accounts for why we want morality and its essential form. Contractarian methodology supposes we constrain ourselves in the pursuit of our own advantage and that we do better for embracing moral rules, the duties incumbent on us as parties to the contract. Contractarianism has to show that it is rational to perform one's covenant even when performance is not directly to one's benefit, provided that it is to one's benefit to be disposed to perform. It is better that a man wants to want to do his duty than that he only want to do it; temptation is more easily resisted. 'The theory we need', says Narveson, 'is contractarianism. The general idea of this theory is that the principles of morality are (or should be) those principles for directing everyone's conduct which it is reasonable for everyone to accept. They are the rules that everyone has good reason for wanting everyone to act on, and thus to internalize in himself or herself, and thus to reinforce in the case of everyone.'²³ What the rules are to be is primarily a function of what the initial condition to be remedied is taken to be.

Perhaps the most developed account of contractarian morality to date is David Gauthier's. In his *Morals by Agreement* Gauthier writes that his enquiry to show that moral duties are rationally grounded leads 'to the rational basis

²³ Narveson, *The Libertarian Idea*, p.131.

for a morality, not of absolute standards, but of agreed constraints',²⁴ and that morality can be generated from the non-moral premisses of rational choice.²⁵ Initially, a person draws no distinction between what he may and what he may not do. How, then, does a person recognise a moral dimension to choice if morality is not initially present? 'Morals by agreement offer a contractarian rationale for distinguishing what one may and may not do. Moral principles are introduced as the objects of fully voluntary *ex ante* agreement among rational persons.... As rational persons understanding the structure of their interaction, they recognize a place for mutual constraint, and so for a moral dimension in their affairs.'²⁶ The rules we observe, the rules we constrain ourselves by and can be held to, constitute - at the most fundamental level - our morality. They constitute our morality because they are the rules we would on rational reflection adopt as binding.

Rational contractors are individuals bearing preferences (values) and who apply reasoning in their endeavours to satisfy them. 'Preferences' is the generic term for the desires, whims, fancies, goals, projects, affinities and the like of agents: in short, the ends at which persons direct their actions, their purpose in acting. They range from the everyday, mundane wanting an ice-cream to the bizarre desire to enter *The Guinness Book of Records* as the fastest jeep-eater in the world to the more rarefied project of saintliness.

Preferences are inherently action prompting: to have a preference is to be moved to seek its satisfaction. Rational contractors are preference-bearing individuals, moved to satisfy the preferences they bear. Expected utility is the measure of the strength of preferences, and the stronger or higher ranked the preference the greater the utility expected

²⁴ Gauthier, *Morals by Agreement*, p.2.

²⁵ *Ibid.*, p.4; Narveson, *The Libertarian Idea*, p.166.

²⁶ Gauthier, *Morals by Agreement*, p.9.

from its satisfaction. If my preference is for push-pin over poetry in choosing between them I maximise my utility by opting for push-pin. Persons rank-order or weight their preferences, i.e. they have a subjective utility structure, in which each preference has a place relative to the others. Preferences can enter and leave the structure as well as change their relative position within it, and accordingly the preferences a person has and their place in his utility structure indicate in which direction his utility lies at that time. Prompted as we are to act on our preferences, we choose rationally when we choose to maximise expected utility. Rational contractors are individual utility maximisers. Persons are rational if they seek to maximise their expected utility, in whatever dimension this assumes, and choose the believed most efficient means to this end. Rationality as purely instrumental mirrors value subjectivism, and thus the posit of intrinsic value is eschewed. This is the psychological profile, as it were, of the parties to the contract, the kind of contractors they are.

As to the preferences persons may have, no limit to their content is presupposed. Obviously, prior to the agreement to be moral there can be no normative stipulations the content of preferences must meet. Of course, standardly, because human beings are alike in many fundamental respects we should expect a broad convergence at one level. Sophisticated New Yorkers and noble savages alike are moral in fundamentally the same ways because they are fundamentally alike as persons. These might be classified as preferences for the traditional economic goods of food, shelter and clothing, but might be taken to include the intangibles of love, friendship and the like. Beyond that, all sorts of things can be the objects of persons' preferences: wealth (Marx), glory (Hobbes), *hedon* (Bentham), sex with mother (Freud) and sundry others; a pet gerbil, yellow plaid trousers, you name it. You name it and there is bound to be someone, somewhere, who currently has it, high or low, in his utility structure. They can even include

preferences for non-existent objects; to own the Holy Grail, for example. It does not matter what they include, nor how broad the range of preferences are at the shared level. All that matters is that preferences are always someone's, and their bearer therefore has a vested interest, in terms of utility, in satisfying them.

Contractarianism neither requires nor entails that persons are selfish. Utility is not the same as welfare. Utility is the satisfaction of interests of the self whilst welfare, on the other hand, is the satisfaction of self-centred preferences, interests in the self.²⁷ My preferences are mine but they need not be about me. Some will be preferences that refer to the utility of others, for example Captain Oates departing the Scott-expedition tent. It was indeed the act of a brave man and an English gentleman: it was ground-floor altruism on the part of Oates in that what moved him was a concern for his fellows. The model of rationality deployed here is a model of human choice and action *per se* and not of 'bourgeois' choice and action. It is as true of Mother Teresa as it is of Pol Pot as it is of Donald Trump.

The contractarian case for a principle of equal social liberty needs a background against which the rationale for and the success of the contract is juxtaposed. The success of the contract is a matter of the parties to it being better off by contracting than by remaining in the pre-moral condition, and better off in terms of their (subjective) utility structures. The rationale for the contract is prospective parties envisaging their being better off. This background is the hypothesised pre-moral condition. What that condition would be is, arguably, best captured by a counterfactual thought-experiment. Imagine that all moral constraint on behaviour is lost overnight. Tomorrow, the state of nature. That state, the pre-moral condition revisited, is the state where instrumentally rational utility maximisers are free to pursue their advantage without restraint. It is the condition wherein

²⁷ *Ibid.*, p.7.

natural and social freedom are undifferentiated. This state for any and every individual is going to be better, indifferent to, or worse than the duty-constrained condition. If persons are broadly equal in their natural powers and abilities, as Hobbes says they are, then we will take it that this state is worse in terms of subjective utilities, and for the sorts of reasons Hobbes gives.

The contract takes place against a background of relevant facts about all men and their environment. Hobbes's is perhaps the most famous of the depictions of the human condition, no doubt because it is the most uncompromising. Whether it is deserving of the appellation 'war' does not really matter. What has to be shown, and all that has to be shown, is that things go better for self-restraint. A more recent listing of the features universal to the human condition is given by Herbert Hart in what he calls the '*minimum content of Natural Law*', where 'the facts mentioned afford a reason why, given survival as an aim, law and morals should include a specific content.'²⁸ Unless these facts are acknowledged in law and/or morality, says Hart, the purpose of associating for survival would not be advanced. Hart's five features are: men are mutually vulnerable physically; men are approximately equal in their abilities to help and harm one another; men possess only limited altruism; resources are limited; and men have only a limited understanding and strength of will.²⁹

Hume cites four 'inconveniences' which justice remedies: selfishness, limited generosity and the easy change and scarcity of external objects.³⁰ I would add Hart's equality of ability to help and harm, on which Hume is silent. Anyone decidedly superior in his ability to harm or avoid being harmed in turn has less if any reason to constrain himself. An incredibly strong and near-invincible machine that was a free agent (a bionic man say) would not need to submit to morality

²⁸ Hart, *The Concept of Law*, p.189.

²⁹ *Ibid.*, p.190-3.

³⁰ Hume, *A Treatise of Human Nature*, p.494.

for its own good. Hobbes was right to include the general equality of ability in his account. '[T]he difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.'³¹ Goliath thought he was different; David gave the lie to this.³² Hart's second feature is an entailment of the first. To the extent that we are mutually vulnerable we are equally capable of harming one another. Both Hart and Hume agree on confined generosity. The fifth of Hart's features is man's limited understanding and strength of will, which could be included under mutual vulnerability. Hume's citing the easy change of goods is obvious, and central. That leaves scarcity.

I would not include scarcity. Easy change is all that is required. Scarcity does not cause conflict, but it can make a bad thing worse. The problem of scarcity has loomed large in the history of political philosophy though its significance, I am inclined to think, is overrated. Adolf Grunebaum writes: 'It is only because goods of the world are scarce that ownership rules are necessary. Were goods as superabundant as the water in Locke's river, there would be no need to justify any form of ownership at all.'³³ That this is mistaken is easily shown. If goods require effort to acquire and are of easy change - as most are - then rules of ownership have a rôle, even granted superabundance. There is a mighty river, broad and deep and most potable. Drawing a goatskin of water from this superabundant river leaves more than enough and as good remaining. Only this river wends its majestic way at the bottom of a grand canyon, and the people live at the top. Collecting water is a straightforward but arduous task. Once drawn it is of easy change: carrying off your goatskin when you are not looking is an easy task. Here a rule or rules that

³¹ Hobbes, *Leviathan*, p.80.

³² Hobbes's Sovereign is decidedly 'different'. Should we not expect it then to claim benefits it says others may not?

³³ Grunebaum, 'Ownership is Theft', p.551.

assign ownership have a place. (And what more natural rule than one that gives to the collector the collected?)

My initial background against which the contract is juxtaposed, then, includes the mutual ability to help and harm, limited generosity, the easy change of external goods, and of course the presence of persons endowed with instrumental rationality concerned to maximise their utility. These conditions give rise to conflict and problems of co-operation. These background conditions do not underdetermine the contract.

Hobbes famously said of the pre-moral condition that it was a state of war of every man against every man, of a life 'solitary, poor, nasty, brutish, and short', a condition in which there could be neither justice nor injustice. 'To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place.'³⁴ And from this, said Hobbes, it follows that every man has a right to everything.³⁵ In the condition of war persons recognise no limitations on what they may or may not do. It is hard to see how, pre-morally, this can be otherwise. Hobbes puts this nicely when he holds that 'The desires, and other passions of man, are in themselves no sin. No more are the actions, that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know.'³⁶ Persons are at liberty to do anything at all that they wish and have the power, the natural freedom, to perform or bring about. One can see why Hobbes saw it as a state of war. For instance, I am in a hurry to cross this narrow bridge and you, old man, are in my way, so I throw you off to facilitate my passage. Persons have no value beyond their usefulness. In the parlance of the distinctness of persons argument there is no reason why, if you do not contingently stand to my preferences such that I am

³⁴ Hobbes, *Leviathan*, p. 83.

³⁵ *Ibid.*, p. 85.

³⁶ *Ibid.*, p. 83.

concerned for you, I should not make my life go better by making yours go worse. Because each has a right to as much as he can by force and guile get and keep there is no security either of person or possession. You, or 'your' straw-filled clothes, will make a first-rate scarecrow if lashed to a post in the middle of 'my' field. Each is at the mercy of the vicissitudes of others. We are all prone to be thrown off the bridge, as it were, because we are in one another's way, by design or by chance. Furthermore, the fruits of co-operation are denied man in his natural condition. No-one is prepared to enter into co-operative ventures without assurance of a return for his time and trouble. In the parlance of game theory no-one is prepared to be 'suckered'. In short, in the pre-moral state people have things they do not want, namely the ills of conflict, and lack things they do want, specifically the fruits of co-operation. Whatever their utility structure, they suffer some disutilities without compensating gain and forego the satisfaction of many preferences for want of co-operation.

What of the person - the fanatic - whose only or greatest preference is for interfering and who cannot see any point to constraining his behaviour? *Ex hypothesi*, it seems his preferences are not served by being moral. The problem posed by the fanatic is possibly vanishingly small. Considering that he values his liberty and acknowledges resources as a pre-condition of his liberty to pursue his utility, the fanatic is but an aberrant preference away from contracting. The lure of morality is present even to him.

Men wish to avoid the ills that beset them in the pre-moral condition and progress to a better one where the goods that are tenuously available are made more securely available, and the goods not otherwise attainable at all become common. For Hobbes, the goods tenuously available in the state of nature are, he says, 'everything', for 'the weakest has strength enough to kill the strongest'.³⁷ Regarding those goods otherwise not available at all, Hobbes's list is predictably

³⁷ *Ibid.*, p.80.

extensive. '[N]o culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society.'³⁸

Conflict and co-operation both present opportunities which the parties to them have an interest in resolving, and resolving in their favour. For each case of conflict there is an optimal outcome for each party, namely that he win. But there is no guarantee that the winner at time t_1 will win at $t_2, t_3 \dots t_n$. A régime of conflict is too costly to contemplate for persons equally well-endowed with natural powers. They can at best hope to win half the conflicts they become embroiled in, and pay the cost of foregone co-operation. As an aside, let me say that I do not think it usually rational to win conflicts by eliminating one's adversary. This would be an unreasonably high price for the victor to pay. Were A to rid his world of B then A would leave the state of war with B, but he would not by that enter the state of peace with its attendant goods. That requires co-operation and now A has no-one, or one person less, to co-operate with.

As with conflict, so too with co-operation. There is an optimal outcome for each party, namely that he receive assistance without meeting the costs. Self-regarding creatures do not assist one another willy-nilly. There has to be something in it for them, in terms of their utility structure. I may gain your co-operation by offering a consideration. The problem is one of assuring fidelity to the co-operative enterprise once that structure is engaged. The party seeking assistance has to offer something to induce it, and this represents a disutility - a cost - to them. Now, why should I pay once you have assisted me, or you assist me once I have paid? Here is the familiar (game theoretical) rub: two self-interested persons each know this is how the other reasons;

³⁸ Ibid., p. 82.

neither is prepared to pay before being assisted or assist in anticipation of payment, for fear the paid or the assisted party default, i.e. sucker him. They fail to co-operate and so forego a mutual increase in utility.

In isolated, one-off cases defaulting on payment may be the rational course. When engaged in recurring or iterated situations it is not. Defection pays only in the short run. In the long run a person does better pursuing his enlightened interest through reciprocal co-operation.³⁹ Co-operation is a hedge against the future. 'Your corn is ripe today; mine will be so to-morrow. 'Tis profitable for us both, that I shou'd labour with you to-day, and that you shou'd aid me to-morrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and shou'd I labour with you upon my own account, in expectation of a return, I know I shou'd be disappointed, and that I shou'd in vain depend upon your gratitude. Here then I leave you to labour alone: You treat me in the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.... Hence I learn to do a service to another, without bearing him any real kindness; because I forsee, that he will return my service, in expectation of another of the same kind, and in order to maintain the same correspondence of good offices with me or with others. And accordingly, after I have serv'd him, and he is in possession of the advantage arising from my action, he is induc'd to perform his part, as foreseeing the consequences of his refusal.'⁴⁰

Terminating conflict and making co-operation possible are what persons contract for. By contracting all stand to gain more utility-wise than they do by not contracting and staying with the *status quo ante*. When push comes to shove in the pre-moral condition mutual constraint becomes attractive. Contracting secures more of what they do want and less of what

³⁹ See Axelrod, *The Evolution of Co-operation*.

⁴⁰ Hume, *A Treatise of Human Nature*, pp.520-1.

they do not want. Through co-operation it is possible that most, perhaps all, get all they want. What is it rational utility-maximisers contract to do or refrain from doing, and to what rules do they submit themselves to as of duty? Rational contractors agree to abide by certain rules that are advantageous to all, in terms of subjective utilities (preference-satisfaction), and so dispose themselves to abide by the rules even when it is to their short-term advantage to opt for expediency over duty.

So what rules do rational contractors agree should constrain them? What are the best-case scenarios for any utility-maximising individual? The best-case scenario is - as Gauthier points out - a condition of natural harmony in which everyone could fulfil themselves without constraint. This is neither possible nor, thinks Gauthier, desirable.⁴¹ The next best is where others are happy slaves to one's preferences, are in one's power or under one's control. Where everyone reasons similarly there are only masters and no slaves and a contract on this basis is impossible. Would-be contractors will have to settle for less than their ideal outcome.

As much as Hobbes's depiction of the state of nature is familiar so too is his solution. Men yield up their equal right to everything in exchange for peace. Men are to 'lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.'⁴² I believe that this is about as much as rational agents would be prepared to concede to one another. (I say 'about' owing to the yet to be addressed second component of the contractual outcome.) It is about the best they could do for themselves. They step into a morality of rights and duties to better themselves over the pre-moral condition. This is the baseline for measuring the success of the contract. What counts as bettering themselves is cashed-out in terms of their subjective preferences, which differ from time to time and

⁴¹ Gauthier, *Morals by Agreement*, p.19.

⁴² Hobbes, *Leviathan*, p.85 (emphasis removed).

from person to person. Rational contractors would only submit to rules that promoted preferences, whatever they might be. The rules of morality will have to be rules acceptable to everyone because they have preferences *per se*.

Everyone contracts to the rule which I will call *Quieta Non Movere*: Leave Well Alone. Rational contractors would agree to forego the pre-moral liberty to do unto others as they please. The rule Leave Well Alone states a principle of equal social liberty requiring everyone to desist from deliberately interfering with others doing as they purpose, providing of course that they in turn meet the requirement.

The principle of equal social liberty means every person is free to pursue his utility providing he does not purposefully interfere with the liberty of others to pursue theirs. It does not entail that a man may not use or consume resources on the grounds that others wish to use or consume them, and his doing so will leave them unfree to. That is far too strong. If I could not satisfy my preference *p* because my using *r* to or in satisfying *p* would leave *r* unavailable to others for the satisfaction of preferences they have, then no-one could use any resources, nor even go any place using some continuum of space at a time without fear of trespassing on someone's liberty. No-one could board a train knowing passengers farther down the line would be left unfree to board due to lack of space. Only in highly artificial environments of the Crusoe kind could this rendering of the rule be anything but a principle prescribing inaction. The principle of equal social liberty does not aim to ensure that persons never get in one another's way but that when they do it is incidental and not essential. The principle draws the distinction illustrated by the two cocktail-party scenarios. It recognises the central difference between not being free because of circumstances produced unintentionally on the one hand, which it judges to be permissible, and not being free due to interference or deliberate hindrance on the other, which it decrees to be impermissible and hence wrong.

Each is to pursue his utility free from the predations of his fellows. If the end at which your actions are directed has been removed by someone else not as the consequence of interference, or has removed itself (the hare has run away), or never existed (your preference is for hunting snarks), then your freedom is not curtailed. Being left well alone is being left free to do, not free to succeed. It is not a rule of equal preference satisfaction.

Why this rule? The rationale for surrendering some natural freedom is to gain peace and the myriad advantages thereof, and of avoiding war with its consequent losses, wherein each has a Hobbesean right to as much as he can get and keep. To this end contractors have to surrender this right. No-one would surrender more than is necessary and sufficient to end war and make co-operation possible. The more he surrenders the more of his preferences he foregoes. Each wants to concede as little as he needs to in order to leave the pre-moral condition and open himself to co-operative ventures. Conceding more than is necessary is to wantonly surrender a greater part of his utility than is required for the end he has. Rational contractors do not want to surrender any more of their natural liberty than the next person for that would put them at a relative disadvantage. If the contractors are naturally equal in their powers they will not have to. The contract is an equal contract: no-one is giving up more, or less, than anyone else because all are equal in their powers.

Conceding more than this threatens to leave some utility maximisers less well off than they otherwise need to be. The pre-moral condition is worse for all rational utility maximisers. The principle of equal social liberty represents almost the necessary and sufficient condition that all can contract to. It leaves all free to pursue their preferences whatever they may be. Anything more than this, i.e. any rule mentioning some preferences not universally shared or mentioning some persons' preferences, would be to favour some preferences over others. Those or those whose preferences are

not picked out would be paying a higher price in terms of their utility to enter morality than those who are individuated or whose preferences are. Assent would not be forthcoming. This may seem hard on those unequal in their ability to pursue the satisfaction of their preferences, e.g. the handicapped. Yet the contract represents a bettering even for them - and a substantial bettering at that - over the pre-moral condition. As with all parties to the contract, they gain as much as they can without recourse to the invalidating device of especial group or preference individuation. Indeed, a case could be made for saying that the naturally unequal gain more. Pre-morally, they are naturally disadvantaged relative to the able majority. Contracting remedies this disadvantage by constraining the more able to treat the less capable as they do one another.

Agreeing to and abiding by the principle removes everyone from the state of war. As soon as the principle is observed the state of war is left behind, for that state is precisely the state in which no-one refrains from using persons as, when and where their instrumental rationality leads them. The principle secures for us freedom to pursue and enjoy (most of) our preferences. True, we lose out in that we are no longer free to throw one another off the bridge - but then we had only a fifty-fifty chance of throwing instead of being thrown. The gains certainly exceed the losses for nearly all rank-orderings of preferences. Fanatics are the exception. The half of being secure is psychological, believing that one's utility structure, whatever its configuration, is on a par with everyone else's. Secondly, the principle gives us access to the fruits of co-operation that were not open previously. Before the contract one could get 'co-operation' through force, i.e. by riding roughshod over the preferences of others. The problem was one could also be oneself coerced into 'co-operating'. Given equality in powers, for any encounter with a person where one of the parties is looking for 'co-operation' the chances are only fifty-fifty that he will be

successful in getting it. Apart from this, non-voluntary 'co-operation' threatens us with conflict. The only way of eliciting genuine voluntary co-operation, I have said, is by appealing to the utility structure of others. We have to get them to want to benefit us by agreeing to benefit them in return. Equal social liberty leaves each and every person free to make and accept those exchanges he wishes to according to his own lights.

It is most rational, then, to retain as much liberty as is co-extensive with each other's liberty. 'Do not incur any duties, you may not want to keep them', would be the policy to pursue. It is each's best-case scenario. Unfortunately, it cannot get one out of the state of nature. 'Incur duties you need to in order to end war and gain co-operation, but renege on your agreements wherever and whenever you can', is the second-best scenario. This policy is not without its risks. Malefactors get found out and lose trust. A reputation for being moral is costly to fake.⁴³ The next best step after this - and the first able to elicit universal assent - is the policy 'Do not incur any more duties than you have to in order to be at peace and gain the prospect of co-operation, you may not want to keep them.' That way one can surrender more of one's freedom, at the time and place and for the duration of one's choosing, outside the contractual outcome. I can socially bind myself by entering into any number of various kinds of promissory relations.

Rational contractors choose the rule *Quieta Non Movere* because it is the antithesis of the ubiquitous interference that is the hallmark of the state of war. The solution to such a state where everyone is under threat of continual interference is the state where no-one interferes, rather than that all do. Between these poles, interfering to bring about or prevent from being brought about certain actions, states of affairs, etc., is a middle-way position, and on the face of it not an unattractive one. The problem is whose preferences are

⁴³ Frank, *Passions Within Reason*, pp.99-102.

to be overridden? And who decides whose preferences are to be overridden, and when? In the absence of contracted-to rules answering these questions such interference is *prima facie* ruled out. A middle-way contractual upshot is unlikely amongst parties with different, and when shared differentially ordered, utility structures. It is not rational to consent to a rule stipulating only certain individuals or some group or class may interfere if one or one's group is not named.

If subjectivism about values is true it might be thought that we have to embrace only a negative principle of liberty. Anything more would be to choose some preferences or values above others - against the requirement of neutrality across preferences. And the question again is: in the absence of (near) unanimous agreement who chooses, and why them? Furthermore, any rule that required persons to assist others in specified ways would be unacceptable to rational contractors on the grounds that it would entail relinquishing pursuing their utility in order to assist others in satisfying their preferences - the happy accident that all prefer this aside. Certainly, this has intuitive plausibility. It is, though, not judicious enough for it ignores the logic of the contractarian argument, which I take to legitimate the right to liberty and a positive right to welfare. The logic of that argument works like this: just as liberty as freedom from interference is necessary for the satisfaction of preferences because necessary for action *per se*, so too are resources necessary for the satisfaction of preferences because necessary for action. Not in the sense that all preferences are directed to the moving, altering, transforming, etc., of resources - not all are, for instance my growing a moustache - but necessary in the sense that they are a pre-condition for being able to pursue any preferences at all. In short, as freedom is a pre-condition for the pursuit of preferences so are those resources that enable one to be a free, utility-maximising agent, for any preferences one has. I touched on this earlier when I said that even the fanatic values his

continued ability to act on his expected utility. Put another way, what does it benefit a man to gain his freedom only to lose his life? Any man who values his freedom will answer 'Nothing', and due to this contractual assent to a positive right to resources for standard, basic welfare is not to be thought implausible.

Given the psychological profile of the contracting parties, the background against which they contract and the symmetrical logic of the contract, persons would be rational to agree to this component. Much of what favours the principle of equal social liberty I believe favours this second welfarist component, and so I will dwell on its justification only fleetingly. Besides, in the fourth chapter the same substantive conclusion is arrived at in the context of a critique of Nozick, though the reasons are quite different. The critique of Nozick turns on a construction of his moral catastrophe clause. My preferred justification would be in terms of the contract though I am happy enough with the consequentialist argument for it. This is not meant as a fudge. That argument is my safety net so to speak: if the contractarian justification is unsatisfactory I can fall back on the consequentialist argument.

The commitment to welfarism is a reflection of the fact that, being rational utility maximisers persons are not going to 'sign' any contract that constrains them in recognising equal liberty for all when they appreciate that, in acting as they are socially free to, others may use and consume all resources in the process. In so recognising the equal liberty of everyone (and everyone else my equal liberty in exchange) I might be inadvertently signing away my life. In both party examples I was left frustratingly drinkless. Now I am left life-threateningly resourceless. Envisaging this possibility might give pause to my contracting to Leave Well Alone. All might have given up their right to everything for a liberty to nothing. At least pre-morally all had a *de facto* fifty-fifty chance of wresting some of these needed resources from whoever

held them. Arguably, it is rational to want a contract that does not allow for the dire eventuality of going wholly without when others have plenty. Everyone wants life and liberty. Only then is the pursuit of happiness open to them.

Meeting the fundamental needs of others is going to cut into the pre-moral pursuit of my preferences, but so too is abiding by the principle of equal social liberty, leaving me unfree to throw you off the bridge, for instance. Abiding by the principle is rational. If I am right then contracting to welfarism is rational too. And it is rational for all utility maximisers whatever their utility structures because it appeals only to formal features that hold of all persons and not to some kinds of preferences but not others.⁴⁴ To abide by the rules that work to the advantage of all - Goliath's and David's, Charles Atlas's and all us eight-and-a-half-stone weaklings alike - just is to behave morally, no matter that one's abiding by the rules, except in rare instances, is not the result of any rational deliberation. Morality does not fall from the heavens inscribed immutably in stone; neither does it emanate from something as metaphysically outlandish as a Good Will; and nor is it the product of the promptings of a philosophically suspect faculty of intuition. Morality is more pedestrian - though not any less efficacious for it - than this.

If all agree to refrain from interfering with others' pursuit of their utility then they are duty-bound to refrain. They have stepped into a morality of rights and duties. If each is duty-bound to not interfere then on the strong, and strict correlativity thesis (the thesis that says if A has a duty to B then B has a right against A) each has a right to be free from interference. Why the strong correlativity thesis applies and not the weak one (that if A has a right against B then B has duty to A) might seem a matter of small importance. Where there is an egg there has to be a chicken to have laid

⁴⁴ See in connection the objection that Rawls's thin theory of the good is not thin enough, raised by Sandel, *Liberalism and the Limits of Justice*, p.27 and pressed by Schaefer, *Justice or Tyranny?*, pp.31&38.

it, and it is of small concern if the chicken or the egg came first. The kind of correlativity, though, is of the first importance. Unlike its weak relation, the strong correlativity thesis recognises no duties where there are not rights. It says that where there is an egg (duty) there is a chicken (right), and makes no place for eggs (duties) not laid by chickens (rights). Accordingly, the strong correlativity thesis disavows duties of benevolence and charity, for example. When developing the welfarist component I assume strong correlativity because, first, I think it the correct view: the only duties a man has are those he agrees to shoulder, and in shouldering them others have rights re his fulfilling his duties. Rand would approve: 'No man can have a right to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man.'⁴⁵ And secondly, because the claim to resources it underwrites can then go through as either a right to resources entailing a correlative duty to provide them or as a duty to provide resources begetting a correlative right to their provision.

I have tried in this chapter to make the case for a moral basis for libertarianism. What I have said is not itself libertarian. Many theorists who do not consider themselves libertarians would happily hold to a principle of equal social liberty and a positive right to the provision of welfare. All the same, it is the basis for the step into libertarianism. It is the jumping-off point for a defence of a strong régime of property rights founded on appropriation from nature. The first step into a morality of rights and duties has been taken, the task ahead is to take the second step into a morality of private property rights. The challenge to libertarianism from the critics who point to the lack of foundations has been addressed. Contractarianism can provide them. The remaining challenge, that to taking the second step, is Spencer's.

⁴⁵ Rand, *The Virtue of Selfishness*, p.96.

III

PERSONS AND PROPERTY

I drive an old Volkswagen Beetle. To date no-one has contested my ownership of it, and were someone to do so I have the documentation to prove that it is mine. I came to own one of motoring's classic cars by a process of just transfer. Judged by weight my car is mostly steel, and steel is mainly iron. And iron is a naturally occurring substance. By a process of just transfer I now own, in Beetle form, a few hundredweight of a naturally occurring resource. The dealer from whom I purchased the car owned that iron before me, and at some time before him the iron was the property of Volkswagen. Ultimately, the iron in my car must have been owned, *qua* natural substance, by someone for the first time. Someone must have had an original title to that iron. All property 'eventually traces its existence (as property) to appropriations of previously unowned goods'.¹ Libertarians, all following Locke in embracing appropriation through labouring, cast original title in the central role. If it is known that A originally appropriated resource *r* and justly transferred it to B, who in turn justly transferred it to C, then *r* is C's. If *r* is possessed by Z then we know Z has *r* illegitimately. Similarly, if C has *r* from B, and B from A, and we know A unjustly had *r* (he stole it from Z, say) then we know that C is not entitled to *r* (Z is).² The actual history of ownership is of paramount importance.

Too important some may think. The vagaries of history can have an impoverished peasant living alongside the Sultan of Brunei. Good fortune for the Sultan (who is royalty as well as wealthy) but what of other political values - desert, say? The

¹ Schmidtz, 'When is Original Appropriation Required?', p.504.

² Nozick, *Anarchy, State, and Utopia*, p.151. All libertarians think a transfer unjust if one of the parties to it has no right to what is transferred. Orthodox libertarians impose the additional constraint that the transfer be free or voluntary.

Sultan does not deserve his good fortune any more than his peasant neighbour deserves to be indigent. Not wishing to be drawn on such matters any more than I will be in defending Lockean libertarianism, a sympathetic though sceptical party might maintain that the principle of just initial appropriation definitive of contemporary libertarianism's stance on property is today a dead letter. That we need to know the history of property from initial appropriation to the present day to know if current holdings are just dooms us to wholesale ignorance. The actual history of ownership is irrevocably lost to us. More than that, the flux of fortune gives us reason to think the current distribution more likely unjust than just.

I have two counter-claims to make against this observation, and a general protest to lodge. Before them let me say that I do not deny that our ignorance of the history of property - where we are ignorant³ - is a problem for libertarianism, and not one to be underestimated. To believe that all holdings here and now are unjust is as false as it is to think them all just. Failing any more creditable practical alternative something akin to a statute of limitations on transfers may be the best that can be done.⁴ The protest is only this: for good theoretical reasons, and if only for theoretical reasons, an account of original appropriation is in order.

The first counter-claim is that our ignorance of the history of property is not universal. Some or all of the property some persons hold is, by the lights of the libertarians' historical theory, without a doubt theirs, and we are in a position to know this. The second and more important counter-claim is that not all naturally situated resources or objects are even now owned. Many are there for the appropriating: tracts of Antarctica; undiscovered reservoirs of oil and deposits of minerals; fish in

³ See Lepage, *Tomorrow, Capitalism*, pp.45-60 for a history of the development of property in medieval Europe, the upshot of which is that 'Personal property was not first perpetrated by a privileged class through extortion or plunder': *ibid*, p.46.

⁴ Rothbard addresses this issue in his 'Justice and Property Rights', pp.115-21.

international waters; water in the atmosphere. Who is to own an iceberg towed to Los Angeles? These are all kinds of tangible property not different in kind from Locke's apples and turfs. More significant is intangible property, as exemplified in 'patents, copyrights, trademarks, common-law trade secrets, and the vastly important domain of financial assets such as stocks and bonds.'⁵ Intangible property is the product of mental labour. Who is to own a work of fiction? That the only way to appropriate is through mixing labour, and that this is sufficient for original ownership, is not obviously absurd. Or so it seems to me and has to others. To believe this is to believe that a utilitarian justification of property, though desirable, is not necessary, and that the labour theory cuts through other possible justifications, such as first possession, equal division and division by lot.

A foundational right is a right a person has *qua* hypothetical contractor. Any right directly generated by the contractarian method, or entailed by a rule directly generated by that method, is foundational. It is a right persons have *qua* rational contractors. A derivative right is a right generated by persons engaging in specific actions or transactions that are the grounds of those rights, where those actions or transactions do not violate any foundational rights. I need not return to you as promised the money I borrowed if you had stolen it. I should instead return it to the rightful owner. Where all have the enforceable right to equal social liberty and welfare, not everyone has the right to drive my Beetle; only those who have transacted with me to drive it may do so.

Whilst acknowledging in the introductory chapter that meeting Lockean rights alters any distributional matrix effected in their absence, the distribution is changed to the point where satisfying a positive right to welfare through redistribution is offset by no overall decrease in the number

⁵ Child, 'The Moral Basis of Intangible Property', p.587.

of the same rights satisfied. Still, this does not affect the issue of both the right to equal social liberty and to welfare being equally foundational. What differentiates them is their being different kinds of rights, particularly that the right to welfare, as a positive right, lays claim to finite resources.

Furthermore, from the principle of equal social liberty but not from the right to welfare, numerous other rights can be derived. Rational contractors are duty-bound to abide by the principle and the right to welfare, and each has the right that all do so abide. Whatever I cannot do to you without dereliction of the duty I have to respect your liberty and right to welfare you have the right that I not do. The right to welfare is violated when someone refuses to redistribute, or refuses to allow redistribution to meet a *bona fide* claim. The stipulation that persons be left well alone has more ramifications. Specifically, it generates as entailments other foundational rights. What cannot another do to me without violating my right to liberty? I cannot be killed, so I have the right to life. This right is not the same as that to welfare because the two rights require for their fulfilment different things of us. When in conditions of great scarcity, that the positive right to welfare cannot be fulfilled does not mean that the negative right to life can be violated. That you are starving to death does not justify my killing you. I cannot be confined, so I have the right to free movement. Nor can I be silenced, so I have the right to speak freely. The right to free movement and speech entail freedom of religion and association.⁶ More pertinently, the liberty the principle secures for me means that I cannot be prevented from *de facto* mixing my labour with resources. If I want to move this stone three metres to the right then I am free to. This freedom is the first pillar in the argument for the labour theory of appropriation. Without the freedom to act on resources the labour theory is a non-starter. And if I am to

⁶ For a more complete list see Spencer, *The Principle of Ethics* Vol.II, pp.64-147.

have this freedom resources must be naturally 'unowned': no-one must have a moral claim against me that I refrain from acting on them. This claim may be pressed in either or both of two ways. The tenet that resources are naturally unowned may be challenged, or it may be maintained that, though unowned, acting on these resources will involve violating someone's right of equal freedom. One person can only act on resources to the *de facto* exclusion of others. My moving the stone three metres to the right excludes your moving it to the left, and this violates your right to social freedom.

Neither objection is exactly compelling. That acting on resources excludes others is true, but it proves too much. It would put a total bar to action. We would all have no option but to sit still and starve. Anyway, the principle of equal social liberty is restricted to precluding only unjustified, deliberate interference and the majority of actions are not interferences, at least not deliberate interferences. The principle distinguishes between, and judges differently, states of affairs caused as the unforeseen and unintended consequence of deliberate action and those foreseen and brought about intentionally.

The challenge to the no-ownership condition is no more forceful. Do pre-existing moral claims prevent me from unilaterally appropriating? Alan Gibbard supposes everyone has equal rights to use all things.⁷ Should we accept this supposition? I think not, unless Gibbard is taken - as he is not to be - as reaffirming Hobbes's right to everything. Pre-morally there are no moral claims at all, and if the moral claim preventing unilateral appropriation is not the product of the contract it is no moral claim at all. The first obstacle to developing the labour theory of appropriation and meeting Spencer's challenge is surmounted.

Tangible property is derived from natural resources, and if the former is ownable so too is the latter, ownable ultimately *qua* natural resources. Persons can come into property by

⁷ Gibbard, 'Natural Property Rights', p.78.

mixing their labour with naturally situated resources, that is resources in their unowned condition. This is not circular. 'Unowned' is defined by the absence of moral claims and not the absence of mingled labour. Mixing labour is the way rights are cast in or over unowned resources. The labour theory of appropriation is definitionally restricted to justifying property acquired in this way. What Locke and the libertarians who follow him do is use labouring to bridge the divide between property as mere possession and property as justified possession. As has been seen with the Lockean syllogism, a man mixes his self-owned labour with naturally situated objects and thereby annexes them to his person, and their annexation by labour signals their removal from the unowned condition. The labour theory of appropriation is not unproblematic. Some of the difficulties were mentioned in the opening chapter. The task for libertarianism is to meet Spencer's challenge, to show how the fact that a person mixes his labour with a resource gives him a right in it.

Rolf Sartorius rejects the need for libertarians to provide an account as to how labouring grounds title. His reason is that 'the notion seems to be superfluous, for Locke's theory assumes that one's ownership of one's labour is established by one's being in possession of, and *thus* in ownership of, oneself. If possession is sufficient to establish self-ownership, why shouldn't it be sufficient to establish ownership of external things as well?'

Two problems arise for Sartorius and any who would follow him. Firstly, it brings one straight up against Crawford MacPherson's distinction between property as mere possession and property as justified institution. Libertarians want their defence of private property rights read as the defence of a justified institution, and this Sartorius would appear to disallow, for he cannot help himself to pre- and post-justification senses of *possess*. Secondly, his rejection of the need for an argument bridging labour and entitlement

⁸ Sartorius, 'Persons and Property', p.204.

repeats the mistake made by Rothbard, and perhaps Locke, namely confusing ruling or controlling with owning. Evidently, they are not the same. Generals and traffic police control but they can hardly be said to own the soldiers in the armies or the vehicles on the road.

Resources and naturally situated objects and manufactured items are possessible independently of any justificatory theory that sanctions this or that distribution. In the times of robber barons property was distributed in a way that no theory of distribution legitimated. The barons had as a consequence of their robbing, and the peasants had not for they were robbed. Thus it is - and undoubtedly has been by the lights of libertarianism's distributive theory - that a person may have no claim to something he possesses, may have a duty not to possess that something, yet nonetheless possess it. Possession, it might be said, is a physical relation, whereas ownership is a normative relation. *Ergo*, possession is not the same as ownership. Witness the case of the robber barons. We can shift back and forth between justified and unjustified senses of *possess* just as we do with *kill*, i.e. between murder and killing in self-defence. For instance, if I steal your car I certainly possess it. I might say, smugly, 'I stole it and now it is mine.' You may retort: 'It is not yours because you stole it.' Both statements are true (at least neither is false), though in different senses. There is an equivocation over 'possess' and its cognates here. It is mine because I have stolen it and yet it is not mine because stolen. But of this there can be no doubt: theft does not confer but presupposes ownership. Hence, once more, the incoherence of Proudhon, who takes up the equivocation whilst simultaneously denying it.

But what is it that accounts for the distinction between property as possession and property as right or justified possession? MacPherson takes enforceability to mark the distinction between property and what he calls 'mere momentary possession', where the former is an enforceable claim and the

latter not.⁹ Property rights come about when a distinction is made between property and possession. Property is an enforceable claim, logically and historically, and, says MacPherson, the force necessary to guarantee the institution of property rights has been perennially justified either on the grounds that it is necessary to human fulfilment or that it is a natural right.¹⁰ This does not mean the existing set of rights is necessarily endorsed. Theorists have 'often argued that the existing set of rights (enforceable claims) is not morally right, and that a different set of rights should be installed. In doing so they are simply arguing that a different set of claims ought to be made enforceable: they are not questioning that property consists of enforceable claims.'¹¹ MacPherson holds that only three propositions are true of property as such: that it is a right and not a thing, that it is an individual right, and that it is an enforceable claim created by the state.¹²

Libertarians would happily agree to the first two propositions and to the enforceability of property rights. They would bitterly oppose any suggestion that property rights are state-created, or that they are institutional creations in any way at all. Most write in a manner indicating that the state post-dates society, that the state is instituted or evolves as a response to predations upon persons' lives, liberties and property. That the state is instituted is standard social contract theory, the evolved picture is Nozick's. Historical truth or not, they are making the point that property rights are conceptually prior to and justified independently of any method or institution of enforcement.

One possible way of justifying the labour theory of appropriation might be to hold that any action sanctioned by a

⁹ MacPherson, 'The Meaning of Property', p.3. 'Enforceable' as used here falls on the post-justificatory side of the wielding of force. Robber barons could and did enforce. Max Stirner bettered Hobbes and denied the distinction in toto as only an outright egoist could. 'I derive all right and all warrant from me; I am entitled to everything that I have in my power'. 'This is egoistic right: it is right for me, therefore it is right': *The Ego and Its Own*, pp.189&191.

¹⁰ MacPherson, 'The Meaning of Property', p.3.

¹¹ *Ibid.*, p.3.

¹² MacPherson, 'Liberal Democracy and Property', p.202.

moral-political theory that accords persons the status of free, rational agents permitted to voluntarily engage in all forms of activity and all types of relations not prohibited by the rights of others is *ipso facto* justified. Labouring with unowned resources and making them one's own is like this and hence is justified. Such might be a Millian liberal's stance. Sartorius takes this line, but sees it as sufficient to give title only to the 'value-added-on product of one's labors' and not in resources themselves that were originally common.¹³ Though in agreement, libertarians are unlikely to be satisfied, wanting as they do rights to the resources themselves and not only the value-added-on product. If this is all the Millian liberal could show it would not be enough. If it could show that by labouring one acquired a property in resources then well and good. Still, we would want to know *how* labouring establishes title, and so meet Spencer's challenge. The libertarian's desire seems understandable enough. If I cannot own a natural resource as such what do I own when I own a Beetle, for example? The right to use and dispose of it, the car, but not the iron it is largely made of? And what of the petrol in the tank which is irretrievably lost to the world as it is burned in the engine? If it is not mine to burn it is not obvious I am permitted to burn it. But if I am permitted to then someone, at some time, must have been permitted to pump the oil from beneath the land. If I do own the petrol-refined-from-oil then someone must have owned the oil.

In arguing in favour of the position that individuals or groups of individuals acting in concert may rightfully appropriate in the absence of social consent, I will avoid talk of self-ownership that has proved so popular with libertarians (and serves them so equivocally). I believe that I can get to much the same substantive conclusion, to wit, that persons have a moral right to private property, without recourse to the device that persons own themselves. Besides

¹³ Sartorius, 'Persons and Property', p.204. Sartorius takes the Humean view that whichever system of initial division works most efficiently is the right one.

which, the right to be left well alone is the functional equivalent of the self-ownership precept. The inviolability of persons (really, persons' bodies) is thus preserved.

The labour theory of appropriation provides a defence of original title in natural resources themselves. The right to property acquired through labouring is a derivative *prima facie* right. That it is derivative, i.e. the product of specific actions or transactions which can be rightfully performed, entails that property can be unilaterally appropriated, say by Crusoe, which in turn implies that the right to property is a right to private property. The defence of property must be a defence of original appropriation as well as of transfer if libertarianism is to be theoretically credible. Nothing less would satisfy its historical theory of distributive justice. Without an explanation as to how mixing labour gives a person a right to a previously unowned resource there can be no compelling reason to accept the libertarian contention that it does, and thus no rebuttal of Spencer's challenge. Nor rebuttal of Sartorius's view that one cannot acquire resources themselves. The labour theory of appropriation has to show why and how in labouring I make the unowned mine, and why it is mine by right.

Locke does not provide a definition of 'labouring', though his examples are indicative as well as commonsensical. They range from picking and gathering to breaking and felling,¹⁴ from the simple and easy to the more skilled and strenuous. A more or less workable criterion would be useful, for instance in demarcating the extent of appropriation. Locke thinks labour as the *principium individuationis* of right title leaves no doubt as to the largeness of possession,¹⁵ but he seems to be relying more on intuition than anything more fine grained. Appropriation is acquisition from nature. To acquire from nature is to purposefully move, alter, transform, consume, etc., naturally situated resources. These actions are

¹⁴ Locke, *Second Treatise*, pp.134&142.

¹⁵ *Ibid.*, p.146.

all ways of labouring with something in the act of using it or to make it useful. They are not exhaustive, only indicative.

Using something involves incorporating it into purposeful activity, which may be done without labouring with that something, as happens when a mariner navigates by the stars. No-one has (yet) a property in the stars. When something is moved, altered, etc., in order that it be incorporated into purposeful activity then that something is appropriated. These activities are individually sufficient for appropriation, e.g. moving a stone three metres to the right makes it mine; altering the phenomenal properties of it by painting it yellow makes the stone my property.

Labouring is a bodily movement, or aggregate of bodily movements, directed towards unowned resources an agent performs in order to satisfy his purpose in acting. This does not mean there has to be a description 'acquiring a property in resource *r*' under which his labouring is intentional, only - less demandingly - that he labour with unowned resources and that there is some description under which his labouring is intentional. A man who intentionally staves off hunger pangs by trapping and eating a deer acquires a property in it. Locke's examples go through on this account. On Karl Olivecrona's they may not. Olivecrona holds that when one mixes one's labour one tends to do so with the intention of keeping the object for oneself, and says that 'Picking up an acorn with the intention of keeping it for oneself must have been sufficient to make it one's own'.¹⁶ On the account I give, the labourer need not have had this self-centred intention, but only some or other intentional attitude towards the acorn which his labouring satisfies, e.g. picking it up to pass to the squirrel. A man appropriates only so much of naturally situated objects as he purposefully moves, alters, etc. This is why the proto-Inuit who first crosses the land bridge into Alaska does not get title to the whole of North America,¹⁷ nor

¹⁶ Olivecrona, 'Locke's Theory of Appropriation', p.227.

¹⁷ Narveson, *The Libertarian Idea*, p.85.

Neil Armstrong to the moon by walking on it. Neither does a man have a right to resources beneath the land he owns just because he owns the land above them,¹⁸ nor does he make an ocean his by stirring water at the shore.¹⁹ I do not want to say categorically that there are no problem or borderline cases. It does nonetheless seem that the majority of cases can be accommodated.²⁰

The right to property is a *prima facie* right because all rights are, and because it is overridden by the foundational right to welfare. A foundational right trumps a derivative right, and the avoidance of moral catastrophe trumps foundational and derivative rights. The right to appropriate can, though it need not of necessity, be unilaterally exercised. The rule *Quieta Non Movere* allows that a person be left so well alone as to be removed from all contact with others and yet he should still have property rights. Chapter V of the *Second Treatise* is devoted to showing just this. It represents Locke's quest to avoid a positivist or consensual theory of property.²¹ Libertarians would allow that were persons to find themselves solitary they could, and would if they laboured, have property rights in resources. Crusoe can have property rights over things on the island in virtue of facts about what Crusoe has done. If his property is of easy change he may take back to England as much as he chooses. Just as the colour of one's eyes does not change when one re-enters civil society after many years in the wilderness, neither does one's relation to one's possessions. What is important is that the right to property is the kind of right that is logically or conceptually distinct from conventional or positive rights, that is from the kinds of rights that are not held independently of institutional arrangements. Finally, that

¹⁸ Gauthier, *Morals by Agreement*, p.279.

¹⁹ Lyons, 'The New Indian Claims and Original Rights to Land', p.361.

²⁰ Becker thinks the issue by and large unproblematic. 'The extent of the land (or whatever) with which one's labor "mixes" is ... quite naturally defined by the purposes for which one labors': 'The Labor Theory of Property Acquisition', p.654.

²¹ The impossibility of getting universal consent made plain to Locke the absurdity of this position: 'If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.': *Second Treatise*, p.135.

property rights are private rights follows from their being unilaterally exercisable. Collective appropriation and ownership is frequently necessary, but it is not logically basic. Collective ownership arises where numerous individual rights consensually dovetail. If individuals do not have the right to unilaterally appropriate then couples, families, tribes or nations do not. Each must have a right to resources if collectively a group has a right to divide them in any way at all. Any individual not party to a collective venture has the same rights against the collective as the collective has against him. There are no new, emergent rights at the group level.

The right to equal social freedom is the jumping-off point for the labour theory of appropriation. On the construal of the theory provided, it makes sense of Locke's fundamentally sound insight that property is an extension of the self (the morally safeguarded self, that is) and shows how property acquired is held as a matter of private right. Appropriation makes a moral difference. '[T]he appropriator', says Jeremy Waldron, 'acquires rights and powers, and everyone else duties, that they did not have before. So something that has been done must have made a big moral difference. What and how?'²² Labouring is what makes the difference. How it does I go on to show.

Samual Wheeler, arguing that private property rights are extensions of our bodies, arrives at a conclusion similar to the one I do. (His motivation is also similar, namely to provide a justification of property rights lacking in *Anarchy, State, and Utopia*.²³) Beginning with the natural right to move and use our bodies as we please, Wheeler wants to show how private property rights are extensions of this right. The right to move and use our bodies is a right we have independently of the contingent ways we stand to our bodies, and that our acquired property does not stand to us in any of

²² Waldron, *The Right to Private Property*, p.172.

²³ Wheeler, 'Natural Property Rights as Body Rights', p.172.

the ways our bodies do is morally irrelevant. These irrelevant contingencies are the relative quality or efficacy of our bodies; the difficulty of removal and transfer of parts of our bodies, and, related to this, the nature of our bodies' material composition; attachment, sensation and agent-type control; and body surpluses.²⁴ Demonstrating that each of these is morally irrelevant is a valuable contribution in its own right for it helps clear intuitive obstacles to conceiving of property in things as somehow an extension of one's self or body. For instance, stealing my attached flesh and blood leg may impair my efficacy more, and may be more difficult, than stealing my non-attached paper money, but what of it? If leg-stealing was less difficult than picking pockets would that make a moral difference? Making it clear that these contingencies are morally irrelevant is preliminary to Wheeler's project of providing a justification of private property rights. He does not, however, deliver.

Wheeler's argument commences with the right to move and use our body. This depends on a more basic right which entails it. What right is that? Ultimately, the right to exist. For this right Wheeler does not argue. Instead there is a shift from the conditional 'If persons have' to the categorical 'Persons do have'. 'If we have a right to exist, then we have a right not to have our agenthood terminated ... if we have a right not to have our agenthood terminated, then we must have a right to the exclusive use and movement of our bodies, natural and extended.'²⁵ Shortly thereafter the shift is made. 'Since a person does have a right to be an agent ... a person has exclusive rights to all of his body.'²⁶ And since your property is your body,²⁷ a person has exclusive rights to his property, his artificial body parts. Having in the previous chapter justified a right to the exclusive use of our bodies we can

²⁴ Ibid., pp.173-9.

²⁵ Ibid., p.187 (emphasis added).

²⁶ Ibid., p.188 (emphasis added).

²⁷ Ibid., p.184.

grant Wheeler his shift. It now has to be shown that property is, is an extension of, one's body or self.

A deliberately imposed constraint on my body constitutes a violation of my right to liberty. My body is the vehicle of my agency, and its freedom from constraint is necessary to my effecting what it is I purpose to do. If Princip is to shoot the Archduke it is necessary that he raise his arm, contract his trigger-finger, and so on. I have to act similarly to move the stone three metres to the right. It is not permissible for someone to deliberately interfere by constraining my body. (Something frustrating my actions would constitute a lack of freedom in the broad sense. This is not of any concern here.) The principle of equal social liberty stipulates that no-one may purposefully restrict a person's liberty to do what is permissible, for to do so will violate his right to do as he pleases. It would be to not leave him well alone.

How this connects with the labour theory of appropriation can now be developed. If resources in their virgin state are unowned, then by the principle of equal social liberty a man is free to mix his labour with them. A man is free to dive for a pearl, spear a fish, catch a pail of rainwater. I think this uncontroversially true. Labouring is an action the conditions of satisfaction of which involve the doing of certain things with one's body. The permissibility of my acting so as to move, alter, etc., resource r entails that this is not wrong. It is not wrong for me to move, alter, etc., r and it is wrong for someone to interfere with my acting on r . I am free, in a moral sense, to dive for pearls and no-one is free to prevent me. From the fact that I was free to dive for them it follows - so the labour theorist wants to maintain - that I have acquired a property right in the pearls. The libertarian, like Locke, says that by virtue of mixing his labour (diving, spearing, catching²⁸) with resources a man appropriates them, makes them his property, from which he may exclude others. Clearly, this is a further step: labouring is not the same as

²⁸ These are actions which involve the moving, altering, transforming, consuming, etc., of resources.

appropriating. Spencer's challenge points to this. To say with Rothbard that by virtue of mixing his labour a man 'has naturally converted the land and its fruits into his property Any man's property is *ipso facto* what he produces, i.e. what he transforms into use by his own effort',²⁹ is patently inadequate and scant more than to pretend 'labouring' and 'appropriating' are synonyms.

Can the performing of a morally permissible action provide libertarianism with the private property rights it needs? How does my moving, altering, etc., resources when incorporating them into my purposeful activity grant me a property in them? If I have not wrongfully removed *r* from its natural state, how does my not wrongfully removing it bring it about that *r* becomes my property?

1. Persons have two foundational moral rights: the one to social liberty equal to the social liberty of one's fellows, and the other to welfare.
2. The foundational right to liberty establishes a domain of permissible action, i.e. actions the rights of others do not preclude our performing.
3. A permissible action is one a person has a right to perform and everyone else a duty not to deliberately prevent him from performing.
4. A person is free to move, alter, etc., his body as he purposes, providing he respects the principle of equal social liberty.
5. In moving, altering, etc., resources a person pursues his purposes in acting.
6. Resources in their natural condition are unowned; no-one has any *ab initio* claim to them.
7. In the absence of *ab initio* claims to resources a person has the right to move, alter, etc., naturally situated objects and everyone else has the duty not to deliberately prevent him.

²⁹ Rothbard, *The Ethics of Liberty*, p.33.

8. In incorporating resources into purposeful activity a person is to be left well alone, as he is to be left alone in moving, altering, etc., his body.

9. By parity of reasoning with 7 and 8, a person has a right to those resources he incorporates into his purposeful activity, and regarding these resources is to be left well alone.

10. Therefore: a person has a right (an enforceable claim) to those resources he labours with (moves, alters, etc.) in accordance with his purposes.

I have the right to move my body, and by parity of reasoning, in the absence of countervailing reasons I have the right to move, alter, etc., things in the world. This answers Spencer's challenge: why should a man have private, exclusive rights in the things he has mixed his labour with? Because he has a private, exclusive right to his body which he moves, alters, etc., and by parity of reasoning a right to things beyond the bounds of his body he has through labouring incorporated into his purposeful activity. The spirit of contractarianism is to grant rights to persons to pursue their purposes and, resources being usually required for this, grants a right to them also.

The permissibility of labouring marks the right to appropriate as a Hohfeldian liberty-right. To have a liberty-right to x is to not be under an obligation to not x . It seems plain that I am at liberty to mix my labour with unowned resources. Equally obviously on Hohfeld's rubric, a person's right in property justly acquired is a claim-right. That I have a claim-right to resource r entails respondents have a correlative duty either to let me have r or to give me r , depending on whether that right is a negative or positive right. Basically, negative rights enjoin respondents to forebear from acting in ways that violate these rights, whilst positive rights enjoin respondents to perform actions that stand to the rights as their fulfilment.

In incorporating resources into my purposeful activity I have to move my body. My purpose, I have said, need not be to acquire. If I inadvertently trample some strawberries when in pursuit of a deer I have not incorporated them into my purposes and so do not have a property in their pulped remains. I appropriate a resource providing I have some intentional attitude towards that resource and act upon it. Intentionality is the requisite link morally connecting a person's labouring and his coming to own, explaining how it is that he 'extends' or 'injects' or 'invests'³⁰ his self or personality into resources. It is the bridge connecting labouring with entitlement, the device through which resources are annexed to the already morally safeguarded self.

This may all seem a little quick, but remember the background against which the labour theory has been set. Moving my body is something I have a right to do, not because it is my body, that I own it, but because it is necessary for the satisfaction of my preferences. The conditions of satisfaction usually also include the world's being, remaining or becoming a certain way. Princip does not want only to contract his finger, he wants to kill the Archduke. If it is permissible for me to move my body, so too, by parity of reasoning, must it be permissible for me to move external things in the absence of countervailing reasons. There are no such reasons. There are no *ab initio* claims to things which preclude my unilaterally acting on them. Neither does my acting on them violate anyone's rights. The moral right I have to my body spills over into the world beyond my fingertips. There is nothing irresolvably mysterious about construing property as an extension of the self. That property in things can be a non-contiguous part or extension of one's body in this morally significant way can be illustrated.

³⁰ Nozick talks of labour 'permeating' the unowned: *Anarchy, State, and Utopia*, p.174; Olivecrona of labour 'infusing one's personality' into unowned resources: 'Locke's Theory of Appropriation', p.226; Wheeler's choice is 'incorporation': 'Natural Property Rights as Body Rights', pp.184-185.

Long John Silver has a wooden leg. He has a wooden leg where you and I have a flesh and blood one. His wooden leg is as much under his control - and in much the same way - as your or my natural legs are. True, his leg does not stand phenomenologically to him as ours do to us, in the capacity to be painfully affected, for example. On the other hand, it suffers things our legs do not, such as woodworm and dry rot. To all intents and purposes Long John Silver's wooden leg is to him as our flesh and blood legs are to us. He walks using it, can balance on it and can kick with it. Our legs can do things his wooden one cannot - test the temperature of the bathwater. His can do things ours cannot - be removed, sanded smooth and returned. As far as legs go Long John Silver probably has as extensive a repertoire of actions using his wooden leg as we have with our natural legs. There is no complete one-one matching or correlation of actions between his leg and ours but the repertoire is probably just as great. Are there any significant differences between his leg and ours?

His leg is not natural. It is not the one he was born with, nor is it comprised of the usual messy substance. His leg is detachable where ours are not. Naturalness, though, makes no moral difference.³¹ To believe that it does is to make the mistake of supposing that the intrinsic nature of a thing is not independent of the manner of its genesis. That this is an error goes some way to showing that property, though quite different to a person's body in its origin and substance, can be on a moral par with someone's body. Neither does it make a moral difference that Long John Silver's leg, like property, is detachable, and replaceable. Kidneys, hearts and teeth are too, and it is a strong thesis that maintains that these are not morally protected. Though I do not own my body I have a right that it be free from interference. Even if you take a kidney from me whilst I sleep and without my knowing, you nonetheless aggress against me for you violate my moral right

³¹ Wheeler, 'Natural Property Rights as Body Rights', p.175.

to be left well alone. If spare kidneys fell out periodically like teeth things might be different. Take the parallel case with property in things. If you take something of mine without my consent and without my knowledge you have stolen from me. I do not have to miss what you take to make your action theft. The kidneys in this body are mine to dispose of. And what is true of my kidneys is true of Long John Silver's wooden leg. We can go from kidneys to prosthetic limbs to motor vehicles. All can be incorporated into morally sanctioned purposeful activity. Indeed, familiarly, they are.

Long John Silver's wooden leg, though in different ways, is as much a part of him as your and my legs are part of us. Accordingly, he has a moral right to his leg. Long John Silver's wooden leg illustrates how this relation between a person and property in external things can be understood. My car, my savings, the shirt on my back, are all related to me in ways analogous to the way that Silver's leg is related to him. Accordingly, I have a moral right to them. And this is a property right, a non-natural addition to my body or self protected by the moral right I have to that body or self.

As with appropriation, so with holding property. The labour theory is a justification of the right persons have to make unowned resources theirs and of their right as owners to hold them. Ownership is an enforceable claim to exclude others from what one has acquired. Where interfering with permissible appropriation is wrong, so too is interfering in the holding or disposing of property. Because property is an extension of the body - in a moral sense - it would be as much wrong to frustrate my keeping or alienating my property as it would be to interfere in my acting in order to come into property in the first place. The right to continued use follows from the right to incorporate into purposeful activity. Once I have established a right in resource *r* then I retain exclusive control of *r* until such time as I alienate it (defeasibility conditions excepted). Alienating *r* can be thought of as excluding it from any purposeful activity of mine. There is no

morally significant difference between a person's labouring to acquire unowned resources and his holding them. Typically, we continue to use our property. It is caught up in ongoing purposeful activity. Something ready-to-hand to use in doing something, though not at the moment being acted upon, is deemed to be in use, e.g. money in the bank. I cite the paradigm case, i.e. the case where the person intends to appropriate. Any non-episodic or dispositional attitude an owner has to his property is sufficient to keep it his, to the exclusion of others. Alienating property is of course subject to the constraints the rights of others impose on our freedom of action. I cannot dispose of my ammunition by shooting it into you - unless you are Gary Gilmore and I am in your firing squad.

Sundering resources from purposeful activity explains transfer. I appropriate resource r by incorporating it into my ongoing purposeful activity. I freely transfer r to you by choosing to let your purposes determine what shall or shall not be done with r . I cede my exclusive control, gratis or for a price. What signifies transfer is settled by appeal to convention. Testaments are conventional indicators of transfer, as is signing cheques, tipping porters, presenting gifts and popping coins into charities' boxes and beggars' bowls.

The moral status of one's body parts is different from, though functionally equivalent to, the moral status of acquired property. If you do own your body it is not in the same way you do your shirt. Whilst ownership of our bodies may be possible - maybe we just *do* own our bodies - self-ownership is not required to explain how we have rights over our bodies. I touched on this earlier. You do have the moral right to be free and this gives your body parts their moral, in effect proprietorial, status. Because we are duty-bound to refrain from interfering we are obliged to leave each other's bodies well alone; to treat your body or body parts as a natural resource open to appropriation would be to aggress against you. We are

obliged to leave body parts where they fall. The arbitrary natural distribution of bodies and body parts is accordingly enforceable. One cannot take one of Smith's good eyes to give to blind Jones.

So much, then, are the essentials of the labour theory of appropriation on the construal I give it. Including the holding of property may appear unnecessary. After all, it is a very strange right to property that grants it in acquisition but is silent on the issue of term. All I have wanted to show is that the theory itself is silent about limits of term. It justifies continued holding on the same grounds it does appropriation, and no upper bounds to acquisition have been touted. No consideration internal to the theory points to such limits. There is a limit of term all the same, i.e. the right to welfare, but external to the labour theory. It is as though the labour theory of appropriation legitimates a rectilinear position of rest until such time as change is induced from without.

PRIVATE RIGHTS AND PUBLIC WELFARE

Rights, Mill notes,¹ are something one ought to be protected in the possession of. We do not need to know if libertarian rights are defeasible or not to know that property rights should not be violated. This is just what it is to have a right. Rights are moral devices that put blocks upon some actions,² and that means that these actions ought not to be performed, and that means in turn that the rights blocking these actions ought not to be violated. This is definitionally true and follows simply from the concept of a right. Whether there are any rights that are absolute is a distinct, though connected, question. I am inclined to think there are not. All rights are, in the final analysis, defeasible. There is not and cannot be any right such that we ought to respect it no matter what the consequences of so doing are. Rights are not to be upheld whatever the consequences.³ Spelling out and justifying the conditions of defeasibility for any right is not an easy task. The view that all rights have some or other defeasibility condition is to say something about the rights we have: not that they cannot be violated, for obviously they can and are, but that none are rights we can claim enforceability for in the face of any and all considerations about how the world will go if we do. Even the right to life that is an entailment of the principle of equal social

¹ Mill, *Utilitarianism*, p.50.

² Including those that would promote the general interest: Dworkin, *Taking Rights Seriously*, p.193. Rights are 'political trumps': *ibid*, p.xi.

³ See Bennett, "Whatever the Consequences". For a defence of absolute rights see Gewirth, 'Are There Any Absolute Rights?'. This is the usual form opposition between rights and consequences assumes. Different moral theories face the same opposition from consequences in different forms. Anscombe maintains that we may do no evil however slight in order that good may come no matter how great: 'The Justice of the Present War Examined', p.79. Smart, facing the problem of being unjust for the sake of maximising utility, somewhat disingenuously bites the problematic bullet on the side of absolutism. Hang the innocent man, says Smart: 'An Outline of a System of Utilitarian Ethics', p.71.

liberty, arguably the best candidate for absoluteness, is defeasible. Absolutism is not open to us.

When they conflict, foundational rights take precedence over derivative rights. Property rights from appropriation or voluntary transfer as derivative rights are defeated by the foundational right to welfare. I have said that the limit to this is that in fulfilling a person's right to welfare this be effected without causing another to press the same claim by the right he has to welfare, i.e. there should be a net decrease in the number of such rights to be fulfilled. Colloquially put, taking from Peter to give to Paul is warranted providing Peter is not thereby left in Paul's pre-transfer situation. Not only would such redistribution be gratuitous but it would violate Peter's right in order to fulfil Paul's.

The foundational rights to liberty and welfare cannot conflict. Welfare conflicts with the derivative right to hold property, not with the right to acquire it. Each person has the right to perform only actions that are not prohibited by the rights of others, so ordinarily no-one has the right to either infringe someone's liberty in the name of welfare or infringe someone's welfare in the name of liberty. Your right to welfare cannot conflict with my right to liberty, only with my right to property. True, it leaves me unfree to dispose or use a portion of my property - but that is a derivative right I have because I have property at all. It does not affect my foundational liberty to acquire property, nor to do anything else not circumscribed by the rights of others. The right to welfare, it might be said, puts constraints not on what persons may do *per se* but on what they may do with their property. And the right to do things with one's property is a derivative right.

Meeting fundamental needs restricts *ex post facto* the liberty to use one's property, and hence welfare is conditional on the incidental production of sufficient property. Persons are not to be coerced in order to create a

surplus if the free pursuit of the satisfaction of their preferences will not. Surfers cannot be forced into tuna canneries in order earn money to give to the needy.

I have not yet said anything about the content of the right to welfare, how extensive a right to property it actually is. In making the contractarian case for foundational rights the baseline for assent was that persons fare better in terms of their preferences than they envisage they would in the pre-moral condition. Everyone ideally wishes to satisfy the named, dated preferences they have, but know they cannot. As with the outcome of the contract itself, the substantive content of the positive right will have to be neutral across preferences. It is to be expected that what can be agreed on will include the relatively concrete archetypal economic goods of food, shelter and clothing.⁴ The intangibles of love, friendship, etc., are not goods that can be redistributed. The concreteness of these goods as the standard is attractive - it holds out the prospect of heading off interminable casuistry - and yet many will have strong intuitions that balk against too narrow a construal of welfare. Dickensian images of working-houses and slum tenements are not far from mind.

Charles Fried writes that the situation of our fellows supports an argument for positive rights, and that 'it is to the satisfaction of needs that we have a positive right'.⁵ The concept of need is not tied to any hard and fast economic parameters but rather informed by our 'common humanity and the norms of our good functioning'. Fried lists as needs (with attendant positive rights) health care, education, legal assistance and a basic diet.⁶ The problem with notions like common humanity are that they are no less, or only marginally less, vague than the idea of need. The parameters are as indeterminate as what they bracket. A needs-wants distinction shows there are some clear cases of needs and some clear

⁴ Dahl & Lindblom, *Politics, Economics, and Welfare*, p.145.

⁵ Fried, *Right and Wrong*, p.120.

⁶ *Ibid.*, p.120.

instances of wants, with much blurring between. Legal assistance and education are closer to wants than needs. They are unlikely to satisfy the neutrality condition. Health care directed towards the preservation and functioning of a person *qua* pursuer of preferences, and not *qua* pursuer of named, dated preferences, is a need. Intensive-care hospitalisation is a need, cosmetic surgery to win over one's as yet unrequited love is a want.

Orthodox libertarians eschew Locke's proviso limiting the appropriation of natural resources. There are no limits at all to how much a person may acquire through appropriation and transfer. Nozick's position is different, and closer to Locke's (though not for that any more Lockean in the letter of what he says). Nozick maintains that acquisition is impermissible where it would mean a net worsening of the position of others,⁷ e.g. as happens when one acquires all the water in the desert. Nozick gets round the enough and as good proviso by contending that even those who are not left enough and as good of a resource *r* are on balance better off than they otherwise would be had *r* remained unowned, and hence the proviso is not violated. Beyond this, and presumably until the moral catastrophe clause is invoked, Nozick would agree with the orthodox libertarians that all unowned resources a person mixes his labour with are 'his or his assigns in perpetuity'.⁸

Nozick's in-principle welfarism places restrictions, albeit he thinks weak ones, upon both appropriation and holding. His Lockean proviso limits the former, the moral catastrophe clause places defeasibility conditions on the latter. Lockean libertarianism of the kind defended here says that the only legitimate restrictions are upon holding. A person can appropriate all or the last of an important or essential resource, water say, but cannot exclude others dependent on that resource by denying them what they need of it. Those completely without have a right to have their fundamental

⁷ Nozick, *Anarchy, State, and Utopia*, pp.178-82.

⁸ Rothbard, *Man, Economy, and State*, p.148.

needs met. The propertied are obliged, i.e. duty-bound, to redistribute to those without on pain of moral wrongdoing. Where the distribution consequent to a process of repeated unilateral applications of labour to unowned resources has left some without resources or property sufficient for their needs, then property rights are overridden to the extent necessary to remedy this lack. This limit of term applies equally to original property and property acquired through transfer. Redistribution is blind to the difference.

Any political theory that does not have as its underpinning a tenable moral theory is itself not tenable. Nothing is politically correct that is morally wrong. Any moral theory that did not make room, in dire circumstances, for consequences to be morally decisive is not a tenable theory. A theory of rights such as orthodox libertarianism is premised on is one such theory. Regarding property rights, that a few should starve in the midst of plenty seems inexcusable, but it has this implication. Aiding others in emergencies is for them an act of goodwill. Rand says that helping others is not a moral duty, and talks of it being 'good' and something that a person 'may' do, never that he 'must' or is 'obliged' to.⁹ In fact, one tenet the orthodox do adhere to suggests they do - or should if they wish to be consistent - recognise an obligation to ensure no-one goes without at least as much as his fundamental needs require. That they do not recognise it suggests a grave inconsistency in their system. They want the best of both worlds, so to speak, and they cannot have it.

The inconsistency arises from their equating property rights with human rights. Here is what they say. Beginning with the indefeasible right of ownership, Rothbard (here acting as spokesman for the orthodox) challenges that 'liberals'¹⁰ force a breach in the concept of property where none should be, that is, when the reality or the facts of the

⁹ Rand, *The Virtue of Selfishness*, pp.48-9.

¹⁰ Whoever Rothbard has in mind by 'liberals' it includes Lockean libertarians.

matter do not warrant such separation. So-called liberals conceptually distinguish two kinds of property, namely in self and in things, and hold them to be only contingently connected. Rothbard believes this to be unwarranted and maintains to the contrary that property in one's person and property in things are inseparably connected. (If the liberals' point is that one can have a property in one's person without having property in things then they are surely right.) Consequently, so his objection runs, there can be no justification for the forced separation of a person from his property, which he has a right to. 'In short, the liberal attempts to uphold the individual's right to the ownership of his own body, but then denies his right to "property," i.e., to the ownership of material objects. Hence, the typical liberal dichotomy between "human rights," which he upholds, and "property rights," which he rejects. Yet the two, according to the libertarian, are inextricably intertwined; they stand or fall together.'¹¹

Rothbard does have a point, and a point that I believe is valid. Unfortunately, the point is not one Rothbard or his orthodox bedfellows can make without leading them into grave trouble. 'Property rights are human rights', Rothbard says, 'and are essential to the human rights which liberals attempt to maintain.'¹² Rand is committed to the same thesis. 'Remember that there is no such dichotomy as "human rights" versus "property rights." No human rights can exist without property rights.'¹³ Hospers says very much the same.¹⁴ That property rights are human rights is the valid point. The right to welfare is accorded to all persons *qua* hypothetical contractors. For orthodox libertarians to then conclude that all property in self and things is absolutely, indefeasibly sacrosanct, and the forcing of the breach morally unwarranted, is manifestly inconsistent with the assertion that property

¹¹ Rothbard, *For a New Liberty*, pp. 43-4.

¹² *Ibid.*, p. 45.

¹³ Rand, *The Virtue of Selfishness*, p. 91.

¹⁴ Hospers, *Libertarianism*, p. 61.

rights are human rights. If it is a human right then the right to property would be a right held by every human by virtue of being human.¹⁵ And because the right to property is a human right all humans, who already have a property in themselves, would have property rights in things. But we know they do not. Orthodox libertarianism allows that persons may not have rights over things. Barring original appropriation or acquisition through exchange they will not. Not only have the two kinds of property come apart conceptually but also in fact. Committed to the thesis that they are not conceptually distinct they are yet content to allow that persons need not have property rights in things. This looks to me like trying to have the best of two incompatible worlds. It cannot work. To say 'Property rights are human rights' is equivalent to saying 'There is a human right to property'. If human rights are universal - and how else are they to be understood? - then so too would property rights be. The inference to be drawn is that those who do not have property in things are without in spite of their human right to property. One remedy for this morally iniquitous situation is redistribution. Rothbard, Rand and Hospers are correct to affirm of property rights and human rights that if they are inextricably intertwined then they stand or fall together. To then assert that they do stand together is necessarily to make a commitment to the supposedly unwarranted breach between the two kinds of property that conceptually sanction redistribution.

Rothbard is most certainly hoist with his own petard. He cannot in good faith maintain (1) that persons come into property either by mixing their labour or through voluntary exchange, and (2) that property rights and human rights are inseparable. Witness what he writes: 'If a man has the right to self-ownership, to the control of his life, then in the real world he must also have the right to sustain his life by grappling with and transforming resources; he must be able to own the ground and the resources on which he stands and which

¹⁵ See MacFarlane, *The Theory and Practice of Human Rights*, pp.3-6.

he must use. In short, to sustain his "human right" - or his property rights in his own person - he must also have the property right in the material world, in the objects which he produces. Property rights are human rights, and are essential to the human rights which liberals attempt to maintain.... In fact, there are no human rights that are separable from property rights.¹⁶

Taking the first two sentences literally, a reader who did not know any better might take Rothbard to be unqualifiedly advocating a positive right to resources, including land to grapple with and transform, as flowing from the right to self-ownership. His use of 'must' reinforces this impression. If every man owns himself then he must own resources; every man does own himself; *ergo*, every man must own resources. A man's not owning resources would mean that he does not own himself, which is to deny the major premiss that Rothbard affirms, namely, that every man does indeed own himself.

Why cannot Rothbard hold (1) and (2) together? For the simple reason that if property rights are human rights as he says, then persons who have not and perhaps cannot come into property - either by mixing their labour or by exchange - are in fact without their right to self-ownership supposedly inseparable from the right to property in things.

Someone may counter that I am unfairly capitalising on an ambivalence in the phrase 'the right to sustain his life by grappling with and transforming resources'. Rothbard means only that persons ought not to be prevented from grappling with and transforming resources and not that they be provided with them. And that this is the correct reading is clinched by the phrase 'the objects he produces'. Persons' property rights therefore extend only to what they have produced and not to what others have. Even if this is conceded the challenge, I believe, remains. Rothbard cannot be read this way on the said ambivalence and simultaneously cleave to the inseparability thesis. The separability thesis recommends the opposed

¹⁶ Rothbard, *For a New Liberty*, pp.44-5.

reading, namely the one with the redistributive implication. If redistribution is chosen then taxation for redistribution, it would appear, is neither theft,¹⁷ nor 'morally obscene'.¹⁸

Redistribution is one remedy for those without resources. Charity is another.¹⁹ Leaving a portion of resources unowned would be a third. If redistribution is opted for then the result of turning one of their favoured arguments against them is to usher orthodox libertarians into embracing the positive right to property. The upshot is that orthodox libertarianism contains within itself an implicit defence of a theory of property rights providing far stronger limits to appropriation and holding than its defenders recognise. I have tried to make this implicit argument explicit. If the argument is correct the orthodox libertarian is left with one of two choices. He can surrender the absoluteness of property rights and accept they are defeasible under the specific conditions to be described, or he can drop the inseparability thesis. Choosing the first straightway leads to a further painful choice, this time between redistribution and leaving enough, if not as good as, remaining. Obviously, redistribution is the less painful.²⁰ The price paid for yielding the inseparability thesis is the loss of an argument for orthodox libertarian property rights. There is no longer an inseparable connexion between labouring and owning. Having laboured on something is no longer a guarantee of owning it. Orthodox property rights now stand in need of justification. Owning one's self does not assure ownership of things one has transformed. Assuming that justification to be provided is none too helpful, for any justification of property rights will have at least one consistently describable condition of defeasibility, so absoluteness is anyway impossible. Redistribution is very much

¹⁷ Rothbard, *The Ethics of Liberty*, p.162.

¹⁸ Rand, *Capitalism: The Unknown Ideal*, p.30.

¹⁹ Charity, touted with candour as the panacea for all poverty, is not an option. Justice is at issue here and charity falls outside the range of the enforceable.

²⁰ Here is a logical reason why it is: At t_1 we leave R resources unowned. At t_2 we need more than R. Where is the extra to come from? Leaving resources unavailable also means that a person who needs them would deprive others of what they need if he appropriated them. These others are in the same predicament. No-one may appropriate. All must starve.

on the cards once more. When examined, the defeasibility conditions for an orthodox libertarian justification of property rights will be seen to coincide with the contractual positive right: the redistribution of goods or wealth staves off impending moral catastrophe.

That the indigent have a claim upon the propertied is not an *ad hoc* appendage to orthodox libertarianism. We have seen that theory implicitly follows from premisses orthodox libertarians explicitly accept. The same can be said of Nozick. Nozick is a Lockean libertarian (of the second sort) and thinks that he is not. There are two reasons for this contention. One is a reading of his principle of compensation and the other takes its cue from his allowing teleological considerations to take over from deontological morality at some point. A non-question-begging interpretation of moral catastrophe that makes the clause sufficiently precise so as to be workable when transposed on other facets of Nozick's theory is seen to work in favour of welfarism. How these arguments work is detailed later.

However justified, a right to the provision of welfare is going to fit into the broad framework of the Lockean libertarian defence of property in something like the following way (I give the whole framework). (i) Resources in their natural condition are unowned. (ii) These resources are ownable, and (iii) are finite. (iv) They are appropriated through a person mixing his labour with them and may be acquired thereafter by process of transfer. (v) Resources are, trivially, appropriable in this way only under conditions of availability. (vi) Where all resources are appropriated the indigent have a right to a share of property sufficient to meet their fundamental needs, which right (vii) cannot be categorical, given the finiteness of resources, i.e. there may be rights to more property than there is. (viii) Given the finiteness of resources, either the claims are satisfiable or they are not satisfiable. (ix) If they are not satisfiable then necessarily they remain unsatisfied, but (x) if they are

satisfiable then they ought to be satisfied. Coercion may be employed to ensure this. (xi) Once satisfied, either there is a surplus of resources or there is not. (xii) When there is no surplus then necessarily (near) equality of resources prevails, but (xiii) if there is a surplus then either (near) equality is enforced or differentials are tolerated according to the distribution effected in (iv). (xiv) Given the enforceable duty to fulfil rights as the only factor militating against the distribution effected by justice in appropriation and transfer, differentials ought to be tolerated. Subtract (x) from (iv) and property differentials remain.

Salient features of this framework germane to this chapter are these. A formal universality of some level of property is secured for all. Redistribution is justified *ex post facto*, that is after and not prior to or during appropriation (or exchange). Hence it is a limit of term on the holding of property. It does not say 'You may not appropriate', but instead 'You are free to appropriate but not necessarily to keep'. Equality or inequality is the product of the supply of resources and the demand for them. Labouring in the presence of scarcity or abundance moves the distribution towards, or away from, equality respectively. Abundance tends to give rise to wealth differentials, scarcity to work against them.

The doctrine that human rights are inseparable from property rights in fact justifies what orthodox libertarians explicitly deny, to wit the liberal dichotomy that makes room for the defeasing of property rights. Recognising the distinction between property in self and in things opens a window of opportunity for spelling out the conditions of defeasibility. Nozick's principle of compensation and his catastrophe clause create similar opportunities, and ones that can be pressed with greater confidence. Both show that Nozick is in the Lockean camp. Orthodox libertarian property rights cannot ride piggy-back on self-ownership, but Lockean

libertarianism does ride shotgun with both the principle of compensation and the moral catastrophe clause.

Nozick (in)famously opens *Anarchy, State, and Utopia* with the straightforward assertion that 'Individuals have rights'. One of these purported rights is that to private property justly acquired either through original appropriation or through just transfer. Anyone in possession outside of these ways possesses illegitimately. They have gotten it by force or fraud. Once acquired a person's property can only be alienated by consent. Anything but a free exchange or gift is impermissible. If you hot-wire and joy-ride my Beetle without my consent then you are stealing, either the car, period, or some portion of the value of the car in the event it is found and returned to me. Using in this sense counts as a kind of stealing. It certainly violates my right of exclusive control.

This is a standard enough conception. Many libertarians believe that redistribution is unjust because it fails to pass the test for a free exchange and hence is the equivalent of theft, and a highly institutionalised form of theft on a grand scale at that. They often liken taxation to highway robbery, or more accurately to the activities of Robin Hood. Taxation is not freely consented to and so fails to satisfy the condition laid down for justice in transfer, the third of the three theses definitive of orthodox libertarianism. Why libertarians think this rests, then, on their understanding of what makes an exchange a free exchange. For them, the essence of a free exchange is something like this: an exchange E is free if, and only if, the parties to E could, contrary to the facts, have not exchanged and thus remained in the *status quo ante*. E is unfree if the parties could not, counterfactually, have remained in the *status quo ante*. I think that this is what libertarians have in mind when talking of free exchange. It fits with their rejection of the Marxian criticism of capitalism that it is based on the wage slavery of the proletariat. Where Marx thought the proletariat selling their labour power was not a free exchange, libertarians think that

it is. 'Sell or starve' is still a free exchange if the choice situation is the consequence of non-coercive actions.

In simple terms, the definition says that an exchange is free if, and only if, it is true of the parties to it that they could have kept what in fact they exchanged if they had chosen to do so, and none of the parties to it, nor any third party, e.g. government, would have penalised or brought sanctions against A or B or both for not exchanging. If they could not have kept what they did in fact exchange, despite their wanting to, then whatever was exchanged was not freely exchanged. Here are some examples:

(a) A two-party exchange: A sells his car to B. Is it true of this exchange that A could have kept his car and B his cash if either had chosen? If 'yes' then the exchange was free.

(b) A one-party exchange, say a bequest: A leaves B a princely sum. Is it true of this exchange that A or B could have returned to the *status quo ante*, say by A striking B from his will or by B refusing to accept A's filthy lucre? If the answer is in the affirmative then the exchange was a free exchange.

(c) Now turn to the case of taxation: 20 per cent of A's income is attached by the government for redistributive purposes. If A does freely give this money then A must be able to keep it for himself, or to give to others as he chooses, if he chooses to. Is this true of A? 'Not at all', is the libertarian's reply. 'A would lose the 20% for sure, and in all likelihood more besides, in the form of a fine or prison term. Try withholding your taxes and see what happens.'

So the libertarian concludes taxation is not a free exchange, and is equivalent to theft. Taxation does not comply with the Nozickean dictum encapsulating libertarian justice: 'From each as they choose, to each as they are chosen.'²¹ Redistribution, then, is 'a serious matter indeed, involving, as it does, the violation of people's rights.'²² As Nozick

²¹ Nozick, *Anarchy, State, and Utopia*, p.160 (emphasis removed).

²² *Ibid.*, p.168.

later puts it, 'The central core of the notion of a property right in *X*, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with *X*; the right to choose which of the constrained set of options concerning *X* shall be realized or attempted.'²³ If the constraints are as the libertarian says, then taxation is not a permissible option. This is the libertarian explanation of why and how redistribution violates property rights. To violate property rights is to commit an injustice. And out rolls the desired conclusion: redistribution is unjust.

Before proceeding to criticise Nozick's defence of the injustice of redistribution, a few words need be said concerning his ideas of what our property rights are, how we come by them, and the limits of them. What our property rights are has been dealt with above. To have a property right in resource *r* is to have the right to determine the disposition of *r* within the constraints imposed by the rights of others. How do we come by our property rights? Nozick does not explicitly embrace the Lockean labour theory of appropriation though it is generally assumed that this is his argument for justice in original acquisition. A person comes to have a right to determine the disposition of *r*, within libertarian constraints, by mixing his labour with *r*, thereby removing it from its unowned condition, or by a process of transfer from someone who had somewhere along the line originally acquired *r*. As to the limit Nozick imposes upon appropriation, he writes that the legitimacy of any act of appropriation depends upon 'whether appropriation of an unowned object worsens the situation of others.'²⁴

Nozick gives two interpretations of this proviso, a stringent and a weak one, and opts for the latter. The weak interpretation says that a person is not made worse off by being no longer able to appropriate providing there remain

²³ Ibid., p.171.

²⁴ Ibid., p.175.

resources he can use.²⁵ Nozick holds that the enough and as good proviso is intended to ensure that the situation of others is not worsened, and later says 'I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke.'²⁶

Persons do not acquire permanent bequeathable property rights in previously unowned things if their appropriation worsens the situation of others. This is a reasonably flexible imposition and can be skirted through compensation. 'Someone whose appropriation otherwise would violate the proviso', says Nozick, 'still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate the others, his appropriation will violate the principle of justice in acquisition and will be an illegitimate one.'²⁷ This, says Nozick, 'will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.'²⁸ The proviso also applies to justice in transfer, e.g. appropriating part and purchasing the remainder of something necessary for life. The proviso places stringent limits upon what a person may do with his property. Nozick's example is this: '[A]n owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.'²⁹ Nozick makes it clear that the rights held prior to the proviso's working are not overridden.³⁰ What this allows for is the reasserting of initial property rights once the circumstances that make the proviso operative have passed. My well returns to my exclusive control once the drought has passed, despite justice requiring

²⁵ Ibid., p.176.

²⁶ Ibid., p.178.

²⁷ Ibid., p.178.

²⁸ Ibid., p.179.

²⁹ Ibid., p.180.

³⁰ Ibid., p.180.

me to yield up my well to use by you, i.e. surrender exclusive control, for the duration of your waterlessness. At the end of his discussion of the proviso Nozick writes: 'I believe that the free operation of a market system will not actually run afoul of the Lockean proviso.'³¹ If I understand Nozick's wielding of the proviso aright, he believes that under a free-market economic system - wherein from each as they choose to each as they are chosen - the proviso will rarely, if ever, be invoked. People are not made worse off by the acquisitions the entitlement theory allows.

Nozick is appealing to an attachment to the potency of the market. In common with others who share this belief that unrestrained markets hold out the prospect of economic optimality, we shall have to go along with libertarians in so far as they say that, whilst restrained markets do well, unrestrained markets do best. There is, if things are left well alone, a price that will clear the market of all commodities. Take unemployment. In a libertarian world there would be no unemployment because labour would find its price on the exchange-market and that price would be a price that cleared the market.³² Now, restricting the labour market by imposing minimum wage levels, offering welfare to the unemployed, etc., distorts the market and creates unemployment.

Whilst I have sympathy for market economics on grounds of both politics and efficiency, I see no good reason why we should swallow wholesale what libertarians say on these matters. Perhaps it would turn out as they say and everyone would have a job, even if not the job they would like to have. Then again, perhaps it would not. Maybe not everyone would have a job, let alone one they prefer. How many baskets woven in therapy can the market absorb? Maybe everyone does have a job but the market-clearing price of labour for some of them is so low that it is insufficient to ... to what? Let us say

³¹ Ibid., p.182.

³² Narveson, *The Libertarian Idea*, p.266 is representative.

insufficient to meet their fundamental needs, the pretty concrete objectives of adequate food, shelter and clothing.

The sceptical contention is that even in a libertarian world the appropriation of resources by some would leave others worse off, leaving them few or no resources at all. Sometimes the market fails to provide for all, not because there is not enough for all but because some are passed over in the process of distribution. And the cases of the retarded, the handicapped and the old provide obvious examples. Some will argue that it is precisely because unfettered markets left some worse off that restrictions were imposed in the first place. If the worse off are not compensated by those whose appropriation has made them worse off then such appropriations are unjust. And they are not compensated by those who have acquired. On balance, their position is worse than it would have been had the resources remained unowned. The appropriations of these persons in the absence of compensation are therefore unjust. They have appropriated not the total supply of something necessary for life but enough of it to leave that person worse off. Nozick writes only in terms of the total appropriation of something necessary for life, but this I contend should not make a difference. Should not for the reason that both readings are consonant with the objectives of the proviso, with what the proviso is intended to secure. And should not because of the moral catastrophe clause Nozick tolerates, which I argue plays an important but as yet unspecified rôle in his theory of property.

The results of the proviso 'may be coextensive with some condition about catastrophe ... the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation).'³³ Notice we are dealing with a disjunction: there are at least two situations in which the proviso applies. What are they? Moral catastrophe is one, and I shall concern myself with it later. The other is the 'desert-island' situation. Nozick employs this example to

³³ Nozick, *Anarchy, State, and Utopia*, p.181.

illustrate what action the performance of which the proviso puts a block upon. Here it is again: '[A]n owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.'

Is this a parallel case to Nozick's? You stumble, starving and wasted, to the door of my remote country seat and request food and shelter from me.³⁴ My turning you away is the same as the islander's casting you off his island is it not? It certainly seems so to my mind. Going a stage farther, what if instead of a remote rural home you are starving and wasted in an urban metropolis and make the same request of me? Perhaps I can refuse you in this situation on the grounds that you can move on (next door even) and make the request of someone else. I am not the only island of resources in the area, as it were. No need therefore for me to meet your request when there are others nearby who might meet it. It seems, implicitly given the Nozickean example, that I need only give to you if you are worse off by my appropriation and if no-one else can. Others can, so I need not. The contingencies of time and place do not collude to make the urban-dwelling me the violator of the proviso, obliging me to compensate you. But this is true for all the other nearby urban-dwellers who can meet your request as well as I can. No need for any one of them to assist you. Each can reason as I have and conclude 'Sorry, try next door'. After fruitlessly knocking on a number of doors all answering the same you starve to death. Being dead you are certainly worse off - exactly what the inclusion of the proviso in Nozick's theory was meant to preclude.

I see no way Nozick can avoid this conclusion. To be sure, he can say it is unlikely to arise in a libertarian economic order. But I am assuming, and I think not unrealistically, that it has arisen under just that order, or rather that even

³⁴ Presumably, 'remote' would cash out in terms like 'remote enough so that, given the state of the petitioner, the chances of reaching the next island, country house or whatever, are slim indeed'. If the proviso did not read something close to this its inclusion would be pointless.

the unfettered laissez-faire economic system libertarians favour is likely to face such a scenario. Your rejection at all the doors is a parallel of Nozick's *reductio* argument against the stringent interpretation of the proviso.³⁵ Either we embrace it despite its conflicting with the stipulations of the proviso or we tighten the proviso so as to rule it out as illegitimate, contrary to what Nozick says. The first response is equivalent to abandoning the proviso *in toto*. The second is equivalent to making assistance to the needy a requirement of justice which goes directly contrary to what Nozick says, namely, that there is no right to be in a particular material condition.³⁶

If the urban-dwelling me is duty-bound to meet your request if I am able, then so are you, my urban-dwelling neighbour, and so is your neighbour, and so on. If this is correct then there are two ways this duty can be read: first, as the duty to respond to the situation of others only when one is requested to do so, i.e. the duty not to refuse charity when confronted; or secondly, as the duty to be charitable even when one is not specifically requested, i.e. the positive duty to do what one reasonably can charity-wise.

The Lockean proviso is not an argument for the first. Why it is not has already been spelt out by Nozick: 'Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates ... unless he does compensate ... his appropriation will violate the principle of justice in acquisition and will be an illegitimate one.' A principle of just compensation is not of the order of the first reading which has the connotation that the duty to be charitable need not be enforced. If this person has been made worse off by appropriation then he must be compensated, and there are no two ways about it.

But which acts of appropriation, by whom, have rendered this person worse off? In the desert-island situation that

³⁵ Nozick, *Anarchy, State, and Utopia*, p.176.

³⁶ *Ibid.*, p.238.

much is clear: the island owner, his acquiring the island. In the case of our representative or average urban dweller there is no clear answer. No single one of us has made this person worse off. We have all acquired a little bit and our acquisitions have collectively exhausted the supply of everything. No one person has appropriated the total supply of something necessary for life. But a number of persons acting individually have done just this. The upshot is an unjust situation, A being worse off, which requires compensation for A from those who have made him worse off. The problem is, in the metropolis but not on the desert island, we cannot identify the one person responsible for A's being worse off, i.e. that person whose appropriation violated the proviso. Nonetheless A is worse off. If no one person made A worse off then some group or subset of all those who have appropriated must have done so. And which subset is that?

I do not think that there is any coherent answer other than to say: 'All those who have appropriated have collectively made A worse off, quite unintentionally and perhaps unforeseeably'. We are all, then, bound to compensate A. In the absence of any acceptable method for divining whether some are responsible and others not, or some more responsible and others less, we have to presume that all are bound to compensate proportionally as much as each other.

Compensating A is very much like redistributing wealth to A. It is certainly not the same as charity. Under the Nozickean schema of just compensation A would be said to have a right to compensation (redistribution). If A and others like him have a right to compensation then this right may be enforced. Compensation would entail taxation if owners were not disposed to compensate of their own volition. Taxation libertarians think to be not a free exchange. But compensation (redistribution) is just; compensation entails taxation; taxation is not a free exchange; therefore, justice entails at least one unfree exchange - contrary to what libertarians would have us believe. And whilst it remains true that the

function of the state is the protection of rights, if I am correct then one of the rights the state should protect, on grounds of Nozickean justice no less, is the right not to be starving and wasted. This would follow from what Nozick says, though clearly it is additional to (what he thinks is) his theory of justice.

If this does not work, reconstruction of the moral catastrophe clause may. Nozick writes that the results of the proviso 'may be coextensive with some condition about catastrophe, since the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation).'³⁷ What the moral catastrophe clause allows is the overriding of deontological morality for reasons teleological.³⁸ If an action that is permissible on the premisses of rights-based libertarianism will have consequences that are exceptionally grave then that action, though right, may not be performed. If some catastrophic state of affairs will eventuate unless some rights are overridden then they may be justifiably infringed.

Most of us do acknowledge, even in our more deontological moments, and perhaps grudgingly, that the avoidance of very grave consequences that would otherwise ensue justifies overriding rights. 'Tis better to prevent Hume scratching his finger as he has a right to if the destruction of the world would follow Hume's doing so. It is not acceptable that if an action is right then that action is permissible no matter what the consequences.

Can the invocation of moral catastrophe be used against Nozick (and libertarians generally)? The death of our starving and wasted individual A, as the outcome of otherwise permissible actions, we say would be a moral catastrophe. In

³⁷ Ibid., p.181.

³⁸ Nozick writes of violating rights in order to avoid catastrophic moral horror: *ibid.*, p.30. I use the more familiar locution, passing over Nozick's reasons for preferring 'violate'.

order to avoid the otherwise impending death of A money or goods are redistributed to him in sufficient quantity to prevent the catastrophe of A's death. Once again an unfree exchange, taxation, looks justified in terms of Nozick's own theory.

The issue that has to be dealt with before Nozick can be hoist with his own petard is this: what precisely has to threaten before rights can be overridden? Once clear about this we can determine whether the demise of A constitutes a moral catastrophe, and whether or not other deleterious consequences for A that fall short of A's dying are catastrophic or not.

Would A's death be a moral catastrophe? No doubt, A would protest it most certainly would. On the other hand, hard-nosed social-Darwinians of the turn of the century kind might think quite the contrary. Whilst I have not ready to hand a metaphysic of moral catastrophe a rough guide or rule of thumb can, I believe, be proffered, against which the demise of A may be adjudicated. This guide relies on a commonsensical idea of catastrophe and on general facts about A (people like A) and his situation vis-à-vis other people.

When we dub an event a catastrophe we need not necessarily be passing judgement of the moral kind. Natural events can and do overtake human beings in catastrophic proportions. To be sure, they often have or give rise to a moral dimension but they are not for that moral catastrophes. The residents of San Francisco are threatened with catastrophe the next time there is a shift in the San Andreas fault, but it is not a moral catastrophe that threatens.

The ordinary, everyday dictionary entry for 'catastrophe' defines it as a 'disastrous end, ruin; event subverting the system of things'. Herein lies the clue to understanding how catastrophe might be wielded in a moral-political setting. For an event to be catastrophic it has to be an event that is improbable or unlikely given general background knowledge of the laws governing the natural world. If the probability of

event *e* occurring is high then *e*'s occurring is not a catastrophe, no matter what *e* is and no matter what its consequences are. It would be a rather vacuous headline that read 'S.S. *Titanic* catastrophe!' if the probability of the *Titanic* sinking on her maiden voyage was high. This might be because of special facts about the *Titanic* herself or more general facts about ships, e.g. that each and every time a ship leaves its berth and ventures onto the open sea there is a probability .5 that it sink. Event *e*'s occurring when its probability of doing so is anything but very low is not a catastrophe but rather par for the course. When undesirable events occur with depressing regularity because the probability of their doing so is fair to middling to call them catastrophes is to plunder the concept of meaning. Jumbo jets full of happy tourists falling from the sky as rarely as they do are catastrophes. If the chances were fifty-fifty that every time a jumbo took off it would crash rather than land then I think 'catastrophe' would not be in order.

So catastrophes are (1) low probability occurrences. What else? Usually, we think in terms of large numbers of people suffering the deleterious consequences of event *e*'s occurrence. That is true of jumbo jets and not true of microlights assuming the probability of each's crashing is the same. We need to add to (1) a second clause (2): for something to be a catastrophe a sufficient number of people must be affected, that number being fixed by the incidence of low probability events each affecting large numbers of people. In a world where the only planes are microlights and Learjets an air-catastrophe is when the latter goes down, but not when the former does. In a world of these two and jumbo jets then the loss of a fully occupied Learjet is not a catastrophe, though the loss of a full jumbo is. The loss of a jumbo with flight crew only is not a catastrophe because the loss of a Learjet is not. The number of people is a function of general background knowledge again. If we add (2) to (1) the situation for *A* looks inauspicious if he happens to be the only person,

or one of relatively few people, in such distress. The low probability occurrence of one person starving is not a catastrophe. The low probability occurrence of one million people starving is.

That seems standard enough. The prospect for his situation being classified a catastrophe looks bleak if A is alone or one amongst a relative few in a society or situation where starvation is a low probability event for any member of that society, as libertarians think their society is.

That is all well and good, (1) and (2) together, for understanding catastrophe. But *moral* catastrophe, though something very similar, is somewhat and importantly different. And it is this important difference that can resuscitate A's seemingly flagging fortunes.

A moral catastrophe is not simply a catastrophe having a moral dimension. That is likely true of all catastrophes. For Nozick a moral catastrophe is an occurrence with catastrophic consequences that arises from persons behaving perfectly legitimately. It is the product of an invisible-hand process; the unforeseen and unintended grave consequences of foreseen and intended actions. In the example I have been using, we have a society of Nozickean-rights bearers freely contracting with one another to exchange goods. Only no-one exchanges anything with A, who is left to starve. Property rights may be held even in rubbish so that what is discarded by me belongs to someone else. I can transfer my rights in my rubbish to the recycling company, or to the orphanage which sells it to the recycling company. A's situation satisfies (1). Does his situation satisfy (2)? I think that indeed it does, given what libertarians themselves say about the productiveness of capitalism. However, in the case of moral catastrophe a third clause is required. That clause goes something like this: (3) though a moral catastrophe, to be moral, must arise from conditions of otherwise just interaction, it must also be relatively easily avoidable. If the burdens to others of preventing it are great then it is not a moral catastrophe. We

are back once more to sizing A's situation against general background considerations. If the costs to society are relatively high then A starves. If the costs are relatively low then A does not starve.

Thus, to the people of famine-stricken Ethiopia the death through starvation of any one of their number is not a moral catastrophe because it is not easily preventable. To the people of the United States the auto-accident death of any one individual is not a moral catastrophe because not easily preventable. To the people of Libertarian-U.S.A., however, the death through starvation of any one of them is a moral catastrophe because easily preventable. A little redistribution is all that is needed to avert a low probability, easily avoidable and gravely deleterious consequence.

Utilitarian considerations determine whether or not we are dealing with a moral catastrophe once it is established that the consequences of event *e* satisfy (1), (2) and (3). This is compatible with what Nozick has later written on the moral catastrophe clause.³⁹ When a person's situation meets all three conditions then we have to do our utility sums. Providing that the harm to be avoided is ranked high and the cost of avoidance low then we are facing a situation which the clause deems to be one requiring action. In the case of *A* the requisite action was a redistributive transfer. In Libertarian-U.S.A. *A* will be put on welfare sufficient to keep him together 'body and soul'. The utility gain to *A*, less the utility costs to others of welfare contribution, remains high. In Libertarian-U.S.A. Donald Trump's business fortunes' turn for the worse are not going to see him receive public monies to keep or repurchase his airline. Here the utility gain to Trump less the utility costs to taxpayers is overall low. Were Trump to suffer the fate of *A* it would be a different matter.

Once redistribution is admitted as just there remains a further, connected topic, namely whether the framework - and

³⁹ Nozick, *Philosophical Explanations*, p.495.

the way the right to welfare fits in with it - lends prescriptive import to the mechanics of redistribution itself. Are there moral restrictions to the complexion a system of redistribution may assume, besides its straightforwardly taking from some and distributing to others? It will be my contention that it has prescriptive import, and that the restrictions arise from the above-mentioned tension between the distribution effected by appropriation and justice in transfer and welfare rights necessitating redistribution. In short, if the labour theory of appropriation and justice in transfer legitimate any holdings then they legitimate all relevantly identical holdings, hence, also, if they legitimate any wealth differentials then they legitimate all relevantly identical wealth differentials. And the same goes for redistribution. If a right justifies redistribution then all relevantly similar rights justify redistribution. Tension arises because the labour and transfer theory legitimates holdings and differentials whilst the welfarist rule justifies redistributing holdings and reducing differentials. Such tension or uneasy coexistence between the two governs the complexion of the mechanics of redistribution. Tongue in cheek, we might call the overarching rule of Lockean welfarism *maximin*: *maximise* holdings, *minimise* redistribution.

The consequences of permissible actions are sometimes so grave - sufficiently grave - that teleological considerations take over. At some point or other, and I have used fundamental needs as the benchmark, rights and their correlative duties peel apart from one another and duties attach themselves to consequentialist considerations. Our obligations change from duties in fulfilment of rights to duties to prevent consequences that are deemed defeating of our prior commitments. In terms of the schema of the tension put forward, our duties in service of consequentialism are always positive. They are duties to act so as to prevent moral catastrophe.

Maximising legitimate holdings in the face of claims to welfare and minimising the number and extent of these claims marks the tension prescriptively governing how any system of redistribution may operate. What the mechanics of any method of redistribution under a régime of Lockean libertarianism are to look like, normatively, will occupy the remainder of this chapter. The inclusion is justified only because of these normative implications. Redistribution is otherwise the mundane and philosophically uninteresting task of apportioning means to allotted ends. In what follows 'wealth' is substituted for 'resources' in line with everyday usage.

Reliance on the goodwill and charity of persons is not only patently over-optimistic but ruled out on grounds of justice. We do not reside in a world populated by saints and heroes, and cannot expect that people, charitable though many are, will give as much as might be demanded. Better then to presume that redistribution will necessitate coercion in the observance of the requirements of justice, and so some kind of apparatus with coercive powers whose task it is to identify *bona fide* recipients and transfer wealth to them will need to be established.

Ordinarily in contemporary societies the execution of coercive redistribution is a function of government or the state. To say that in a libertarian society redistribution would be the responsibility of the state is to already choose sides in the acrimonious debate within the ranks of libertarians over the virtues of anarchism versus statism. For the purposes of this discussion of the mechanics of welfare this issue is left undecided. I address it in a later chapter. Until the anarchism versus statism debate is resolved it must be noted only that the justice of coercive redistribution does not necessitate state- or government-enacted redistribution. It is possible that there should be coercive redistribution in a society without a state.

Who should exercise the powers of redistribution is for the time being neither here nor there. What the redistributor will

have to have powers over are the two sides of the redistribution coin, namely welfare accumulation and welfare distribution. The former is the domain of contributive justice, and involves the identifying of those liable to contribute, deciding on a standard for contributions, assessing the level of contributions necessary to satisfy the genuine claims and then collecting, or rather exacting, them. Welfare distribution is simply the identifying of genuine recipients and ensuring that they receive their redistributive dues. Of all these processes only the formulation of a standard for contribution is contentious as only it is plausibly the arena for debate on questions of fairness, equity and the like. The others are no more than matters of suiting efficient means to an adopted end. Once the positive right is accepted these all come as a matter of course.

Proportional taxation, i.e. being taxed a certain percentage of one's wealth or income is, I think, the standard of contribution that best conforms with the *maximin* dictum governing redistribution. The desirability of proportional taxation over other standards, notably progressive rates, is evinced primarily by the fact that it does not discriminate against the wealthy on the grounds that they are wealthy. Recall that articles (iv) and (x) of the framework, i.e. ownership through labouring and transfer and the enforceability of the right to welfare provision, legitimated any wealth differentials. Proportional taxation does not conflict with (iv) and (x). Arguably, it is the only standard of taxation that does not. Friedrich Hayek asserts as a matter of historical fact that redistribution effected through progressive taxation, now almost universally accepted, was always intended by its supporters as a means for bringing about a more just distribution of income.⁴⁰ True or not, it is until otherwise shown only a matter of history. There is nothing self-evidently just about progressive taxation. Orthodox libertarians see all taxation as unjust, and though

⁴⁰ Hayek, *The Constitution of Liberty*, pp. 306-11.

they are mistaken it is not because they deny the self-evident. Lockean libertarianism says not that taxation is unjust, only that progressive taxation is.

A standard of proportional contributions is not open to the objection - which is intuitively suggestive and which is levelled against another candidate formula, namely a *per capita* flat-rate contribution - that the more property individuals have not only the more they are able to pay but the more they ought to pay. Part of the suggestiveness of this objection derives from the adage that a penny to a poor man has greater utility than a penny from a rich man has disutility. Were this conceded,⁴¹ it is hardly as it stands a case for the redistribution of pennies. Would marginal utility driven redistribution justify, in surely what are conceivable circumstances, redistributing from the exceptionally wealthy to the not quite so fabulously rich, say from the Sultan of Brunei to the Queen of England?

The weight of this objection to proportionality revolves around an implicit notion of just compensation or something akin to it. Those who have more ought to contribute more for after all they are causally implicated to a greater degree in worsening the situation of others by leaving them without. If I am an impoverished crofter and you are my wealthy neighbour, lavishly attired, well-fed and wined, squire of many acres, is not my poverty more the consequence of your having as much as you do than it is the consequence of me and my fellow crofters having what little we have? And is this not proved in that if you had not acquired all you have we would have been better off by appropriating those things now yours for ourselves? I am quite sure this objection fails in this guise and am sceptical it can go through in any form at all.⁴² It says I have less because my neighbour has more, and this is plain wrong. I could have more were I to help myself to what my neighbour has, as a thief does, but that he has more is not

⁴¹ Hayek voices a dissenting opinion: *ibid.*, p.309.

⁴² Flew, *Thinking About Social Thinking*, p.121.

because I make do with less. If my neighbour had never existed, indeed if no-one had ever existed but me, I should have far less than I now do. I could not have made my Beetle on my own. Were it to go through it may simply beg Hayek's charge of discrimination. Why ought anyone to pay more, proportionally, than anyone else? To answer along the lines of the objection above is to treat the tension between just title through appropriation and free transfer and the welfare-based right to property as pulling preponderantly in favour of the latter, and hence towards greater equality. Answering instead, 'Because they can afford it' most assuredly begs the discrimination charge. Since when did being legitimately wealthy and able to pay by itself justify disproportional contributions to public schemes? 'It is', surmises Hayek on progressive taxation, 'no more than a rejection of proportionality in favor of a discrimination against the wealthy without any criterion for limiting the extent of this discrimination.'⁴³

Proportional taxation is the formula for contributive justice that dovetails most neatly with the injunction to maximise holdings. And the system which fits best with the counterpart injunction to minimise redistribution? Three types of response to the welfare issue have been catalogued, and all three represent distinct moral-political approaches to redistribution, as each one's defining characteristic shows. (The typology is useful for it enables us to match the mechanics of redistribution with known types of welfare state.) They are the *positive state*, the *social security state* and the *social welfare state*. The first places 'major emphasis on social insurance programmes' and does not 'guarantee surrogate forms of property for all citizens'.⁴⁴ The second type introduces 'the important objective of a guaranteed national minimum'.⁴⁵ The social welfare state goes further and

⁴³ Hayek, *The Constitution of Liberty*, p.313.

⁴⁴ Furniss & Tilton, *The Case for the Welfare State*, pp.15-16.

⁴⁵ *Ibid.*, p.17.

seeks 'to achieve a general equality of living conditions'.⁴⁶ Initially, it might seem that any claim of property for all would accord best with the social security state and the guaranteed minimum it secures. On the other hand, the injunction to minimise redistribution favours the positive state's emphasis on social insurance. A compromise over the two types results, and unsurprisingly given that the dictum pulls in two directions simultaneously. The private provision of welfare through social insurance programmes is adopted in concert with a guaranteed minimum safety net. The fanciful example following is intended in illustration of this compromise, and to show the bounds of coercion and the conditions appropriate to the provision of welfare.

Two characters A and B are washed ashore a desert island from a shipwreck and both have justly acquired holdings, in the form of coins, in their pockets, only A has ten dollars and B has one. Washed ashore with them is the ship's automatic drink dispenser. The machine dispenses drinks at a price. The price of a drink is exactly two dollars, a fifth of A's holdings and twice B's total holdings. A necessary condition of subsistence is that both have a drink. Accordingly A must, is duty-bound, to redistribute to B one dollar of his holdings in order that B may purchase a drink. So much, from the point of view of Lockean libertarianism, is uncontentious.

Now imagine that two unowned plants containing an equal number of seeds are washed ashore and our two characters each mix their labour with one. By a peculiar though fortunate quirk of fate the seeds work the drink dispenser, and A and B discover this. Is it reasonable for A to say to his island partner, 'You must, are duty-bound, as I am, to "invest" some of your seeds against future contingencies which but for your investing might or would impose a redistributive burden on me'? A has just shouldered the redistributive burden B presented prior to their discovery: cannot he now insure himself against having to do so again by coercing B to engage

⁴⁶ Ibid., p.20.

in the desert-island version of a social-insurance programme, i.e. 'coercion intended to forestall greater coercion of the individual in the interest of others',⁴⁷ and 'justified not for his [B's] own good but for the good of the rest of us'?⁴⁸

Coercing B in this manner need not be taken to excuse A from all future redistributive commitments to B. Circumstances may arise putting B in need of subsistence once again, if for example he cannot retrieve his invested seeds (the equivalent of the United States Savings & Loans debacle?). Still, it does not seem wrong for A to distance the prospect of future welfare contributions by having B insure himself from his own property. Nor does it seem wrong for payments to be in the form of dedicated non-transferrable cash vouchers.⁴⁹ That would restrict the opportunities for recipients to blow their welfare on wine, women and song whilst their children went hungry at home. Hayek captures the point quite succinctly when he warns that, 'We must also expect that the availability of this [public] assistance will induce some to neglect such provision against emergencies as they would have been able to make on their own. It seems only logical, then, that those who will have a claim to assistance in circumstances for which they could have made provision should be required to make such provision themselves ... [I]t seems an obvious corollary to compel them to insure (or otherwise provide) against those common hazards of life.'⁵⁰ Amalgamating the two pillars of the

⁴⁷ Hayek, *The Constitution of Liberty*, p.286.

⁴⁸ Friedman, *Capitalism and Freedom*, p.188.

⁴⁹ Contrary to popular belief Friedman was not the originator of the voucher system but Cardinal Bourne, in 1926: Lepage, *Tomorrow, Capitalism*, p.144. Flew accords Mill the distinction: 'Selfishness and the Unintended Consequences of Intended Action', p.199. Flew may be adverting to Mill: *On Liberty*, pp.160-1.

⁵⁰ Hayek, *The Constitution of Liberty*, pp.285-6. It is interesting to note Friedman's opposition to the compulsory (coercive) purchase of social insurance on the grounds that it restricts the liberty of many to spend a portion of their income as they wish, which of course it does. Friedman is, I believe, confused. On his account the greater the number of public charges dependant on the assistance of others and thereby restricting their liberty to dispose of their income as they see fit, the greater the impetus behind switching to the compulsory purchase of annuities: *Capitalism and Freedom*, p.188. Crude majoritarianism will decide. It is difficult to square Friedman's reasoning unless he is taken to be defending a 'maximisation of liberty' thesis, namely that for any permissible action it is better that more rather than fewer be able to perform it. If it is objectionable for me to coerce you to insure yourself on the grounds that it denies you the liberty to dispose of a part of your income, why is it all well and good for you to deprive me of the same liberty through redistributive taxation? It will work as a maximisation of liberty account but I cannot credit this to Friedman, particularly not in light of his saying that 'the believer in freedom has never counted noses': *ibid.*, p.9. This is nose-

positive and social-security states in one system satisfies the demands of Lockean libertarianism. A guaranteed minimum is assured (scarcity permitting) and insurance programmes work to minimise redistribution. There is, then, no rationale for movement to a more thoroughgoing welfare state.

counting with a passion. Furthermore, Friedman maintains people must be free to make mistakes, including profligacy now for penury later: *ibid.*, p.188, and this is manifestly not a position readily commensurable with a maximisation of liberty thesis of the sort he appears to be defending.



LIBERTARIANISM AND EGALITARIANISM

In his *An Essay on the History of Civil Society* Adam Ferguson wrote: 'Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.'¹ Ferguson is here employing a form of explanation most commonly associated with the name of Adam Smith; the so-called invisible-hand explanation of the origin and causal development of certain patterns (institutions).² The invisible hand explains how a pattern or general result which seemingly manifests intentional design is brought about not by individuals' or groups' attempts to realise such a pattern but by other intentional behaviour of theirs. In short, such outcomes are the unintended consequences of intentional actions. The first of the two cocktail-party cases where my drinklessness is not deliberate is an example.

A society of equal wealth might come about via the workings of an invisible hand. Imagine that over a period of time more and more persons take it upon themselves to raise the level of wealth of their less wealthy friends until such time as it is equal with their own, subsequently decreased, wealth. They and everyone else give from their just holdings to their friends until they and their friends' wealth-levels are equal. These recipient friends do likewise for their less well-off friends,

¹ Ferguson, *An Essay on the History of Civil Society*, p.122.

² Smith wields the invisible hand in explanation of the unintended promotion of public welfare. Of the individual Smith wrote that 'he generally, indeed, neither intends to promote the public interest nor knows how much he is promoting it ... [H]e intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it': *An Enquiry into the Nature and Causes of the Wealth of Nations*, p.423.

who in turn do the same for their poorer friends. After a finite number of such bestowals - from each as they choose to each as they are chosen - the wealthy become less so and the poorer better off until all financial standings are equal. No-one can bestow more because nobody has less than they or anyone else. To avoid closed groups of friends unintentionally producing local pockets of intra-group equality but inter-group inequality we need to build into the example a principle of inter-group connexions. In this case the principle might be something like this: 'Every person has at least one friend who has a friend who is not a friend of his'. A has a friend B who has a friend C, where C is not a friend of A. So whatever the wealth of any person in that society, community or whatnot, no-one has more or less wealth than anyone else.

The upshot is a society of equal wealth which was no part of any individual's intention. The intention of any one person was simply to raise the wealth of his friends until such time as it was the same as his own. Yet all have, together and as an unintended consequence of each's intentional actions, given rise to a society with an equal distribution of wealth. The example is fanciful because unlikely. All that I wished to show by it is that an equality of wealth could come about in a way that, first, does not incorporate unequal means in pursuit of the egalitarian end,³ such as in powers of coercion, and secondly, could not be objected to by Lockean or orthodox libertarians. Each person has chosen for himself to dispose of wealth that is legitimately his in a particular manner. The first point obviates the need for a group, or class, intellectual and power élite to impose equality on a recalcitrant majority (replete with eradicable or surmountable inegalitarian tendencies?), whilst the second precludes the possibility of any libertarian objecting from the standpoint of invaded liberties. It was his money. He was not coerced. No-one's rights were violated.

³ Flew, 'The Procrustean Ideal: Libertarians v. Egalitarians', pp.161-3.

What this is intended to show is that, though only some level of wealth equality is non-categorically guaranteed as a principle of justice, a thoroughgoing equality of wealth or outcome is quite compatible with the libertarian right to property, providing it is an equality brought about in a specific way. In the example under discussion, equality effected in consequence of manifold voluntary non-enforceable actions going above and beyond the call of moral duty. In essence, equality of this sort is what might be termed a supererogatory possibility. Of course, what is supererogatorily possible is practically unlikely, for supererogatory actions are the exception to the norm. All the same, libertarians could individually act in a way that has the effect of bringing about equality, or they could, more straightforwardly, individually plump for equality and work to that end. The point is this: equality of wealth is possible to a society of libertarian-rights bearers without anyone's rights being violated. If equality is to be an enforceable precept of justice this will require justification. The justification will have to be stronger than and so override wealth differentials we have seen the labour theory of appropriation and justice in transfer to legitimate.⁴

If everyone came to believe that equality was desirable and came to desire equality then an egalitarian society might ensue. But not everyone is possessed of an egalitarian frame of mind tending to such actions, and though some are indifferent to equality in the sense that it is not prominent amongst their preferences, others are anti-egalitarian. For them equality, or at least not equality of wealth, does not rank as a preference at all. Given a society of pro-, anti- and indifferent-egalitarians commingling, there are at least two possibilities open to advocates of equality. They might educate persons as to the value and desirability of equality

⁴ Equality is sometimes presumed to be the distributional 'stable state' and that deviations away from equality require justification. See Wollheim, 'Equality', p.304. This presumption has not gone unnoticed: Letwin, 'The Case Against Equality', pp.6-8. Neither has it gone unchallenged: Hayek, 'The Atavism of Social Justice'.

and through a non-indoctrinatory educative process lead people to want an egalitarian society and want to be part of it. Alternatively, they might impose or enforce equality in the name of justice.⁵

A Millian liberal might advocate the former alone, contending that in the market of ideas equality must compete for allegiance on its own merits. It could not of course be guaranteed success. Arguably, this will strike as rather fanciful anyone sceptical as to the purity of the rational faculties of man and the ability of ideas to overturn vested self-interest, prejudice, and the like. So let equality be enforced in the name of justice. For us to do this we have to show how it is that equality (or justified inequality in the case of John Rawls, to which I turn later) is an article of justice, how it is that a just society entails an egalitarian one. Can equality be enforced in the name of justice?

Bernard Williams has put forward three arguments in favour of equality as a political ideal, the first two of which, the arguments from 'common humanity' and 'moral capacity', are arguments for a form of equality far removed from equality of wealth. The first of these arguments maintains that there are 'definable characteristics universal to humanity' such as the desire for self-respect and affection and susceptibility to pain, and that political and social arrangements should respond to these characteristics accordingly. Williams's second argument, that from moral capacity, makes use of the Kantian notion of persons as intrinsic moral agents to be treated with due and equal moral respect as ends in themselves, as equal members of the Kingdom of Ends.

Most non-egalitarians would not, I think, be overly troubled by either argument. Equality of treatment called forth by these arguments can and does find a place in political theories that specifically eschew equality of wealth as a principle of justice, as a reading of *Anarchy, State, and*

⁵ I should not want to rule out enforcing equality in the name of justice at the same time as educating for it, but they are independent options nonetheless. The 'impose equality and to hell with justice' option is discounted.

Utopia for instance will make plain. Neither argument as it stands lends any weight to equality of wealth. I may take cognizance of your common humanity from the comfort of my Rolls Royce, and treat you as an end whilst yet having a thousand times as much wealth. As I am concerned only with equality of wealth I leave these two arguments and turn to the third argument.

With this argument Williams calls into question the consistency of recognising the equivalence of some ground of distribution, say need, over two or more similar cases whilst treating these cases differently, i.e. unequally, when it comes to satisfying or meeting this ground. The grounds are the same and the reasons for meeting them are the same, yet they are not met equally. Schematically, Williams's argument is this (using his example):

(1) The proper ground for receipt of medical care is ill-health. '[T]his is a necessary truth'.⁶

(2) In some societies money is required in order to purchase medical attention. No money, no medical attention. Call these fee-societies.

(3) Two people equally ill, and therefore equally in need of medical attention, are not treated equally, i.e. equally treated, because one cannot afford it. They are living in a fee-society.

Williams concludes saying 'we have straightforwardly the situation of those whose needs are the same not receiving the same treatment, though the needs are the ground of the treatment. This is an irrational state of affairs.'⁷ The import of the argument would seem to be that similar cases call for or should be accorded similar treatment, and clearly fee-societies do not treat similar cases similarly. Ill-health is the ground for distribution and receipt of medical attention, but in a fee-society only some, the wealthy, can secure that something all ill persons have a *bona fide* ground

⁶ Williams, 'The Idea of Equality', p.163.

⁷ *Ibid.*, p.163.

for claiming. And this, we are told, 'rings hollow to the point of cynicism'.⁸

The poor ill have the relevant reason for claiming medical attention, namely ill-health, but lack the 'operativeness of reasons' because without money they cannot secure medical attention. Expressed in another way, if everyone has in their ill-health the ground for receiving medical attention but some lack the causally requisite condition for securing it (money in this case), then Williams says we have 'a situation in which reasons are insufficiently operative; it is a situation insufficiently controlled by reasons - and hence by reason itself.'⁹

Williams's argument could work if one accepted a particular understanding of the nature of rights and what it is to have rights that the argument might trade on. Let us assume that Williams operates with just such an understanding. On this understanding, to have a right to something entails having also the right to the means or pre-conditions necessary and sufficient to satisfy or fulfil that right. If a person has the right to medical attention then he has also the right to whatever it is that fulfilling his right entails, such as money, the time and effort of doctors, etc. So construed, this right is a positive right. This is something we need not accept. Furthermore, we would do well to reject this understanding lest we land ourselves with an impracticable morality.¹⁰ Why not rights 'all the way down', whereby the necessary and sufficient conditions of securing that to which one has a right (that which one is not prohibited from securing) is the having of prior rights, say in resources? 'I am not prohibited from x-ing' entails, 'I have a right to x'. But from 'I have a right to x' it does not obviously follow that 'I have the right to whatever I need in order to x'. I may indeed have rights in or over whatever I need in

⁸ Ibid., p.164.

⁹ Ibid., p.164.

¹⁰ Mackie, *Ethics: Inventing Right and Wrong*, pp.129-34.

order to x , but they could be rights I have independently of x or my x -ing. Rights over resources frequently are rights of this type. Maybe all talk of a right to medical attention is unwarranted in the first instance for in a fee-society there may well be no right to medical care as such. Instead, there is the freedom to exchange for goods and services offered by others, which may or may not include medical attention. Rather, then, we should say that one is free to purchase medical attention if it is offered at a price one can and is willing to meet. On this understanding there are no antecedent rights to anything, let alone to medical attention and the means to secure it.

As to the charge of irrationality levelled against the fee-society, it can be parried easily enough. By this criticism Williams seems to align himself with a system of rule equality whereby every constituent member of a class has an equal claim to that which has been accorded to the class as a whole, and other persons satisfying the conditions under which an individual or class has been accorded a claim to something constitute equal claimants. From this the charge of irrationality fails to carry, simply because there is not only a single rule operating and being controverted. On the contrary, in the case of the fee-society it would seem that there are two rules operating, neither of which is sufficient but which are jointly necessary and sufficient for securing medical attention. These are the rule that one be ill - which all satisfy - and the other the rule the class of poor ill persons cannot satisfy but which the class of wealthy ill persons can, namely the financial rule. There is no inconsistency between these two rules, and whilst such a state of affairs may be undesirable it hardly seems irrational. Certain situations demand equality for the sake of consistency, but fee-societies can meet these demands without assuming rights to the means to secure other, equal, rights. 'Treat equals equally' is an injunction of a vastly different order to the injunction 'Everyone to be equal', where the

latter expresses not the treatment to be accorded persons in lieu of relevant similarities shared by them, but the call for all persons to be made equal in as many respects as (technically, presumably?) possible, and to be treated equally in these respects.

Let me turn now to a brief account of what sort of societies free-societies are, and how wealth differentials are brought about, i.e. how it is that they are able to embody certain formal rule equalities according each and every individual rights to things whilst denying that this entails also the right to the means required to secure that thing, and how they are not irrational in denying this entailment. My concern will focus primarily on the manner in which wealth differentials eventuate in these societies, and though the portrayal is brief it captures the essence of the mechanics of unequal wealth generation.¹¹

(i) Individuals are possessed of varying identifiable abilities, talents, gifts and capacities which they just have as a result of their natural and environmental circumstances. Call these their natural assets. I have a keen eye and a steady hand, you a strong voice and a passion for singing.

(ii) In those societies where persons are at liberty to exercise or use their natural assets they may choose to do so. Assume that they do. I pursue a career in watch-repairing, you a career in opera.

(iii) In those societies where persons are at liberty to dispose of their property they may elect to do so, under conditions of their own choosing.

(iv) One way in which persons may dispose of their property is by transferring some or all of it to those exercising their natural assets. Assume that they do just this.

(v) Those exercising their natural assets gain financially, and some gain more than others. I have a modest income working

¹¹ My example is similar to Nozick's Wilt Chamberlain example: *Anarchy, State, and Utopia*, pp.160-4. Nozick uses his example to illustrate a different point.

from home, you do very well from multiple appearances at La Scala.

(vi) Differential wealth distributions are generated.

It does not matter whether these differentials develop subsequent to an initial equal or an initial unequal distribution of wealth, for the latter allows for the creation of a new matrix of unequal distribution with different persons having more or less than they had prior to any exchanges. Neither is it proposed that (ii) presupposes (iii). The exercising of natural assets does not necessarily presume financial gain or the expectation of it. Not all natural assets are rewarded when exercised, and not all assets that are rewarded are rewarded equally well. What determines whether a talent is rewarded, and to the extent that it is, is a product of the decisions of individual persons made under (ii), (iii) and (iv). It is a product largely of the supply of the exercise of a natural asset and the demand for it.

Societies like this are familiar enough, and despite tax measures that seek to limit inequalities wealth differentials, sometimes of vast proportions, are common to them. Fee-societies are not obviously irrational in embodying a layer of rules, the prerequisites of which determine membership in a specific class and subsequent equal treatment of the members of that class. This still leaves the possibility that equality of wealth is demanded in the name of justice, and hence that wealth differentials ought not to be tolerated. A number of options are available to the egalitarian. If prevention is thought to be better than cure then certain natural assets, for example the more rare ones, could be nullified by the appliance of science. Persons' tastes could be altered by means of aversion therapy. Similar assets in others could be developed and released onto the market until it becomes saturated and differential gains from its exercise are not forthcoming. Alternatively, the exercise of some assets, or the differential rewarding of them, might be prohibited. We could 'tax back' to equality. I shall not examine these

options individually, only pause to say that some seem at present implausible, some wrong and some (to some people) too high a price to pay for equality.

That equality of wealth might be a precept of justice is a conclusion reached by Rawls. He argues that all inequalities are to be justified, failing which justice demands equality, and that there is only a single justification for inequality. A systematic examination of Rawls's theory would be too large an undertaking, and so I prudently confine myself to the task of mooting possible - and it is hoped, not implausible - objections to it.

Justice begins with the original position. The original position is the pre-institutional gathering of moral selves behind the veil of ignorance, under which conditions the participants, who are taken to be rationally self-interested, must unanimously choose principles of justice which they are to abide by, even when it is not in their individual self-interest to so abide. Behind the veil of ignorance these moral selves know nothing about what natural endowments they possess nor what place they shall occupy in society. These self-interested but endowment-ignorant persons choose the substantive principles of justice that are to govern their post-original-position institutions. According to Rawls, they will reach agreement on two principles of justice. The first is that each is to have as much liberty as is co-possible with a like liberty for others, and the second that inequalities are justified only if they work to the advantage of the least well-off group in society. This second principle is Rawls's famous 'difference principle', which legislates that: 'All social values - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.'¹²

¹² Rawls, *A Theory of Justice*, p.62. These are the Rawlsian 'primary goods', goods that all persons want if they want anything at all.

Social institutions are to be structured in line with the principles of justice, for it is their function to serve and protect justice, and Rawls specifically says of the difference principle that it rules out justifying institutions on the utilitarian grounds that the hardships borne by some are offset by an aggregate greater good. 'It may be expedient but it is not just', Rawls writes, 'that some should have less in order that others may prosper. But there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved.'¹³ That institutions are derived from and subservient to moral theory Rawls makes abundantly clear, and the moral theory that grounds his difference principle is one that, in conjunction with the choice made in the original position, denies the legitimacy of any theory of distributive justice which connects holdings to the possession of morally (because naturally) arbitrary characteristics. 'There is no more reason', Rawls argues, 'to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune',¹⁴ and 'No-one deserves his greater natural capacity nor merits a more favourable starting place in society.'¹⁵ It is the function of the difference principle, as applied, to compensate those disadvantaged in the arbitrary lottery of natural fortune. Natural endowments are in a moral sense not properly deserved by the possessors of them and therefore neither can the benefits thereof be said to be properly deserved. He who deserves not the endowments deserves not the benefits that flow from them. Those who do well tend to do well because favoured, or not disadvantaged, by the natural lottery, and similarly those who do not do well tend to fare worse because less favoured, or positively disadvantaged, by the distribution of natural assets. (Of two disadvantaged persons

¹³ Ibid., p.15.

¹⁴ Ibid., p.74.

¹⁵ Ibid., p.102.

one can be less disadvantaged than the other. In the land of the blind the one-eyed man is king.) The difference principle justifies redistributing from the well-to-do to the less well off.

At present anyway talents, natural affinities, social fortune, and such like, cannot always be cancelled out or neutralised. Hereditary peerages can be abolished and inheritances confiscated, but it is considerably more problematic to efface a public school education once acquired, or a talent in biochemistry. Rawls is well aware of this, saying that 'it is not in general to the advantage of the less fortunate to propose policies which reduce the talents of others'.¹⁶ All are made worse off for that. Rather, we ought to conceive of talents as social assets to be utilised in the service of the 'common advantage'. Accordingly, we treat the naturally well-endowed with due respect by 'arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberty.'¹⁷

Granted that endowments are arbitrarily, so amorally, distributed, and that it can be shown that the recipients of such good fortune have no claim to the benefits flowing from them, the assertion that they are rightly social assets and belong equally to one and all remains to be substantiated. Showing that individuals do not deserve 'their' assets is not automatically to show that society as a whole does deserve them. If moral arbitrariness does undermine desert, then by itself it fails to establish any alternative as to how assets are to be regarded and the benefits thereof distributed. The argument from arbitrariness is this, and as can be seen it proves too much:¹⁸

P People should be permitted to retain only what they deserve.
P1 People have natural assets.

¹⁶ Ibid., p.107.

¹⁷ Ibid., p.179.

¹⁸ These syllogisms take their cue from Rawls's 'Equality vs. Liberty: Advantage, Liberty', pp.41-2.

P2 No person deserves their natural assets.

C1 We should take all natural assets from all people.

(C1* Differential rewards flowing from natural assets should be taken from all people.)

What Rawls does is advance the following argument:

P' What a person does not deserve should be divided equally.

P1 People have natural assets.

P3 No person deserves any natural assets any more than any other person.

C2 All natural assets should be distributed equally.

(C2* Differential rewards flowing from natural assets should be distributed equally.)

But conclusion C2(C2*) does not follow from P3 because P3 follows from P2, and the conclusion of P2 is C1(C1*). From the supposition that no person deserves their natural assets it follows that no person deserves their natural assets any more than any other person. What is needed is a premiss to the effect that natural assets are deserved in some way by someone, but then, of course, no such premiss is compatible with P2. An argument with such a premiss would look something like this:

P' What a person does not deserve should be divided equally.

P1 People have natural assets.

P2 No person deserves any natural assets any more than any other person, but some people do deserve their natural assets.

C2 All natural assets should be distributed equally.

(C2* Differential rewards flowing from natural assets should be distributed equally.)

But if some people do deserve their natural assets then it follows that neither C1(C1*) nor C2(C2*) is true. Rawls cannot draw egalitarian conclusions from any argument that contains the essential premiss that no person deserves their natural assets, and if he yields this premiss then it follows that some people do deserve their natural assets and what flows from them.

Indeed, it may be that desert-based arguments favouring the Rawlsean conclusion are just not available. One reason for thinking this would be if the five bases of desert identified by Joel Feinberg are exhaustive. Only one of these bases is at all relevant here, that of 'compensation, reparation and liability'.¹⁹ According to Feinberg's typology, we should view the difference principle as a maxim for compensation, where compensation applies to 'losses which are no-one's fault'. Natural assets, as the arbitrary product of the natural lottery, are losses of this type. Their very arbitrariness assures this. Though the better endowed (and presumably the better off) are not deserving neither, it would seem, are the less well-endowed (less well off) deserving - the basis upon which the difference principle compensates. Compensation for intentional harm is one thing, 'Compensation for harm which is no assignable person's fault is, however, a different matter'.²⁰ The less and the better endowed are equally undeserving; so what justifies compensating the former from the holdings of the latter?

A second objection to the Rawlsean project arises with the threat of our losing sight of persons amongst the natural assets they bear but which are not part of them. Recall that the original position is that pre-institutional gathering of moral selves - denuded of all knowledge of their post-choice empirical characteristics and situation - wherein the two principles of justice are selected. Yet Rawls allows that what distinguishes individuals from one another are empirical characteristics, namely their wants, desires, aims, natural assets, etc. This suggests that persons are decomposable into two parts, the one the moral subject and the other the human being, so to speak. All that is me that is not a property or attribute of the moral self is ascribed to the human being.

¹⁹ Feinberg, 'Justice and Desert', p.75. The other four types are 'Awards of prizes; assignments of grades; rewards and punishment; praise, blame and other informal responses'.

²⁰ Ibid., p.86.

In the original position I am only the former, and there the moral subject chooses the principles that are to govern the recombined whole.²¹

The moral self is the Kantian end in itself. 'Each person', writes Rawls, 'possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.'²²

The dichotomous self, as it might be styled, is integral to the Rawlsean project. But just how easy is it to make this division? Perhaps we want to say that any contingent asset cannot be an essential constituent of the self lest one's sense of identity be vulnerable to transformation by the least vagary of experience. Assets are 'mine', in the sense that they are located here under 'my' control, but not *me*. But perhaps we should not balk at the suggestion that empirical features are constitutive of the self if we picture assets, desires, etc., as woven into the fabric of one's sense of identity, some of which are undoubtedly dispensable without affecting that sense, but others of which are not. In the film *Whose Life Is It Anyway?* Richard Dreyfuss plays a sculptor who loses his contingent ability to sculpt when paralysed. He may well remain the same moral self but he nonetheless experiences a loss of sense of identity, and a substantial loss at that. Kafka's metamorphic Gregor Samsa might have wished to say something much the same.

The intention behind these examples is to illustrate the point that though some contingent features are certainly not constitutive of me others may well be. Legislating a *priori* seems not to settle the matter. And if there is any truth in

²¹ Barry thinks Rawls's view that men are not owners of their natural abilities a 'curious view': *On Classical Liberalism and Libertarianism*, pp.147-8.

²² Rawls, *A Theory of Justice*, pp.3-4.

this we cannot so easily drive the required wedge between the me and the 'mine', in order to utilise the 'mine' without using me. I am not pressing for a radically situated subject, i.e. where the self is not separable at all from its ends, but wish only to cast doubt on the model of the easily divisible dichotomous self.

Before proceeding to the final consideration contra Rawlsean justified inequality, another reflection on the argument from moral arbitrariness might serve to pump intuitions - if nothing else. Cases attesting to the transition from a deprived, socially disadvantageous natural lot to one of achievement and success are not unheard of. This outcome is itself morally arbitrary by the standards of the deep theory of endowments - the theory subsuming how we choose to exercise our assets - but it does stretch our intuitions to maintain that the rags to riches achiever does not in any way deserve at least a portion of his success and attendant benefits. Working long and hard against the odds, coming from nothing, making good, are all tied in with our everyday discourse and understanding of desert. Rawls is free of course to maintain that any and all morally arbitrary conditions that are relevant in such cases cannot be bases of desert, but our intuitions may suggest otherwise - and intuitions are not so easily hurdled. Being better off in spite of encumbrances bestowed by the natural lottery in endowments is not the same as being better off just because the natural lottery happened to favour one. Again, what our intuitions are possibly intimating is that we are in danger of losing sight of persons by putting all betterment down to the workings of that blind, impersonal force we know nature to be.

In conclusion I moot one final consideration that has a bearing on Rawlsean equality. The argument is an empirical one and, further, one that conforms to an invisible-hand model in accounting for the unintentional generation of the greatest good via other intentional actions of individual agents. It is

an argument that is familiar enough, and as I am only concerned with the conclusion I shall not recount it here.²³

Even if Rawls is right and those in the original position would choose his two principles of justice, they will, if they are concerned with the least well-off group, so this reasoning goes, be choosing what amounts to a laissez-faire system or a system of natural liberty of holdings and exchanges which tolerates all and any wealth differentials. What if, following Adam Smith, a laissez-faire system tolerating all wealth differentials resulted not only in a greater aggregate good but increased the well-being of all in the long term? Some groups may have their position improved more than others, and wealth differentials may widen, but all are made better off, even though the less well off could have done better in the short term under a different system, one that was broadly redistributive. Thus the reading of the dictum cited earlier would change to: 'It is expedient and it is just, or not unjust, that some have relatively less in order that all may prosper'. This is a possibility Rawls allows for, recognising as he does that 'in theory the difference principle permits indefinitely large inequalities in return for small gains to the less favoured.'²⁴

Acceptance of the difference principle does entail that some will have absolutely less in order that others may prosper because the better endowed are worse off than they would otherwise be under a system of natural liberty, for instance. Consider in this regard the difficulty for Rawls's anti-utilitarian proviso raised by the problem of finite resources and justice across generations. (Rawls does not discuss natural resources in this context, only capital.)

That the difference principle justifies inequality only if it improves the lot of the least well-off group seems to allow for the consumption of all, or the greater part, of a fixed resource, oil say, at time t_1 by generation g_1 , thereby

²³ See Hayek, *The Constitution of Liberty*, pp.39-53, for one variant of the argument.

²⁴ Rawls, *A Theory of Justice*, p.536.

leaving less for generation g_2 at time t_2 . But without an explanation of why g_1 at t_1 , even the least well-off group within g_1 , should prosper at the expense of g_2 at t_2 , the difference principle conflicts with Rawls's anti-utilitarian proviso, re it being expedient but not just that some should have less in order that others may prosper. How we might determine the shares of a fixed resource g_1 or g_2 are to receive, if any, can be brought out by turning to an argument of Samuel Scheffler's.

Scheffler's argument purports to show that it is reasonable to introduce consequentialist considerations into deontological theories when there is no method for deciding between two or more courses of action that equally satisfy the conditions of the deontological theory in which they arise.²⁵ With regard to the consumption of finite resources, however we choose some do gain at the expense of others. Some will have less, namely g_2 at t_2 , if finite resources are made available for consumption at t_1 , and g_1 will have less if they must forsake consumption in order that g_2 should benefit. Applying Scheffler's reasoning to the relation between fixed resources and the difference principle and the anti-utilitarian proviso together, we have the situation where we should violate the proviso disallowing consequentialism a rôle because the proviso is violated either way. If g_1 uses some or all of a resource, thereby leaving less or none for g_2 , it prospers at the expense of g_2 . If g_2 are to be left resources that could have been used for the benefit of g_1 , then they prosper to the detriment of g_1 . Assuming that g_2 's consumption would yield greater utility over g_1 's; or that the unavailability of the resource at t_2 would affect g_2 detrimentally to a greater extent than if unavailable to g_1 ; or that g_2 lose more than g_1 would gain, then if we were to know this we will be lead to choose against g_1 and in favour of g_2 . It is an empirical matter, a question of how the utility sums turn out.

²⁵ Scheffler, *The Rejection of Consequentialism*, pp.99-100.

Whatever happens some people gain at the expense of others, independently of how we choose, if we choose. Given this outcome, ought we not to aim at the greatest gain over the least loss? In this scenario the deontological theory cannot help us in choosing between the rival courses of action because each is equally impermissible from the point of view of that theory. Each is not, however, equally impermissible from the consequentialist standpoint, and so we reasonably adopt that point of view and allow such considerations to play the rôle of decision-maker in order to break the impasse.

Putting the two strands together, if consequences do have a secondary rôle to play in deontological theories when an impasse is reached - as appears to be the case in the conflict between the difference principle and the anti-utilitarian proviso - and if the conclusion that laissez-faire works best is correct, then the difference principle becomes forthwith the justification for what is, effectively, a system of natural liberty. All inequalities of wealth do, as a point of fact, work to the advantage of all or to the greater good of a greater number and hence are justified. No other, more stringent equality is demanded in the name of Rawlsean justice.

I want now to look at an argument advanced by Ernest Loevinsohn to the effect that 'from a purely libertarian point of view' government ought to coercively redistribute goods. One reason for examining this argument is that it is not really an argument for redistribution on libertarian grounds but rather because redistribution is believed to maximise the satisfaction of desires. Loevinsohn misconstrues the essential nature of libertarianism, and on this basis attempts to push through an argument against it. Appearances notwithstanding, the argument is a teleological one masquerading as deontological. Thus the argument is wide of the mark as an objection to libertarianism worked from within. This is the main thrust of my criticism.

Because of his misconstrual it is not at all transparent that Loevinsohn is objecting to libertarianism at all. He says that the coercive prevention of a person's pursuit of some or other course of action is the curtailment of his liberty.²⁶ Preventing someone from pursuing a course of action is a constraint upon his freedom. In the broad sense of *freedom* this is certainly true. However, and as should be evident from the preceding pages, libertarians do not hold to the broad view *carte blanche*. For them, liberty is subordinate to rights; one is free to act - there ought not to be any constraints upon action - where that act, pursuing that course of action, does not involve violating persons' rights. One's liberty is the sum of those actions one is not precluded from performing by the rights of others.

Furthermore, the argument proceeds to its conclusion only by virtue of the inclusion of a rather dubious assumption. Where this assumption does not hold the argument will not go through. Some promptings as to why we might doubt the veracity of this assumption are given. Whilst they do not constitute a knock-down refutation of the argument they do blunt its thrust somewhat. What they suggest is that whether government should redistribute according to Loevinsohn's justification is, in the final analysis, and as befits a consequentialist account, an empirical matter. Finally, some possible ramifications of what Loevinsohn says are advanced with the primary purpose of showing that redistribution can go much further on his justification than he instances, and where this new territory is morally questionable.

Is it better, from a purely libertarian stance, for government to coercively transfer property from some to others, or not? Loevinsohn argues that it is. Government would coercively transfer, without compensation, the ownership of goods from some citizens (the producers) to others (the recipients), and this would 'raise the overall level of satisfaction of wants. For the persons who would receive the

²⁶ Loevinsohn, 'Liberty and the Redistribution of Property', p.229.

goods in question ... are poorer than the producers, and they have a greater desire to use or consume the goods than do the producers.'²⁷ What Loevinsohn calls the 'property rights view' says that such redistribution is contrary to liberty, and that government should therefore choose the non-redistributive alternative. (Whether or not this view includes an escape clause, e.g. 'a duty to satisfy extremely urgent needs',²⁸ is neither here nor there.)

Opposed to the property rights view is 'the view that insofar as the government is guided by considerations of liberty, it should choose the redistributive alternative.'²⁹ It is Loevinsohn's purpose to show that the redistributive alternative best satisfies a commitment to the maximisation of liberty and is therefore preferable - on supposedly libertarian grounds - to the property rights view. The redistributive alternative entails curtailment of the liberty of producers to use and consume the goods they have produced. Does the non-redistributive alternative entail any curtailment of liberty? Loevinsohn maintains that it does: it curtails the liberty of non-producers 'by the threat of legal penalties from using or consuming the goods'.³⁰ And it is precisely this that is taken to be definitive of the curtailment of liberty.

Producers' ownership of goods means that others are excluded from using or consuming them without the owners' consent. Where they desire to use and consume them, and are coercively prevented from doing so, their liberty is curtailed. '[I]f we prevent someone from acting in the way she desires, we must be able to show cause why she should be prevented. Otherwise it is wrong to prevent her. Prima facie then, we are obligated to refrain from preventing anyone from acting in the way she desires to act.'³¹

²⁷ Ibid., pp. 226-7.

²⁸ Ibid., p. 227.

²⁹ Ibid., p. 227.

³⁰ Ibid., p. 229.

³¹ Ibid., p. 231.

It is here, for the first time, that the consequentialist nature of Loevinsohn's critique of libertarianism becomes plain. It need only be asked, 'And what of the desires of the producers to act as they desire, presumably in ways that make exclusive use of goods they have produced?' Asking that question leads directly back to the initial assumption - the dubious empirical assumption - that to allow the satisfaction of the producers' desires would not raise the overall level of satisfaction of wants, and to be concerned with the satisfaction of wants is to be libertarian. And the refutation of this is: no libertarian, and especially not any of those I have cited, is concerned with so overtly utilitarian an outcome as the overall maximisation of the satisfaction of wants.

Loevinsohn's disguised utilitarian commitment is revealed by the following question he poses. Both the redistributive and the non-redistributive alternatives entail the curtailment of liberty. The question is, which involves the greater curtailment? The latter, says Loevinsohn, his reasoning being that 'if the non-redistributive alternative is chosen, the recipients will be barred from the goods in question. This will frustrate certain of their desires. (Overall, however, there will be less frustration of people's desires if the redistributive alternative is chosen.)'³² Person's desires are the variable in discerning the greater curtailments of freedom from the lesser. Curtailments of liberty are greater when the action the person is prevented from performing is of greater importance to him. The extent to which liberty is curtailed depends, *ceteris paribus*, on how important the course of action in question is to the agent.³³ This is Loevinsohn's 'importance-to-the-agent' factor, which he believes provides a libertarian reason to choose the redistributive alternative.

Loevinsohn illustrates how this factor operates. In case one, X is about to drink from a stream he has come across when

³² Ibid., p.235 (emphasis added).

³³ Ibid., p.232.

armed men appear and tell him that he cannot drink from that spot but will have to move one or two feet farther downstream. 'However, it is not very important to X whether he drinks where he is, or two feet away.'³⁴ In case two the same happens to Y, only Y is prevented from drinking at all from his favourite stream, and he was rather looking forward to drinking from this stream. For Y, drinking from this, his favourite stream, is quite important to him. Y has to drink from another stream. Case three sees Z prevented from drinking at the stream 'when, as he knows, the nearest alternative source of water is so many miles away that he might collapse from thirst before he got there. So it is very, very important to Z to drink from the spring.'³⁵ 'In sum, the more important the blocked course of action is to the person, the more the person's liberty is curtailed (other things being equal).'³⁶

Applying the importance-to-the-agent factor to the redistributive and non-redistributive alternatives answers the question which of them most curtails liberty. The non-redistributive alternative involves a greater curtailment of liberty because of the assumption that the recipients have a greater desire to use and consume the producers' goods than do the producers themselves. It is more-important-to-the-recipients that they use and consume than it is important to the producers.

Coming now to my criticisms of the argument, this looks very much like an underlying utilitarian argument for the redistribution of goods. Goods are to be redistributed because doing so means less liberty will be curtailed than otherwise would be, because those to whom the goods are redistributed have greater desires to use and consume them. It is more important to them. Loevinsohn denies his argument is underpinned by utilitarianism of some or other variety: '[T]he argument does not require that we be consequentialists with

³⁴ Ibid., p. 232.

³⁵ Ibid., p. 233.

³⁶ Ibid., p. 233.

regard to liberty ... as I have tried to show, it [government] will be curtailing liberty less if it chooses the redistributive alternative.³⁷ My objection is to the contrary conclusion. Where liberty is the only criterion, to favour less rather than more curtailment of liberty is precisely to be a consequentialist about liberty. The argument is no more than a misdirected critique of libertarianism on the mistaken grounds that to be a libertarian is to be wedded to the maximisation of personal liberty *tout court*. The slogan 'Prohibiting prohibited' is not an epithet that does full justice to libertarianism. Despite his protestations to the contrary, Loevinsohn's importance-to-the-agent factor, reduced as it is to one of desire-satisfaction, cannot be anything but a consequentialism-about-liberty argument. It is an argument that has just the same form as does Friedman's argument against the compulsory purchase of social insurance encountered earlier.

What Loevinsohn appears to be doing is something like this:

1. Positing a maximisation of liberty account (though he himself denies this).
2. Building into the account the assumption that recipients have stronger desires for the goods than do the producers of them. Call this Assumption 2. This may well be an erroneous assumption.
3. Noting that Utility calculations follow a procedural formula, and that with this formula the outcome is completely a product of the variables factored in.
4. Factoring in the essential variable that recipients' desires are stronger than producers', i.e. factoring in Assumption 2. A consequence of which is that redistribution satisfies more in terms of desires.
5. Concluding that utility - liberty - therefore favours the redistributive alternative.

³⁷ Ibid., pp.237-8.

But what if Assumption 2 is mistaken? I think that we have reason to believe that it in fact is.³⁸ If Assumption 2 is mistaken then a case can be made for the property rights view on grounds of satisfaction of desires that are important-to-agents. Were this case to go through we would then have libertarian grounds, in so far as Loevinsohn understands them, for choosing the non-redistributive over the redistributive alternative.

From the standpoint of liberty, and all other things being equal, it might well seem eminently rational for government to redistribute in the broad way Loevinsohn suggests. If the government is going to have to curtail liberty either way (it is not a question of curtailing as opposed to allowing to be curtailed), then it is better that it curtail liberty less rather than more. But this serves only to muddy the waters and disguise the fact that Loevinsohn contends for a desire-satisfaction justification of redistribution. Liberty is not what is important. What is important is the desire-satisfaction that persons would otherwise not get because precluded, in the absence of government intervention, from the goods necessary to sate their desires.

We can make good sense of our ranking our desires according to their strength, and seeking to satisfy those desires that have a higher ordering first. We have a rank-ordered utility structure. My desire to write this chapter is less than my desire to enjoy a nice cold beer in the garden of the local public house. That is just being honest. But both are less strong than my desire that I do what I believe is expected of me. And so I write the chapter and forego the beer.

The comparison and weighting of desires is applicable interpersonally. Economists have perhaps devised methods for yielding interpersonal utility comparisons. They may determine them according to the price one is prepared to pay for a good under ideal conditions, or by how much immediate satisfaction

³⁸ One way of measuring the strength of desires is in terms of preparedness to produce. Presumably, recipients fail this test.

one is prepared to sacrifice for greater long-term gains. Whatever economists' methods, humans have been employing folk psychology in making such comparisons, though more crudely, for centuries. They have done this using general facts about human psychology and motivation: that A chooses vanilla ice-cream over chocolate and chocolate over strawberry shows A's preference is for vanilla. B's choosing in the reverse order shows his preference ranking. In much the same way as we choose chocolate over vanilla ice-cream, though we desire both, so we choose to give to A rather than B a vanilla ice-cream on the basis of the strength of A's desire.

Let me turn now to the issue of producers and recipients. We want to know, of the goods Loevinsohn has in mind, whether the recipients have a greater desire to use or consume them. Loevinsohn assumes that they do, as indeed he must if his argument is to show that the redistributive alternative is preferable on grounds of 'liberty' (read 'desire satisfaction'). But if his argument is to be damaging to libertarianism it depends entirely on the truth of this dubious empirical assumption, which I have dubbed Assumption 2. Are the recipients starving? Or is Loevinsohn's account premised on diminishing marginal utilities? It can make a difference. Loevinsohn does not say. All we know is that the sort of desires that producers have, and that the redistributive alternative frustrates, are, unsurprisingly, the desires 'to bequeath the goods in question to their children ... or ... that the benefits of their labor accrue to themselves.'³⁹ Are we taking from the exceptionally rich to give to the horribly poor, or only from those who produce and have a little more? If it is a case of Getty-Rockefeller versus the starving, tired, poor, huddled masses, then possibly interpersonal utility comparisons are made easily enough. If not, then can we be sure our interpersonal comparisons are valid?

³⁹ Loevinsohn, 'Liberty and the Redistribution of Property', p.235.

A further likely real world complication is distinctions within the class of recipients itself, namely where there are better- and worse-off recipients, though all recipients are worse off than any producer. Redistribution from the producers may by-pass completely the upper echelons of the recipient class because there is simply not enough to go round. The less well-off recipients have their desires satisfied and the better-off recipients' desires remain unsatisfied, as of course do the desires of the producers.

This means that overall, despite stronger desires on the part of less well-off recipients, more liberty is lost than is gained. And similar reasoning can be applied to any three- or multi-party interaction between producers and the two or more classes of recipients, where the outcome is that if only one class can be granted the liberty to use and consume the goods then liberty may not be served any more by giving the goods to one class than it would be by giving them to any of the others. Other considerations will have to be imported to decide which class is to be accorded the users-and-consumers liberty. The libertarian stance, as Loevinsohn understands it, will have proved incapable of deciding by itself. Once this is recognised then talk of the rights of producers, the property rights view, becomes a live option.

Eschewing talk of producers and recipients for the moment because the notion of producers is too vague - are producers those who contribute in any way to the productive process and are rewarded for it? - and because it may suggest the exceptionally rich versus the horribly poor picture, I shall talk instead of 'wealthy' desires and 'poor' desires. Call them *w*-desires and *p*-desires, where *w*-desires are those desires that necessitate large or above-average amounts of money to satisfy, and *p*-desires are those that require only small or below-average amounts of money for their satisfaction. A typical *w*-desire would be 'To own a Porsche', a typical *p*-desire 'To cover the dashboard with nylon fur'.

w-desires include those desires of the non-wealthy that require extensive wealth for their satisfaction. w- and p-desires, then, cut across the classes of those with and those without wealth. The wealthy may desire to eat fish and chips, the poor to dine on Beluga and Bollinger. For the sake of simplicity, I shall attribute the w- and p-desires to the wealthy and poor respectively, ignoring any real life intermixing, and thus allow the wealthier and the poorer to represent, respectively, the producers and the recipients.

Now, it is a moot point whether a person's w-desire to send his son to Eton is, *ceteris paribus*, less important to him (to-the-agent) than is another's p-desire to send his son to the local secondary modern to get the three R's. Perhaps, furthermore, the former's son himself has a w-desire to go to Eton in order that he become a civil service mandarin, whilst the latter's son would rather play soccer for the community youth team. In the first case both parent and son may desire that he, the son, become a civil service mandarin. Two strong w-desires may outweigh, in terms of desire satisfaction, many p-desires that could be satisfied by a redistribution of goods from the wealthy to the poor. Crudely put, it may be better - on Loevinsohn's own account, mind - that one son should go to Eton and many sons play soccer than that one son should not go to Eton and the others acquire proficiency in the three R's. If w-desires for the goods in question are as numerous and as strong, or stronger though slightly less numerous, than p-desires, then utility or 'liberty' or desire satisfaction will not be served by redistributing from the wealthier to the poorer.

Loevinsohn's argument depends upon: (i) recipients having stronger desires to goods than producers. If they did not then his argument would turn out to be one for maintaining the maximising *status quo*; or (ii) recipients' desires being less strong but more numerous. Many weak desires outweigh fewer stronger ones. Many p-desires for a cup of tea outweigh a few w-desires to acquire a public school education; or (iii) there

being fewer recipients but with stronger, and hence outweighing, desires.

Loevinsohn's argument is too quick, it proves too much. What is more, by parity of reasoning it leads to unacceptable, or at least morally dubious, conclusions. Admittedly, as with his own justification, whether we are obliged to accept these potential ramifications and act upon them depends on the facts, the facts about what persons want to do and how much they want to do it. A person's liberty is curtailed when he is coercively prevented from pursuing some course of action. This opens the redistributive floodgates. '[A] person who is prevented from doing something which is of some importance to him is suffering a greater curtailment of liberty than you are ... the degree to which his liberty is thereby curtailed depends (other things being equal) on how important the course of action in question is to him.'⁴⁰

If Loevinsohn is committed to the stance that property rights can be defeated by considerations of liberty maximisation, what might be the consequences? Here are a few conjectures: the redistribution of body parts; the redistribution of liberty itself for the sake of utility or desire satisfaction gains now or in the future; the transfer of the newborn across families.

The redistribution of body parts seems ruled out. Loevinsohn talks of the producers of goods. Clearly I do not produce my kidneys. But the difference between the produced and the natural or naturally occurring is a morally irrelevant difference. Body parts can be transferred from person to person in much the same way that material goods can. Such transfer would be justified when the 'donor' Jones's liberty is not affected at all, as happens when he goes under general anaesthetic to have a tooth pulled and whilst under has a kidney removed without his consent, plus perhaps a pint of blood and some bone marrow. Jones never knows of this and may never find out. His liberty in this regard is quite

⁴⁰ Ibid., p. 232.

unaffected. It would be justified, too, when Jones's liberty is affected only slightly, as happens when he is informed that one of his kidneys is to be removed, though he does not consent to this. His liberty is only slightly curtailed; he has to spend a day or two in hospital recuperating. Regaining his mobility from a redistributed kidney is more-important-to-Smith than the loss of one of his two kidneys is important-to-Jones.

In both of these cases liberty is increased overall. In the first there is a gain and no loss, though there may possibly be a loss later if Jones's remaining kidney fails, and in the second there is a small loss and a great gain. In both cases the gain is a direct consequence of the transfer. Does it make a difference that in the second case Jones knows? To be sure, this is something that needs to be reckoned into the loss-gain calculations, though only, if liberty is paramount, from the standpoint of whether it increases or decreases liberty. The unhappiness, insecurity, etc., Jones might feel upon discovering what has happened to him, or knowing that it is about to happen, is not factored into the calculations unless they somehow affect those calculations themselves. For instance, if upon discovering what has been done to him whilst under anaesthetic Jones becomes psychologically quite unable to act as he wishes, and prior to the operation was able to, his liberty has been curtailed. (If non-libertarian considerations are to be factored in then Loevinsohn's thesis is considerably muddied.)

It seems that Loevinsohn would tolerate the redistribution of body parts on the grounds that this would raise the overall level of the satisfaction of wants. People want kidneys, eyes, legs and the like. Doctors want them to transplant, and patients want them transplanted. Friends and relatives of the recipient want the doctors to transplant them. All these people have all these various desires and they are desires that have distinct conditions of satisfaction. Dr. Barnard desires that his patient receive a new heart, and this desire

is not going to be satisfied by Dr. Frankenstein's patient receiving a transplanted brain.

Is the transfer of babies across families justifiable? Certainly, adoption is partly or largely a matter of natural parents who have less strong desires towards their children giving them up to couples who have stronger desires. Normally it is voluntary, but utility may prompt us to coercively redistribute babies, from large families to sterile couples, for example.

Does Loevinsohn's argument justify the redistribution of liberty itself? Does it condone slavery or the partial enslavement of some? Does it condone slavery or the partial enslavement of some at time t_1 in order that at a later time t_2 they should be emancipated, and where the good of their later emancipation, minus the hardships of enslavement, results in a net gain? Perhaps the satisfaction of the desire to be free at t_2 is sufficiently great to outweigh the hardships of slavery and the non-satisfaction of the desire to be free at t_1 . It seems it must. Loevinsohn himself writes that redistribution to diminish the liberty of some to effect thereby an increase in the liberty of others is acceptable, providing only that 'the transfer would decrease the extent to which those [recipients'] desires go unsatisfied, and decrease it sufficiently to outweigh any increase in unsatisfied desire resulting from the transfer.'⁴¹

May we be coerced into surrendering our Saturday mornings to wheel elderly folk round supermarkets so that they might do a spot of shopping, the justification being that their liberty to shop once a week is of overriding value? May we be press-ganged into the merchant marine so consumers can have cheap pepper at the table? Here I raise the well-worn theme of the spectre of intolerable interference, justified in these cases by too zealous an affinity for utility.

⁴¹ Ibid., p. 227.

Loevinsohn will have government transfer from 'the citizens who produced the goods to other citizens'.⁴² In modern economies who produces? Labourers? Owners of factories? Who? His account turns into a general argument for (greater) equality or welfarism turning on the use of utility-cum-liberty as the determining consideration: to those who have less, are poorer, from those who have more, are richer, where the former have a greater desire to use or consume the goods than do the latter.

If Loevinsohn is arguing only for a possibility, i.e. for possible conditions under which redistribution is required, then we may discount it given what we know of the world. The possibility is but slight. Suppose we restrict the argument on Loevinsohn's behalf and have it apply only to the redistribution of goods and money. The looming totalitarian ramifications are then headed off: press-ganging and the like are to be discounted. Does this help? Not as much as might be thought, due to the dubious empirical nature of Assumption 2. Loevinsohn's is an argument for contingent conditions under which coercive redistribution is justified. If the facts are thus-and-so then redistribution is to proceed, but if the facts are otherwise then not. Given what we know of the world we might discount the prospect of redistribution and the threat to the property rights view from this quarter as by no means alarming.

The property rights view could prove to be the stance that maximises liberty, in the sense of freedom from the coercive powers of government - which is the model of liberty Loevinsohn seems in places to be operating with. The property rights view would maximise liberty on the assumption that it granted, not unreasonably for an account of its kind, property rights to persons over their body parts. Being allowed to keep one's kidneys, eyes and so on, is a legitimate invocation of the term *liberty*. It would maximise liberty because producers and recipients would have rights and protection of those

⁴² Ibid., p.226.

rights over things that are important to them. Under the redistributive alternative this need not happen; the only gain would be in recipients' liberty to use and consume goods previously reserved to the producers, less their liberty to use for themselves their body parts if others desired them more than they.

Nothing about the redistributive alternative says that the redistributive traffic needs be one-way. There may be two-way traffic, with goods moving from producers to recipients and body parts moving the other way. *Ceteris paribus*, if producers get greater desire satisfaction from body parts than do recipients-'donors', and recipients get greater desire satisfaction from goods than do producers, then the redistributive outcome is clear: producers are to get the body parts and recipients-'donors' the goods. What happens, though, if, *ceteris paribus*, producers get less desire satisfaction from body-parts-but-not-goods and recipients less desire satisfaction from goods-but-not-body-parts? Is the coercive transfer still to go through? Nothing in what Loevinsohn writes stipulates it must. And nothing stipulates it must not. Here the property rights view has the advantage. Granting private property rights in goods and body parts would certainly allow the producers to keep their goods and recipients to keep their body parts. If the facts are as I have suggested they well might be, then the libertarian property rights view is vindicated by the very argument designed to vanquish it.

VI

ANARCHY, STATE, AND THE INVISIBLE HAND

Stepping into a morality of rights and duties is stepping into a morality of enforceable obligations. Coercion is justified when wielded in order to prevent violations of rights. That a person has the right to the provision of welfare sufficient to meet his fundamental needs entails some others have the enforceable duty to provide. Crusoe must, if he is able, provide for Friday's needs if Friday is not able to provide for himself, and vice versa. Friday is free to use coercion to have Crusoe fulfil his duty. And, as one of the normative implications of the tension between property and welfare rights, Crusoe may justly coerce Friday into making provision for himself where Friday is able to, and vice versa.

In a world where persons know their duties and cheerfully go about the business of fulfilling them, coercion, though justified if wielded, is not needed. The simple world of Crusoe-Friday interaction can be like this. Such is not true of our immeasurably more intricate world of interpersonal interaction. In this world persons all too often - sometimes unintentionally and sometimes wilfully - deny they have duties they do have, or take themselves to have rights they do not, or both, or know themselves to have duties but fail to fulfil them, or all three. The problem of incomplete moral knowledge is pervasive, the problem of moral backsliding rife. Coercion is going to be a common enough feature of this world.

As for the question of who is to wield the needed powers of coercion - libertarians are all agreed coercion is needed, and justified, in the protection and enforcement of rights - in the fourth chapter I left it unanswered, noting there only that coercion for the purpose of redistribution need not be state-enacted coercion. We know government or the state can effect coercive redistribution: most do it a good deal of the

time. Can a society without a state coercively redistribute as a matter of justice? Non-coercive redistribution not enacted by the state, i.e. private charity, is familiar enough, but is not the state necessary if there is to be coercive redistribution? This is a question posed in the context of a dispute that cleaves libertarians into two broad, opposing groups. Stephen Newman calls it the 'great rift in libertarian ranks', between those who favour a return to the minimal or night-watchman state - the minarchists - and those more radical libertarians who advocate the abolition of the state.¹ The anarchist pursues the libertarian's anti-statist sentiment to its logical conclusion. (The noun *anarchist* is to be taken in the sense of the absence of government and not the absence of law.²) Thomas Paine remarked that a man would only submit to government providing he did not stand to lose more than he had a hope to gain³ - and the anarchist's contention is that under monopolistic government or the state we are net losers. The anarchist's claim merits attention. Note at this juncture only that should a Lockean libertarian look to be an anarchist he will have to account for how redistribution can be worked in the absence of state coercion. There is no analogous problem for the minarchist. Before examining the anarchist-minarchist controversy a few preliminaries will help avoid any misunderstanding. I will accept the standard libertarian (in fact Weberian) definition of the state as that political body which in any given area has at least a *de facto* monopoly over the exercise of the means of coercion, immediate self-defence excepted.⁴ The anarchist contends that the state is not necessary for the protection of rights, and persons would be better off (or at least less badly off) without the state. That the state performs necessary functions does not show that only the state can perform them. An explanation purporting to

¹ Newman, *Liberalism at Wits' End*, p.92.

² Auspitz criticises Nozick for his vision of libertarianism without law: 'Libertarianism Without Law', pp.82-3.

³ Paine, *The Rights of Man*, p.55.

⁴ Hospers, *Libertarianism*, p.419; Nozick, *Anarchy, State, and Utopia*, p.23; Rand, *The Virtue of Selfishness*, p.107; Narveson, *The Libertarian Idea*, p.208.

demonstrate the necessity of the state will have to do three things. First, it will have to identify what function or functions the state serves or performs. Secondly, demonstrate that these functions are indispensable, which will most likely entail viewing the state as a pre-condition for or guarantor of the attaining of certain goals and the preservation of certain states of affairs. And thirdly, argue that these functions cannot, or cannot satisfactorily, be performed by anything but the state.

The libertarian programme is ably captured by Paine. Man, said Paine, 'finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other case advises him out of two evils to choose the least. Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expence and greatest benefit, is preferable to all others.'⁵ Paine will have us choose from amongst forms of government, and though government is at best a necessary evil, some forms are more preferable, because less evil, than others. The anarchist's complaint is that on Paine's criteria anarchism is the least of the evils, and neither Paine - nor the latter-day minarchists - have shown it is not.⁶ Anarchism is not refuted, rather it is ignored.

In most if not all societies which redistribute for reasons of distributive justice, welfare contributors and their respective contributions are identified, and redistribution enacted, by the state. This much is simply common knowledge. If the Lockean libertarian is to be an anarchist he will have to show that his alternative hypothesis for the enforcement of rights, namely by private protection associations operating on the competitive market, is compatible with enforcement of the right to welfare. In the account that follows, welfarism is

⁵ Paine, *Common Sense*, pp.65-6.

⁶ Rothbard emphatically remarks that government rule is 'the reverse of objective necessity': *For a New Liberty*, p.11.

twinned with anarchism. Even where coercive redistribution is morally demanded it is neither necessary, nor inevitable, nor obviously desirable that it be enacted by the state. The anarchist component of this account draws on, and in many respects modifies and expands upon, Rothbard's defence of anarchist libertarianism. Rothbard is the only orthodox libertarian favouring the anarchist, or as I shall henceforth title it the stateless, society. Rand and Hospers are both minarchists. The account I give modifies the Rothbardian scenario owing to the failure of the orthodox property rights thesis Rothbard subscribes to, and it expands on it because Rothbard's argument for the stateless society is in many respects inadequate. When I turn to consider Nozick's invisible-hand derivation of the minimal state my attention moves away from the viability of redistribution within a stateless society to the viability of the minimal state itself.

Rothbard's depiction of the stateless society is presented first because it is at once more radical than the notion of a *de facto* (yet just) monopoly protection association or the minimal state, and more importantly because only with the failure of the Rothbardian thesis can Nozick's derivation proceed at all. Nozick's derivation begins where Rothbard's ends. Where the stateless society hypothesis defaults, if indeed it does, the *de facto* monopoly to the minimal state explanation can proceed.

In his overview of *Anarchy, State, and Utopia* Bernard Williams supposes it is reasonable to think that there are no 'real candidates' for alternatives to the state.⁷ But Williams expounds not on what a real alternative candidate should be like, what an alternative must encompass in order to be accepted as real. Presumably, it would have to perform the *bona fide* functions now discharged by the state, as well as or better than the state discharges them. It is not important what Williams takes these functions to be, nor what his

⁷ Williams, 'The Minimal State', p.27.

criteria of efficient discharge are. They may be the same as Paine's, or they may be different. All we need to know is what libertarians take them to be, and here there is consensus: the sword is to be wielded only in protection of libertarian rights.⁸ The criterion of efficient performance is that in wielding the sword authority does not violate libertarian rights and that we surrender as small a part of our property as is commensurate with acquiring the protection we want. Both the Rothbardian and Nozickean alternatives attempt to establish themselves as serious options, and though Williams believes 'Mr. Nozick is not an optimistic idiot'⁹, I am not so sure he would not apply the epithet to Mr. Rothbard.¹⁰ I hope to show that the stateless society scenario is not unduly optimistic (nor naïve nor inconsistent) and is a valuable alternative worth examining on its own merits, and also because of the close connexion between it and the derivation of the minimal state given by Nozick. The temptation to class Rothbard from the outset as a myopic libertarian supplementing the ranks of cranky left-anarchists and hopelessly utopian communists should be resisted.

The situation where each and every individual protects himself is not a real, in the sense of viable, alternative. Individuals have the right to exercise the enforcement of their own rights. Crusoe and Friday have no choice in this matter. The considerable problem with and limitations to self-protection expose its fundamental inadequacies. The problem is that inordinate and excessive retribution by victims is undesirable, not just on grounds of justice but because the prospect of retaliation on the part of the punished for what they perceive to be inordinate and excessive punishment leads to escalating conflict. As Hospers remarks apropos the victim's proneness to vengeance: 'He may consider death-by-a-thousand-cuts to be the appropriate punishment for someone who

⁸ Rand, *The Virtue of Selfishness*, p.110; Hospers, *Libertarianism*, p.418; Narveson, *The Libertarian Idea*, p.49.

⁹ Williams, 'The Minimal State', p.33.

¹⁰ Rand probably would. She calls the private protection association scenario a 'weird absurdity': *The Virtue of Selfishness*, p.112.

stepped on his toe.'¹¹ Vendettas and blood feuds should be avoided. Locke is fully aware of the tendency to escalation endemic to self-protection, and views government as ordained 'to restrain the partiality and violence of men'.¹² Says Locke of the private enforcement of one's right to punish transgressors of the natural law: 'I doubt not but it will be objected that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends, and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow.'¹³ (Locke cannot deny that individuals have the right of self-enforcement without thereby refusing it to civil authorities who take up the surrendered exercise of it.)

The limitation is the time-consuming and frequently dangerous nature of self-protection, which disadvantages the elderly, weak, etc. I am not talking of immediate self-defence here. How is an ordinary individual to solve the common crime of the theft of his car, for instance? This limitation is aggravated by insufficient means of pursuing restitution, such as information and finance. Some idle rich may choose to protect themselves, but it is unreasonable to expect others not to circumvent the limitations and exploit the benefits of the division of labour by contracting out for protection, particularly when (as will be shown below) once one person has protection then all others are subsequently disadvantaged relative to that person. Once I have a willing Rottweiler and a high-powered lawyer and you do not, you are disadvantaged - whether you are an apprehensive potential victim or would-be violator.

As an aside, the anarchist can help himself to this last consideration to boost his case. If one person is disadvantaged vis-à-vis another when one has protection then

¹¹ Hospers, *Libertarianism*, p.440.

¹² Locke, *Second Treatise*, p.127. See also Nozick, *Anarchy, State, and Utopia*, p.11; Rand, *The Virtue of Selfishness*, p.109.

¹³ Locke, *Second Treatise*, p.127.

how much more disadvantaged are everyday citizens vis-à-vis the state. Recall Hobbes's claim that the differences between men are not so great that one may claim a benefit another may not as well. Appreciating this fact, persons know they can only fare badly in holding to the right they have to everything, and so are motivated to be moral. The state is significantly different to any ordinary citizen. What motivation has it to act within the bounds of morality? Should we not expect it, 'that great LEVIATHAN ... that mortal god',¹⁴ to be tempted to 'defect' from co-operating, believing its chances of being worse off are minimal? I may have a dog and a lawyer, but the state has dogs and lawyers and much more besides. Rothbard likens relying on government to protect property rights to putting the fox to guard the chickens.¹⁵

Rothbard postulates that the enforcement of rights by private associations can overcome the limitations of self-protection through the calculated, dispassionate, business oriented and procedurally rigorous pursuit of justice; through the use of trained and experienced protectors with time, information and other resources at their disposal; and by providing protection for all. This is no more than the beginning of an answer, which in the course of this chapter will be more fully considered. I am not concerned in this chapter with the details of which laws to enforce, only with protecting rights. 'No government' does not mean 'no law'. Hospers is inclined to think that it does,¹⁶ but Rothbard is clear that all would have to abide by the basic law code, and instances Anglo-Saxon common law, admiralty law, and merchant law as laws arising from custom independently of government.¹⁷ Just as there can be security without government, so the anarchist says there can be law without government.

Rothbard's depiction of the non-monopolistic provision of protection derives partly from his acceptance of the orthodox

¹⁴ Hobbes, *Leviathan*, p.112.

¹⁵ Rothbard, 'Justice and Property Rights', p.105.

¹⁶ Hospers, *Libertarianism*, pp.447&449.

¹⁷ Rothbard, 'Society Without a State', pp.205-6.

libertarian equation of taxation with theft. Government exacts taxes, and because taxation is involuntary it violates rights. Lockean libertarianism shows that taxation can be distinguished from robbery when it serves to fulfil a right. A just transfer coercively effected is a just transfer. Otherwise, Rothbard's justification for other-protection derives from every individual having the right to defend his property as an entailment of his right to that property itself. And a proprietor may enlist the help of others in this endeavour.¹⁸ The modification of the anarchist scheme commences once it is taken that Lockean libertarianism entails the right of those without sufficient resources to enforce their claim to a redistributive share and to accept, or exchange to get, assistance in enforcement. The Lockean libertarian stateless society thesis begins from a standpoint different to Rothbard's, i.e. one allowing redistribution, but incorporates taxation for redistribution with a society where persons and property are protected by private protection associations.

Rothbard's principled opposition to the state is based on its violating rights by taxing to fund itself. Be that as it may, it is a mistake to believe that because states do tax it follows that states have to tax. Rand is a minarchist and wedded in her orthodoxy to the 'taxation is theft' equation. She would have government financed by lottery and by the government-supplied service of the enforcement of contracts.¹⁹ These she believes will provide sufficient revenue. Will they? And is government to have the exclusive right to run lotteries and supply enforcement on contracts? If not, then it is not transparently clear there would be a monopoly. Competing bodies might offer both of more for less. And if these services are exclusively government's, on what grounds does it reserve this monopoly to itself? Perhaps it just exercises this power because it can, and chooses to. What checks are

¹⁸ Rothbard, *The Ethics of Liberty*, p.77.

¹⁹ Rand, *The Virtue of Selfishness*, pp.116-7.

there to the state's arrogating to itself more and more power?²⁰

The major thrust of Rothbard's critique is empirical in nature: the market provision of protection accords more and better protection than the state can give for less than the state will charge. If the criteria are Paine's, then anarchy is our best bet. 'Competition', he says, 'insures efficiency, low price, and high quality, and there is no reason to assume *a priori*, as many people do, that there is something divinely ordained about having only one police agency in a given geographical area.'²¹ It is better that protection be provided on the competitive market for just these obvious advantages, and the belief that nothing but the state can provide protection should be resisted. The connexion with Lockean libertarianism is as follows. An efficient, high quality and low cost provision of protection is manifestly commensurable with the maximisation of private property holdings and, though less manifestly, with the minimisation of redistribution. Redistribution is minimised because low-cost protection enables the less well-off to allocate more of their scarce resources to the purchase of other goods, thereby postponing if not preventing their recourse to welfare. These are, then, the immediate and palpable advantages of the competitive provision of protection over its monopolistic provision. Other advantages are less direct, stemming more from the end of disadvantageous state protection than from the competitive provision of it.

The free market is born of the voluntary exchange of private property, and optimal economic functioning is, arguably, best assured by voluntary private property exchanges. It is the *a priorist* perception of the state as

²⁰ Barry lists this as one of four arguments levelled by the anarchist against the state. The other three are that the state exercises powers not available to the individual, that state personnel consume without producing, and that the state's exclusive control of certain goods and services means it can charge more for them than would be charged on the market: *On Classical Liberalism and Libertarianism*, pp.164-5. Narveson gives four different reasons why the state's enforcement of rights is 'disturbing': *The Libertarian Idea*, p.210.

²¹ Rothbard, *For a New Liberty*, p.223.

necessary that Rothbard wishes to upset - to 'demystify' and 'desanctify' the state as an object of unreflective allegiance. If Rothbard is successful in overcoming this perception, then how is redistribution to operate in a society where people purchase the services of an association with the protection of their property in mind, and where protection can be protection against the predations of contributory justice? Is moral backsliding not likely to lead to associations which protect their clients' attempts to evade the requirements of justice? A sceptic might say that for precisely this reason the anarchist's project fails at the first objection raised. Competition in protection would involve - and reasonably enough the sceptic would wish to say - competition in redistribution-avoidance as another aspect of the protection of property. And might not an association be more marketable the better it protects property from the impositions of contributory justice? The assumption that a person subscribes to an association with the protection of his property in mind, and then meekly allows a portion of that property to be taken for redistributive purposes is either naïve or inconsistent or both.

The modified Rothbardean scenario can be shown to be neither naïve nor inconsistent. I will illustrate in what follows that the tendency to protect property, including avoiding redistributive burdens, in a society where protection is a privately purchasable market commodity, need not have built into it any optimistic assumptions regarding a person's proclivity to be responsive to the demands of justice. The market in protection itself grows out of non-optimistic assumptions about good neighbourliness. Enforcement of the right to welfare is premised on the same. It is not naïve as it rejects straightforwardly reconciling people to paying their just contribution. It is not inconsistent because the tendency to protect property, even in the face of just claims to it, can be satisfactorily incorporated into this account.

'On the free market, protection would be supplied in proportion and in whatever way that the consumers wish to pay for it'.²² Those who cannot afford protection Rothbard says would be supplied by private charity.²³ Perhaps charitable dispositions would suffice to provide the needy with protection, but we need not - optimistically - assume this to be the case. Working with the supposition of selfishness-contra-justice, three arguments can be adduced to show why the resort to charity, weak as it is, need not be made in the case of enforcing a right to welfare. The first two I think are unsatisfactory. The first because it trades on a notion of rights that should be rejected, and the second because it relies on persons voluntarily paying for the protection of those unable to pay for themselves in order to best serve their - the payers' - interests. This leads straight back to the initial query raised against the charitable supply of protection: will it be provided? (The somewhat cynical argument for public assistance Hayek relates, i.e. that it is necessary 'in the interests of those who require protection against acts of desperation of the needy',²⁴ is not included on the grounds that it fails to show why it is desirable that the needy should be protected.)

Before relating the three arguments, it is useful to enumerate the relations between the violator of a right and the victim of the violation. There are four possible relations, which include the attempts of protected individuals to prevent others from acquiring protection.

- (1) Neither violator nor victim is a member of a protection association.
- (2) The violator is not a member of a protection association but the victim is.
- (3) The violator is a member of a protection association but the victim is not.

²² Ibid., p. 220.

²³ Ibid., p. 224.

²⁴ Hayek, *The Constitution of Liberty*, p. 285.

(4) Both violator and victim are members.

In relation (1) both parties are equally poorly protected, that is, by themselves. The violator from retaliation by the victim, and the victim from the initial as well as further violations. With relation (2) the violator is not protected against retaliation by the victim and his association, and whilst he retains the ability to protect himself and his property he is in a weaker position than his victim, handicapped as he is by the limitations of self-protection listed earlier. In relation (3) this position is reversed. Here the violator is protected against the retaliatory measures of the victim, which are less sure than would be the case were the latter protected. Finally, in relation (4) the situation is the opposite of (1), where now both parties are equally well-protected.

Relations (2) and (3), and to a lesser extent (1) - even when no right has been violated - furnish clear motivation to purchase protection. The attempt by protected individuals to prevent others from acquiring protection is subsumable under either (2) or (3). (Would it more likely be a case of (3), the sceptic's choice?) Regarding (1), the state of nature in Locke's and Nozick's analyses, when one individual purchases protection all others are placed in the relation of either (2) or (3) until they too acquire protection and remedy their disadvantaged status. Either violation becomes less easy or accessible, etc., and the probability of detection, etc., increases, or the violator assures himself of some protection against retaliation or, as would likely be the case, both.

What this means in actual cases of the violation of the right to welfare, i.e. when the demands of contributory justice are refused, can be illustrated by imposing this class of infringement upon the four relations. In a case of type (2) the victim has an improved prospect over (1) of enforcing his claim, and in a (3) situation this prospect is reversed as the violator's association restricts the room to manoeuvre for welfare on the part of the victim. The state of nature,

relation (1), is unlikely to last long in a world of fallible yet rational beings, for protection in such a condition is an undoubted good, and persons will acquire protection in order to be more successful if and when they need to press their claim - or prevent further violations of their right - to welfare. (Note I do not say they purchase protection. They may never pay for protection and yet be protected.) This effects a movement to (2), wherein some are at a relative disadvantage, and leads to the movement to (4). Even violators have an interest in ensuring they do not suffer unduly at the hands of their victim or their victim's association. How protection might be provided for all, without resort to charity, can now be shown.

The first of the three arguments is one for universal, tax-funded protection based on the grounds that protection is necessary to the enforcement of the right to welfare. There is to be public provision of the means to enforce the right to welfare. We need not accept the notion of what it is to have a right this argument trades on. To have a right to *x* is not to have a right to the necessary and sufficient means to assure one of *x*. It would be strange were the positive right to welfare to generate a right to the provision of the means to enforce it when none of the host of negative rights a person has do so. The right to life generates the right to act in self-defence, but not the right to the public supply of the wherewithal for it. Positive rights entail respondents acting in specified ways on pain of wrongdoing or injustice, and not that the bearers of positive rights have rights over the means required to ensure respondents do act thus. This argument should be rejected.

The second argument will have protection included as a facet of redistribution, on the grounds that it may well lead to the overall minimisation of redistribution. Once redistributed, the sum of resources now in the hands of the less well off requires protection from would-be violators. Stealing from them may reduce recipients to once again laying

claim to welfare, and may initiate a new round of redistribution. Protection as an accompaniment to welfare may therefore be the most prudent policy to adopt financially. In the light of this it might be tempting to say that this is a further prescriptive import of the mechanics of welfarism and should be compulsory in just the same way social insurance is. There is, however, a significant difference between the two. Compulsory social insurance is legitimated in terms of adherence to redistribution minimisation, and this is the rationale behind the current suggestion. But such insurance is the compelling of others to insure themselves from their own money, not with monies supplied by the wealthier and justified on the grounds that it is in the long-term financial interest of the wealthier. As it is not morally required of persons that they pursue their best interests, there is no justification for coercing the wealthier to pay more now so that they might pay less later. Prudence is not enforceable.

Where a person's right to welfare is not fulfilled he is free to enforce his right against those morally obliged to redistribute. (Relations (2) and (4) need not concern us here for they apply to those victims who already have protection.) In relations (1) and (3) the person whose right has been violated subscribes, or has already subscribed, to a protection association, even though he cannot presently afford to pay, as the best method of enforcing his right should the need arise. He takes out a 'dormant' subscription. His association accordingly sets about enforcing his right and takes its payment from the monies it is successful in redistributing to him. On top of the amount required to assure its client's right to welfare the association levies from the violator an extra sum to pay its costs. Such protection, then, is financed on a principle of awards where the cost of enforcement is borne by those who have violated that right and rendered the extra cost necessary. This principle is enshrined in some legal systems today where costs are awarded against the guilty party. There is, furthermore, a formal neatness

when the cost of the enforcement of justice is met through awards, in that it fits well with the workings of a free market: the association acquires new custom and income, and though the selfishness-contrajustice assumption ostensibly rules it out, ethical prestige for the association could be a motivating factor. Most importantly, the violator pays the costs, not the public.

Protection acquired in this manner is, of course, only possible when resources are withheld, and thus the third argument appears to contain a major flaw. Withholding wealth and meeting the association's attempts at enforcement successfully might be - and when unsuccessful probably would be - more expensive than contributing one's dues when one is supposed to. Defence costs are involved in successful withholdings, and in unsuccessful withholdings there are award costs to boot. What is due to you from me may be less than the expected costs incurred by my trying to avoid paying my dues. Such an argument works least well where there are large wealth differentials between a wealthy few and an indigent multitude, i.e. where what is due to them from me would be more than would be incurred in my resisting paying it. In the more homogeneous societies closer to the libertarian's heart this is not the case, and it remains in my best interest to pay my dues. And, the argument concludes, if we do pay our dues how do the less well off get protection?

Were associations to exact costs (and maybe a little profit) from violators then the solution lies with dormant subscriptions. Those who are so poor that they cannot afford protection for themselves take out dormant subscriptions. A dormant subscription is a 'protect now, pay later' model policy. A person signs up with an association and is henceforth its client, albeit a non-paying one. If and when he requires his association's services it is informed, his case is assessed if needs be, and the association goes to work. If successful in prosecuting its client's case the association claims costs from the violator as payment. Should it be

unsuccessful the association will have incurred a loss, but as an assessor of its client's case this was a reasonable presumption of risk voluntarily undertaken. For most crimes of property, and many others besides, such a scheme is workable. Admittedly, protection of the poor is not guaranteed. What goods and services prove marketable cannot be known in advance. What I think has been shown, though, is that the market's great flexibility, and the range of options a market in protective services could offer, renders the situation where there are completely unprotected individuals a marginal possibility.

Even if the above argument, in conjunction with dormant subscriptions, fails - and supposing charity cannot make up any shortfall - failure here does not militate against the practical viability of the stateless society scenario. What the argument shows in the case of protection is the compatibility of what is right with everyday notions of what is good. It is not wrong that some people are less well off than others in any number of ways if their being so is not the consequence of any rights violations, and yet we might think such a state of affairs undesirable and wish to remedy it without ourselves violating any rights. The argument shows how this might be done, minus appeal to charity.

Protection can be provided to the less well off. And this, it is hoped, will allay the suspicion some may entertain of an unscrupulous group, namely the protected, preying Viking-like on an unprotected group. But it is the workings of a free market in protection when explicated that must make the greater impression in refuting any *argumentum ad terrorum* directed against the stateless society hypothesis. '[A]ny alternative to the existing State', Rothbard notes, 'is encased in an aura of fear. Neglecting its own monopoly of theft and predation, the State raises the spectre among its subjects of the chaos that would supposedly ensue if the State should disappear.'²⁵ Whilst we cannot give an exact account of

²⁵ Rothbard, *For a New Liberty*, p.63.

a market that exists as an hypothesis only, Rothbard does believe broad guidelines and perspectives on the shape of a projected stateless society can be offered.²⁶ Indeed, such guidelines have to be supplied if the spectre of chaos is to be dispelled and the stateless society shown to be a real alternative to the state (and Mr. Rothbard shown not to be an optimistic idiot.) The rationale and motivation for, and the justness of, the anarchist scenario have been mooted. What is required now is the operational blueprint attesting to the viability of a free market in protection.

The major question mark against the operational plausibility of libertarian anarchism is what Rothbard dubs the 'final nightmare' for privately subscribed protection, usually considered decisive in rejecting such a scenario. 'Wouldn't the agencies always be clashing? Wouldn't "anarchy" break out, with perpetual conflicts between police forces as one person calls in "his" police while a rival calls in "his"?'²⁷ Conflict over the occurrence of a violation happens when A, a client of association X, and B, a subscriber to another association Y, are in honest disagreement. Either A or B is seeking punishment of, and restitution from, the other, and either A or B is seeking protection from punishment and restitution, and A turns to X and B to Y to help them.

A(X) and B(Y) attempt to resolve their differences through interaction in a court of law - if it proceeds this far - A(X) through his court and B(Y) through his, where associations X and Y are not affiliated to the same court. Call the two courts Xc and Yc, respectively. (If A(X) and B(Y) were affiliated to the same court then A and B would have a *prima facie* obligation to abide by that court's decision. If they subscribed to the same protection association they would likely be affiliated to the same court.) If the two clients (associations) reach an agreement the difference is settled at this stage. But is this particularly likely when X and Y each

²⁶ Rothbard, 'Society Without a State', p.196.

²⁷ Rothbard, *For a New Liberty*, p.225.

have a vested business interest in protecting their clients to the best of their ability, and where there seems no compulsion for either to try its client? Why should X even bother to defend A, guilty or innocent, in court against B(Y) when there seems no palpable pressure to do so? And if one court pronounces a verdict of guilt and the other a verdict of innocence, what then? When schematised, the blueprint has this form:

- (i) Dispute between A(X) and B(Y) leads to;
 - (ii) A(X) and B(Y) seeking resolution in the courts of Xc for A(X), and Yc for B(Y).
 - (iii) Either there is a cross-court resolution of the dispute, that is both Xc and Yc find the same party innocent or guilty, or the dispute impasse is displaced from A(X)-B(Y) to A(X,Xc)-B(Y,Yc). If the latter this leads to;
 - (iv) A(X,Xc) and B(Y,Yc) seeking resolution at a neutral court of arbitration, court Z.
 - (v) Court Z passes binding judgement on the A-B dispute.
- This judgement is binding on all parties.

According to Rothbard, it is only as far as stage (iv) and the judgement at stage (v) that any dispute will progress. 'The appeals judge would make his decision and the result ... would be treated as binding on the guilty',²⁸ for the reason that 'a decision arrived at by any two courts shall be binding.'²⁹

Why is there ever a movement from stage (iii) to stage (iv), or even from stage (i) to (ii)? The reasons for the latter movement are those which show the advantages of protection. If you have access to legal channels and I do not I am at a relative disadvantage in any dispute with you. To equalise my situation I acquire protection. Of the displacement from (iii) to (iv), economic pressure is likely to be the key. If either A(X) or B(Y) refuse to participate in seeking a resolution the ensuing protracted honest

²⁸ Ibid., p.233.

²⁹ Ibid., p.234 (emphasis removed).

disagreement - fuelled naturally by the desire of A and B to protect themselves through X and Y, and compounded by X's and Y's motivation to serve their clients - will prove financially costly. Increased costs will be passed on to consumers in the form of higher subscription premiums, and demand for the services of X and Y will fall as clients transfer their patronage to other associations. Of course, if protection is so desirable then we should assume that the demand for it will be inelastic and will not fall off as the price increases. Accordingly, though we may be able to explain the movement to courtroom resolution we cannot explain the movement to arbitration at court Z. An impasse at the level of $A(X)-B(Y)$ may not hurt business. Would not strong protection by non-participation in the legal system, a retreat into the inner sanctum of the protection association as it were, be attractive to clients and prove marketable? There are reasons for thinking not.

For a start, inelastic demand for protection is not the same as inelastic demand for the protection rendered by associations X and Y. Other associations which had adopted methods to work round any impasse could attract the clients of X and Y. Any two or more associations which prearrange a method for resolving honest disagreements between them and their clients would be highly marketable, more so than those bereft of such procedures. It only pays to be a subscriber to an association that does not co-operate if it wins and it passes the benefits on to its clients. Clients desire resolution, and any inter-association agreement to this effect will be attractive to them. Thus associations will agree in advance to procedures for resolving disputes, that is at the $(X, X_c)-(Y, Y_c)$ level, plus a procedure for binding arbitration at a neutral court. Clients would, when subscribing to either X or Y, commit themselves contractually to these arrangements and be bound by whatever decision is reached. Arbitration procedures would be written into contracts. The parties to a contract would indicate in writing that in case of a dispute,

a certain arbitration agency would be agreed upon by them to hear the case', and 'There could be a hierarchy of such agencies ... written into the contract, up to the final court of appeal.'³⁰

Considerable pressure can be brought to bear against an association to participate in conflict resolution - as the analysis of the rogue association will show - and so the blueprint for workability can proceed. A(X) and B(Y) seek agreement and might find it without either admitting guilt but nevertheless accepting the verdict of the courts. However, the real problem arises when there is a conflicting verdict. For a conflicting verdict there must be a tenable depiction of an appeals procedure A and B and their respective associations would have recourse to, and where the verdict would be accepted by the involved parties.

If the arbitrator's decision proves unsatisfactory to one of the parties why should he accept the verdict as binding? One reason is that it ends the impasse. There is also a non-prudential reason why he should. A and B, and their associations, had agreed to move to arbitration and accept the decision arrived at there as mutually binding. Arbitration, as a contractual undertaking, should be adhered to for moral as well as prudential reasons, and therefore not just for Rothbard's reason that a two-court decision should be binding simply because reached by two courts.³¹ Both A and B agree in advance to arbitration in a neutral court in order to overcome the impasse at stage (iv), and are bound by their agreement. Associations not incorporating dispute-resolution channels in their contracts would not be serving the interests of their clients. Victims want protection and punishment and restitution, and violators want protection from punishment and restitution. An A(X)-B(Y) or A(X,Xc)-B(Y,Yc) stand-off constitutes an unsatisfactory, and perhaps expensive, position

³⁰ Hospers, *Libertarianism*, p.432.

³¹ Rothbard later writes that '"Two" is not an arbitrary figure, for it reflects the fact that there are two parties, the plaintiff and the defendant, to any alleged crime or contract dispute': *Society Without a State*, p.203.

for both A and B. Neither has what he desires, and what he subscribed to X or Y for.

A stronger challenge comes in the guise of the rogue association. 'We have shown how a libertarian legal and judicial system could work on the purely free market, assuming honest differences of opinion - but what if one or more police or courts should become, in effect, outlaws? What then?'³² Rothbard alleges that the free market would minimise any tendency for associations to become dishonest, and isolate and extinguish by market means - primarily boycott and ostracism - any association or court which did become 'venal or crooked'. Unfortunately, Rothbard is less than expansive. Of the courts he writes: 'The very life of the court, the very livelihood of a judge, will depend on his reputation for integrity, fair-mindedness, objectivity, and the quest for truth in every case.'³³ Of any rogue association, he says that it is faced by 'other police forces who could use their weapons to band together to put down the aggressors against their clientele'³⁴ - a thought more at home in the Wild West than in modern cities, Beirut excepted. Thirdly, Rothbard suggests that there could be no sense of legitimacy attached to associations that abused their moral *raison d'être*, and popular support could never be forthcoming.³⁵

It is difficult to know quite what to make of these reasons. To be sure, they are possessed of a certain plausibility. Exactly how much it is not easy to judge. Reputation does count in business, and there is little reason to think the business of private associations and courts an exception. The fact that rogue associations could be put down might be a threat sufficient to keep them from surfacing. These are all empirical matters and cannot be decided *a priori*. Consider this though: where there is a monopoly on a good or service - as the state currently has on the powers of

³² Rothbard, *For a New Liberty*, p.243.

³³ *Ibid.*, p.244.

³⁴ *Ibid.*, p.246.

³⁵ *Ibid.*, p.246-7.

coercion - and no prospect, or but very slight prospect, of termination of it - for government once established is not so easily disestablished - are there any in-principle checks to corruption, venality, etc.? The libertarian anarchist's case may come to this: a free market in protection may not be better, but it will not be worse than its monopolistic provision. And it distances the prospect of authoritarianism.

Other ways in which the activities of rogue associations might be curtailed are passed over in Rothbard's work. There may be a movement away from the abusive police force and court by its own clientele of their own, possibly moral, choice. Clients might move away due to the increased costs incurred by the association in its antagonisms with the rights-respecting associations (a similar possibility I later raise against Nozick's minimal state). Indeed, in such a situation these latter associations would do well to lower their subscription rates as an incentive for clients to switch from the rogue association. If a rights-respecting association or court is particularly subject to the predations of a rogue association, for instance if the majority of its clients reside in an area where the incidence of improper activity is high, the long-term interests of other respectable associations are arguably best served by helping with the financial burden this association has unwittingly shouldered on its own. There is, after all, strength in numbers, there is the possibility of reciprocation, and the possible avoidance of potential conflict with the rogue association at a later date. Dishonesty may lead to a boycott effectively isolating the rogue association. It would be excluded from inter-association dispute resolution. Lastly, as long as individuals sought protection there would be reason to provide a worthwhile supply. A rogue association would be an economic as well as a moral aberration.

The Nozickean derivation, I have said, can only proceed on default of the Rothbardean hypothetical market in protective services. Only if there is a breakdown of the Rothbardean

scenario is there a movement, or as Nozick depicts it a progression, to the minimal state. Nozick's express purpose is 'to demonstrate that a minimal state will qualify as morally legitimate, a demonstration that is specifically aimed at undermining the opposing claims of the libertarian anarchists (notably Murray Rothbard).'³⁶ And of the market provision of protection, James Buchanan remarks that 'Nozick accepts this paradigm, but he recognises the inherent instability of the system'.³⁷ Nozick's derivation is as follows, with each stage following the previous ones: (i) the state of nature, wherein rights are sometimes violated; (ii) the evolution of private protection associations to protect against violations occurring in the state of nature; (iii) one association becomes the dominant protection association; (iv) the dominant association evolves into the ultraminimal state exercising a monopoly on coercion and protecting only those who pay for its services, and from this evolves into; (v) the minimal state which 'redistributes' protection from paying clients to non-paying clients (independents) as compensation for its prohibition of their risky self-enforcement of their rights.

Is the Rothbardian hypothesis inherently unstable? I have endeavoured to show that if it is then it is not obviously unstable, for there are features that lend coherence to that hypothesis within the framework of free choice and exchange. Including the right to welfare does not materially affect the question of viability. The enforceability of this right is no more problematic than enforcing the right to the return of my stolen property. A brief recapitulation of Nozick's invisible-hand derivation of the *de facto* monopoly protection association will lend support to the anarchist by showing that the free-market scenario is not obviously unstable. I then press the instability objection against the minimal state. The purported instability Nozick attributes to the anarchist conception is this: protection is a good which has only

³⁶ Buchanan, *Freedom in Constitutional Contract*, p.51.

³⁷ *Ibid.*, p.51.

relative worth, and is not the sort of good competition can maximally supply. A market in protection is not the stable order Rothbard thinks but, on the contrary, ensures the emergence of geographically discrete areas wherein one association resembling the minimal state predominates. If the rot - the slide into statism - is to be stopped, the anarchist would do well to head off the minimal statist here.

Beginning with the anarchist's vision of different protection associations offering their services in the same geographical area, Nozick asks what will occur when clients from different associations conflict? He discerns three possible developments from such a (recurring) situation. (a) One association always wins conflicts. The disadvantages of being a client of a losing association force clients to do business with the winner.

(b) People gravitate towards the association which is the strongest in their area where protection is likely to be better.

(In both (a) and (b) only a single protective association operates over a given geographical area.) Thirdly, Nozick surmises how the Rothbardean arbitration-regulated scheme produces a monopoly in a given area:

(c) The associations win and lose an equal number of disputes, and 'to avoid frequent, costly, and wasteful battles the two agencies, perhaps through their executives, agree to resolve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ.... Though different agencies operate, there is one unified federal judicial system of which they all are components.'³⁸

Nozick's (c) looks to me to be the kind of model the anarchist has in mind, and Nozick does not think this model statist. Nozick writes that in (c), as in (a) and (b), there is 'some common system that judges between their [persons']

³⁸ Nozick, *Anarchy, State, and Utopia*, p.16.

competing claims and enforces their rights'.³⁹ This can go one of two ways. Either the common judge is the common enforcer or the common judge hands down a decision for the associations to enforce. If judge and enforcer are one then the associations are either entirely superfluous or at best delegate agents of the higher authority, and so not different to it or to one another. If the common judge is not also enforcer - as I think the anarchist's arbitrator is not - then the associations are genuine market rivals adhering to a common code of conflict resolution. In that case, anarchism is still with us.

Nozick might reply that anarchism cannot work because, granted this reading of (c), neither (a) nor (b) is refuted. Each of them is sufficient to initiate the move to the minimal state. What is the anarchist to make of this? Because the second reading of (c), where there is a common judge but different enforcers, is the anarchist's model he would surely reply that in this situation it need not be true that one association always wins. After all, one insurance company does not have all the accident-free drivers, nor is there a monopoly law firm. And if no one association always wins there is less if any reason to suppose that people gravitate towards the association strongest in their area. There may be no identifiable strongest association anyway, and the package of protection people are interested in is likely to vary in content and cost. It is not obvious that what Nozick says about the kind of good protection is makes enough difference to undermine these responses. Should this be so - and it is the scenario I take Rothbard to advocate - anarchism is still with us. It remains moot whether there is default at the level of the law-governed, arbitration-regulated unified judicial system, where private associations co-exist and do not have, or pretend to, a monopoly of the use of coercion. They cannot, then, be ultraminimal states - and we may wonder if the ultraminimal state will develop from the market in protection.

³⁹ Ibid., p.16.

Let us assume there is default from the stateless society, and that the ultraminimal state does evolve via the dominant protection association. According to Nozick's derivation, this stage in turn leads to the evolution of the minimal state. The mechanism for the evolution from the ultraminimal state to the minimal state is Nozick's principle of compensation. The monopoly of the ultraminimal state is morally impermissible unless everyone is protected by it, including those who have not voluntarily joined. When all are protected the ultraminimal state has become the minimal state. 'The operators of the ultraminimal state are morally obligated to produce the minimal state.'⁴⁰ The principle of compensation 'requires those who act in self-protection in order to increase their own security to compensate those they prohibit from doing risky acts which might actually have turned out to be harmless for the disadvantages imposed upon them.'⁴¹ Individuals or groups enforcing their rights sometimes leads to further rights violations, or increases the likelihood of them, for the reasons noted earlier, e.g. ignorance, partiality, over-zealousness. Such enforcement imposes risks on others, and will be perceived as imposing risks, and this raises the question 'Why cannot others protect themselves against risky and fear-imposing acts by prohibiting them?' Nozick thinks they can providing they compensate. Adopting a principle of compensation leads to the following dilemma. Either I enforce my rights in a risky and fear-imposing manner and compensate others for any violations of their rights committed by me, or others prohibit my risky rights enforcement and compensate me for doing so. In the former case your rights are violated and you are compensated, in the latter my right of enforcement is prohibited and I am compensated. Now we will, or should, choose the second horn of the dilemma for one of the reasons Nozick cites, namely that

⁴⁰ Ibid., p.52.

⁴¹ Ibid., p.114.

some rights simply cannot be compensated for if and when violated, for example, the right to life.

From a market of competing associations Nozick contends that a movement will be effected, through either of the three routes, to a monopoly situation of one association dominant in any given area, which association becomes an ultraminimal state for it 'maintains a monopoly over all use of force ... but it provides protection and enforcement services *only* to those who purchase its protection and enforcement policies'.⁴² The paying of compensation signals the arrival of the minimal state, which possesses a monopoly on coercion and compensates those it prohibits from enforcing their rights for themselves. This compensation (in voucher form) 'can be used only for their purchase of a protection policy from the ultraminimal state'.⁴³

Associations are allowed to prohibit those who enforce protection in a risky or perceived-to-be-risky manner providing compensation is forthcoming. They may be justly prohibited because of the fear and apprehension their risky enforcement causes in others and which gives rise to these others defending themselves against it. 'The principle', says Nozick, 'is that a person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice. In applying this principle, an individual will resist those systems which after all conscientious consideration he finds to be unfair or unreliable.'⁴⁴

Unreliable procedures of enforcement impose risks, and therefore an association 'may treat the unreliable enforcer of justice as it treats any performer of a risky action'.⁴⁵ For Nozick, some acts must be prohibited. Others cannot be allowed even if compensation is paid. Belonging to the first class are uncompensatable acts such as murder. To the second class belong those goods that would be reallocated to those willing

⁴² Ibid., p.26.

⁴³ Ibid., p.27.

⁴⁴ Ibid., p.102.

⁴⁵ Ibid., p.105.

to pay compensation; compensatable acts which are fear inducing but where the fear cannot be compensated; and acts which cause public fear but where only victims of rights violations can receive compensation. Risky self-enforcement falls under the second, third and fourth types, and possibly under the first if self-enforcement were such a desired good that its practitioners were willing to pay for it by compensating for the fear they impose, and thereby have this good reallocated predominantly to their jurisdiction. Such people would be the idle rich I mentioned earlier. This is Nozick's non-free market argument against self-enforcers, such as the idle rich. It is not that self-enforcement is impractical or less likely to be successful (though this is true), rather that it is just not legitimate.

Nozick states that by virtue of its power a dominant protection association occupies a unique position: it can prohibit not only private individuals but other associations as well. When enforcing justice and prohibiting risky and unreliable procedures of enforcement 'it enforces its will, which, from the inside, it thinks is correct'.⁴⁶ Only the dominant protection association can do this continually and consistently, for only it has the requisite power and financial muscle against the sporadic, inconsistent and relative to it ineffectual, self-enforcement of their own rights by independents and the enforcement of competing associations. Hence the dominant protection association does occupy a *de facto* monopoly position in the protection market, and one that once acquired is seemingly unassailable. 'The dominant agency', as Nozick puts it, 'can offer its customers a guarantee that no other agencies can match: "Only those procedures we deem appropriate will be used on our customers".'⁴⁷ The *de facto* monopoly is rendered a *de jure* monopoly, and the dominant protection association becomes the minimal state, when independents are compensated - in the form

⁴⁶ Ibid., p.109.

⁴⁷ Ibid., p.109.

of protective services - 'to cover those situations of conflict with the paying customers of the protective agency'.⁴⁸ Independents are co-opted into the minimal state which pays a money price for its co-opting activities.

Robert Holmes raises an objection to the dominant protection association's guarantee. Nozick contends that for the dominant association to be justified it must adhere to what he calls the Epistemic Principle of Border Crossing. This is defined as: 'If doing act A would violate Q's rights unless condition C obtained, then someone who does not know that C obtains may not do A.'⁴⁹ This is the stricter definition of the Principle. The weaker version has the qualification that a person 'may not do A if he has not ascertained that C obtains through being in the best feasible position for ascertaining this.'⁵⁰

Holmes asks who determines whether condition C obtains, or who is in the best feasible position for determining this? Obviously, it is the dominant protection association itself. The Principle threatens to collapse into a question-begging exercise. Who decides that it is the dominant protection association that is best located? Answer, the dominant protection association. Now, Nozick admits that everyone has the right to punish violators of the Principle. Any person 'who attempts to punish someone without first having ascertained their guilt by a procedure of justice of proven reliability' can be punished by anybody.⁵¹ What the dominant protection association deems appropriate and the criteria of justice Nozick espouses may well differ. Put more poignantly, and a good deal more sceptically, the dominant association may prohibit if, and only if, it observes the Principle. But if the dominant association sets the criteria for the Principle how are we going to see the criteria set? How likely is it to

⁴⁸ Ibid., p.110.

⁴⁹ Ibid., p.106.

⁵⁰ Ibid., p.107.

⁵¹ Holmes, 'Nozick on Anarchism', p.63. Holmes maintains that the minimal state is unjust because no compensation is paid at the stage of the ultraminimal state: *ibid.*, p.61.

institute a set of antecedent conditions it may later be unable or unwilling to fulfil? Furthermore, if the strongest association decides what constitutes a threat then what restraint is there to its prohibiting activities? This brings to mind the anarchist's complaint met with earlier: what is there to prevent the dominant association from arrogating to itself ever-increasing authority, this on the pretext of justly prohibiting risky activities? Holmes's criticism reduces the *de facto* monopoly association to the status of, to use Peter Danielson's term, an economic firm: [T]he dominant protective agency is merely an *economic* firm dealing in the protection of rights',⁵² and a firm that may violate the rights of some in protecting the rights of its clients as business deems worthwhile, without the constraints - weak or otherwise - the free market placed on associations in Rothbard's scenario.

The derivation of the minimal state proceeds when, and only if, the free market in protection defaults. My arguments have done something to bolster the anarchist's case that we may never make the progression. Were the market to default, as we are assuming it will, and the minimal state to evolve, the anarchist's ammunition is not yet all shot off. There are grounds for believing that the monopoly position of the minimal state will not last. The minimal state's position is not unassailable, and there may be a return to a market of competing associations.

The argument I am going to develop is directed against the minimal state, and only it. It is fair to cast it as one indirectly favouring the Rothbardean anarchist scenario, and only it: the dominant protection association and the ultraminimal state are not alternatives to anarchy on the one hand and the minimal state on the other.

The major ground for believing in the instability of the minimal state - if arrived at - is intricately connected with the free-rider problem. The principle of compensation is

⁵² Danielson, 'Taking Anarchism Seriously', p.142.

liable to give rise to free-riders through unproductive acts of exchange. Moreover, there are two (critical-number) points through which the minimal state is threatened with collapse. These two points need not arise, but given what Nozick says about why and how people seek protection it is conceivable that they should. The argument does not suppose that pecuniary reward is all or even primarily what individuals are motivated by, only that when a sufficient number defect from the minimal state and receive compensation - and whose defection is made possible by an appropriate number who abide by the minimal state and pay compensation - the state may collapse. To coin a phrase, the minimal state may contain within itself the seed of its own dissolution.

Compensating prohibited risky acts of self-enforcement leads to unproductive exchanges,⁵³ and to a possible breakdown of the minimal state. The principle of compensation allows us to prohibit risky acts which we would otherwise not be able to prevent through our purchasing the abstention from such acts from would-be risk-imposers. However, as Nozick stresses, we might be securing 'relief from something that would not threaten if not for the possibility of an exchange to get relief from it.'⁵⁴ Paying Danegeld is an unproductive act of exchange. So why not be a prohibited-and-compensated independent enforcer of one's rights? (It is one way for the poor to secure for themselves the protection they could not afford if they were to pay for it.)

Why not receive protection at less or no monetary cost to oneself? Here is an opportunity to free-ride in the strong sense. Someone free-rides in this sense when he acquires at less or no monetary cost the same or a comparable good which others pay to acquire. In the weak sense someone free-rides when he benefits non-comparably relative to the purchaser of the good. A protection free-rider in the weak sense benefits

⁵³ In unproductive acts of exchange, after purchasing abstention, the buyer is left no better off than he would have been if the seller did not exist or had nothing to do with him.

⁵⁴ Nozick, *Anarchy, State, and Utopia*, p.85.

to the extent that someone else pays to put criminals away, though he is himself without protection. In the strong sense a free-rider stands to gain, for less cost, protection comparable to those who pay the full price for it. 'If there is potential money in it, individuals will find it to their advantage to be recalcitrant, not because this expresses their internal private preference but because it promises to yield valued returns.'⁵⁵ Independence promises valued returns.

Essentially, my contention is this: that the principle of compensation of prohibited risky self-enforcers of rights, as provided by Nozick, may generate free-riders, Nozickean independents. The generation of independents threatens the minimal state with collapse. The collapse of the minimal state would, given its derivation, be no more and no less than a lapse back into anarchism.

The problem for Nozick's derivation as I see it is this. The existence of present, or the generation of future, independents threatens the minimal state in two, respective, ways. They may prevent the minimal state from coming into being, i.e. halt the evolution from the state of nature through to the minimal state, or they may bring about the collapse of the minimal state once derived. And they may do either quite unintentionally. The invisible hand may prove to be the undoing of the minimal state. For the former possibility I shall henceforth refer to the independents as 'abstainers', and for the latter as 'defectors'. Either of these two are, I believe, individually possible, and I will deal with them separately. Most likely is a composite scenario of abstainers and defectors interacting. The possibility that the minimal state may fail to arise is arguably the less serious, and so I shall only present the briefest depiction of the problem.

Abstainers threaten the movement to the minimal state through their numbers vis-à-vis paid-up members of the dominant protection association. Once one association has

⁵⁵ Buchanan, *The Limits of Liberty*, p.4.

become dominant in any given territory or area it exercises its dominance by prohibiting the abstainers from pursuing their own rights enforcement in what it deems to be a risky manner. The prohibited abstainers are compensated. The principle of compensation, as previously seen, 'requires those who act in self-protection in order to increase their own security to compensate those they prohibit from doing risky acts which might actually have turned out to be harmless for the disadvantages imposed upon them.'

The question for any abstainer is clear. Why not be a prohibited-and-compensated enforcer of one's rights? The attractions of abstention are the attractions of free-riding. You can get something for nothing or at very little cost to yourself. Abstainers who ask themselves this question will appreciate the gains available to them from their continued independence, and will value their being prohibited-and-compensated at the expense of others.

Too many abstainers to too few paying clients of the dominant association will present too heavy a burden on the association's members, and the economic viability of the association will be undermined. (The costs of prohibiting abstention are liable to encourage defection by those who are paid-up members of the association. And the greater the costs the more defections there are liable to be. This is the interactive scenario.) Whatever else might happen as a consequence of this, one eventuality is the failure to progress from the dominant protection association through to the minimal state. In this scenario there is not so much a lapse back into anarchism as the failure of Nozick's invisible hand to guide us out of it.

Perhaps an objection would be to query the value of abstention. 'Perhaps abstention brings certain gains to its practitioners, but at what price? The price they pay is a period of time during which they are inadequately protected, namely by themselves. Relative to the protection others secure by paying others to protect them, the situation of the

abstainer during this period is not in the least enviable and, on balance, abstention is not worth it.' Whilst agreeing that self-protection is both less efficacious than being other-protected and surrounded with its own peculiar perils, the force of this rejoinder may be blunted were the dominant association to prohibit-and-compensate promptly, as arguably it should. The danger posed by abstention would be lessened. However, whatever may be said contra abstention I leave aside because I am more concerned with the problem that defectors pose for the minimal state once derived.

This second scenario is more difficult for Nozick, though it has a similar form to the first. Let it be granted that the minimal state comes about in the manner Nozick's invisible hand says it will. The dominant protection association becomes the ultraminimal state becomes the minimal state. Now, why should not paid-up members of the minimal state renounce their membership - defect - in order to become prohibited-and-compensated independents? Instead of prudent abstainers the minimal state is now faced with equally prudent defectors who, if their number is sufficient, threaten the minimal state with collapse and the lapse back into anarchism.

As the number of those who opt to become free-riders and defect increases, so revenue to the minimal state decreases. In consequence, membership fees have to go up, thereby encouraging more to defect. As it becomes increasingly worthwhile financially to be prohibited-and-compensated (savings are made on inflating premiums) and more and more defect, the minimal state is jeopardized. Some determinate number of defectors will bring about the collapse of the minimal state some time after its establishment. There will be some moment between defectors $d_1, d_2 \dots d_n$ when the minimal state ceases to be economically viable.

Expressed monetarily the scenario is as follows, where m represents the revenue lost to the minimal state with each defector d , and d_n represents the client whose defection is the last defection from the minimal state before its collapse.

The minimal state is economically viable at or above a certain threshold T ; only at or above T does its revenue equal or exceed its expenditure. Threshold T is determined by the proportion of clients (revenue) to disputes and defectors (expenditure). Suppose the minimal state is at or beyond T . Defectors $d_1, d_2 \dots d_n$ take with them their monies $m_1, m_2 \dots m_n$, and are prohibited-and-compensated. The withdrawal of $m_1, m_2 \dots m_n$ and the cost of compensation means the minimal state falling below T . Below T the minimal state is no longer economically viable and will have to raise further revenue, which will take the form of an increased cost to members for protection. In other words, the monetary value represented by m increases. This is liable to motivate further prudent defections amongst those who have not already made the decision to become defecting free-riders. So more d 's withdraw with their increased m 's, and the spiral of decline continues anew at an accelerating pace.

Briefly, some defect and are prohibited-and-compensated. They are compensated by the remaining members of the minimal state. As the price of membership of the minimal state increases the demand for membership decreases as it becomes a more attractive proposition to defect. More then defect. The price of membership increases. This serves to further depress demand, and so on. The minimal state lapses.

Nozick contends that self-help enforcers (independents) may be legitimately prohibited on the grounds of the risk their self-help activity imposes on an association's clients, but that clients must - morally must - compensate independents for disadvantages imposed upon them by being prohibited. The likely least expensive method of compensation is the supplying of protective services to them. Nozick then turns to look at his principle of compensation, asking 'Must the members of the protective agency pay for protective services (vis-à-vis its clients) for the independents? Can they insist that the independents purchase the services themselves? After all,

using self-help procedures would not have been without costs for the independent.⁵⁶

The principle of compensation lays down that prohibitors must pay an amount sufficient to compensate for the disadvantages of prohibition, less the cost the prohibited party would have borne supplying his own protection. If the prohibitor pays compensation to an amount covering the disadvantages imposed, minus the cost of the activity were it permitted, this amount may not be enough to enable the prohibited party to overcome the disadvantages. Accordingly, the principle stipulates that 'The prohibitor must completely supply enough, in money or in kind, to overcome the disadvantages.'⁵⁷ In short, 'As the only effective supplier, the dominant protective agency must offer in compensation the difference between its own fee and monetary costs to this prohibited party of self-help enforcement.'⁵⁸ 'No compensation need be provided to someone who would not be disadvantaged by buying protection for himself.'⁵⁹

In the light of this principle, an example, very much simplified, might be this. I am an independent (either abstaining or having defected) and the monetary cost to me of self-help enforcement of my rights is \$50 per annum (the cost of a revolver over its lifetime, say). The cheapest policy offered by the dominant association has a premium price tag of \$100. Were I to be prohibited from enforcing my rights I must be compensated to the tune of \$50. And it does not seem that the principle of compensation cares whether I have a luxury yacht and a fortune in the bank.

At the end of his setting out of the principle comes the point where Nozick appears to recognise the prospect of the sort I am raising, for he asks, 'If the dominant protection agency provides protective services in this way for independents, won't this lead people to leave the agency in

⁵⁶ Nozick, *Anarchy, State, and Utopia*, p.111.

⁵⁷ *Ibid.*, p.112.

⁵⁸ *Ibid.*, p.112.

⁵⁹ *Ibid.*, p.112.

order to receive its services without paying?'⁶⁰ Nozick answers in the negative, and he cites three reasons. One, that compensation is paid only to those who would be disadvantaged by purchasing protection for themselves. Two, that compensation is paid only in an amount 'that will equal the cost of an unfancy policy when added to the sum of the monetary costs of self-help protection plus whatever amount the person comfortably could pay.'⁶¹ And, thirdly, the more free-riders there are the more desirable it is 'to be a client always protected by the agency'.⁶²

Taking these in reverse order, my objection to the third reason, that the desirability of free-riding diminishes the more free-riders there are, is its complete dependence on there being a time lapse between when one is prohibited and when one is compensated, or between when one defects and when one is prohibited-and-compensated. Why should or need there be any significant, i.e. deterring, time lapse between them? Why not say that when one is prohibited one is simultaneously or nearly so co-opted into the dominant association, ultraminimal or minimal state, whichever it is, and protected by it? It might all boil down to so much data changes in computers followed by official notification and compensatory voucher (for \$50).

As to Nozick's second reason, what is wrong with the unfancy policy offered? Is it the sort of policy nobody would want to have? If so, is the association or state justified in compensating only in kind with this policy or only in an amount sufficient for this policy to be purchased? Maybe an unfancy policy, despite its cost, is no better or only marginally so than self-protection.

My reply to the first line of reasoning is that if the principle of compensation allows for the compensating of only those 'disadvantaged' we need to know how we are to understand

⁶⁰ Ibid., p.113.

⁶¹ Ibid., p.113.

⁶² Ibid., p.113.

what is meant by this. Nozick offers something of a clue when he writes that 'Only those disadvantaged by the prohibition would be compensated: namely those who lack other resources they can shift (without disadvantaging sacrifice)'.⁶³ My response then is that this looks to me like discrimination against the better off, those who can without disadvantaging sacrifice pay the \$50 difference between a revolver and a policy. And if so, what is Nozick's justification for it? It seems to run counter to the spirit - if not the very letter - of Nozickean libertarianism. What, for Nozick, is wrong with my being a yacht-owning millionaire and choosing independence because I want to be compensated to the tune of \$50? Why does my having greater just holdings than most preclude me from being prohibited-and-compensated? Can it be, simply, that I have *enough* - and that there are other limits to acquisition hidden in *Anarchy, State, and Utopia* besides moral catastrophe and the Lockean proviso?

⁶³ *Ibid.*, p.115.

VII

CONCLUSION

As free agents we are able to pursue the satisfaction of our preferences. And the unrestrained pursuit of our preferences generates particular interactional problems, namely of conflict and the difficulty of mutually beneficial co-operation. Even should we want to we cannot all retire, Thoreau-like, to our respective Walden Ponds. For one thing, there are not enough ponds. Because we are free we can choose to abide by a moral contract, and in choosing morality we are more likely to be successful in satisfying our preferences. Utility maximisers, whatever their preferences, have to choose either to enter into the moral enterprise (by contracting to undertake duties in order to gain rights) or to remain in the pre-moral condition. The price of rights is paid in the coin of correlative duties. I have argued that, faced with the choice between remaining in the pre-moral condition - where natural and social freedom are undifferentiated - and contracting into a morality of rights and duties, contractors who are rational will follow their enlightened self-interest and elect to be moral.

The rationale for contracting is each person's envisaging his being better off, in terms of his subjective utility structure (his preferences), if he exercises constraint. The success of the contract is judged in terms of each person being better off in the long term. Given the universal background of relevant facts about utility maximising agents and their shared environment, persons are better off for constraining themselves. Conflict is lessened and co-operation made possible.

Contractors agree on two rules to constrain their natural freedom. The first rule is consistent with Hobbes: persons, whatever their preferences, surrender their pre-moral freedom

to do all they will and have a power to. Each constrains himself from deliberately interfering in the purposes of others in exchange for the same consideration from them. This rule I called *Quieta Non Movere*. It establishes the right to equal social liberty. Instead of each being naturally free to do all he wills and has a power to, each is now socially free to do all he wills and has a power to - just as long as he does not deliberately seek to curtail the equivalent freedom of his fellows. The second rule all contractors accept generates for each the positive right to welfare, to having his fundamental needs met by others when unable to meet them himself - on condition, though, that what is laid claim to in the name of welfare is the incidental product of the free pursuit of preferences. Persons would be rational to agree to both rules. The right to equal social liberty justified in the second chapter provides for libertarianism the basic moral foundation it needs.

Alone, the right to equal social liberty does not establish libertarianism. Only once the régime of rights is transformed into a régime of property rights is that achieved. The progression to libertarianism is effected when the labour theory of appropriation is justified. With the defence of the contention that labouring grants the labourer a title to what he has laboured with the central tenet of the libertarian programme is in place. The right to equal social liberty is the key to the labour theory. Because a person has the social freedom, the right, to move his body as he purposes in ways that do not violate the social freedom of others - and any property rights they may have - he has the liberty to incorporate into his rights-respecting purposeful activity naturally situated objects. In so incorporating unowned resources he acquires a property right in them.

In the introductory chapter libertarianism was divided into three distinct types, namely orthodox libertarianism and two variants of Lockean libertarianism. Orthodox libertarianism says that property rights are absolute, and that the claim of

exclusion is relinquishable only by the free consent of the owner. The first of the two variants of Lockean libertarianism holds property rights to be *prima facie* and not absolute, and property therefore liable in principle to coercive transfer. The exact conditions under which property may be coercively transferred are not specified. However, overriding (or violating as Nozick will have it) rights is a serious matter and only justifiable in the more exceptional cases. Nozick acknowledges he is a Lockean libertarian of this weak sort. My contention is that he is a Lockean of the second and considerably stronger variety, i.e. of the sort which agrees that the right to property is *prima facie* and not absolute, but says in addition that there is a positive right to welfare. Though his reasons are not the same as mine, and despite his avowals to the contrary, Nozick implicitly endorses a libertarianism of this sort.

To deny categorically that the avoidance of gravely deleterious consequences never overrides rights is a simple moral mistake. Absolutism in matters moral is to be rejected, and Nozick is correct to appreciate this. An argument from moral catastrophe will succeed against any and all moral theories, and therefore against any and all moral-political theories. The construction of moral catastrophe given in the fourth chapter succeeds against orthodox libertarianism and Lockean libertarianism of the weak kind. What that argument justifies is the very redistribution they so assiduously eschew. Where the contract method generated a moral right to be in a particular material condition, the injunction to avert moral catastrophe concludes that persons have a just claim to have their basic welfare provided for. If just for this reason, the only tenable libertarianism is one committed to meeting person's fundamental needs.

Lockean libertarianism has normative policy implications, two of which were mentioned. Both are ways of best adhering to the *maximin* dictum governing redistribution. The first is that taxation be proportional. That two people, equally entitled to

their radically unequal respective holdings, are equally obliged to contribute towards the welfare of a third puts a bar to any standard of contribution except proportional taxation. The second implication is that persons may be justly compelled to purchase social insurance when they are able to. Persons are duty-bound to make provision for themselves against the contingencies of life. This obligation is enforceable against them.

On the matter of the distribution of property, Lockean libertarianism is not anti-egalitarian. Rather, it is indifferent to equality. Were equality brought about as a consequence of redistribution to meet needs or through free exchange it would be a just equal distribution. There is, however, no justification for bringing about a movement to equality or greater equality. If equality comes about either by transfer to meet needs or by a rights-respecting invisible-hand process no-one has cause for redress. Beyond this, equality is not, *pace Rawls et al*, required in the name of justice. To think with Loevinsohn that libertarianism requires the redistribution of goods to those whose use and consumption of them is more important to them than it is important to the current holders is to mistake libertarianism for something else. It is, I have suggested in the fifth chapter, to mistake it for a rather crude aggregative utilitarianism.

Persons have the right to liberty and property. In a world of imperfect moral beings these rights will need enforcing. I could choose to be my own rights enforcer, but this is highly impractical: it is better that a specialist enforce my rights on my behalf. Is it better, though, that the specialist be one of many competing for my patronage on the market, or not? Is anarchism to be preferred to statism? If the market hypothesis is to be plausible the protection associations will have to protect the rights of persons the state currently does at least as well as the state currently protects them. In the sixth chapter I showed how persons' rights, including the right to welfare, could be enforced in the absence of a

monopoly on coercive powers. Anarchism and redistribution are not incompatible. Shoring up his case, I defended the anarchist libertarian against Nozick's invisible-hand derivation of the minimal state premised on the failure of the market in protective services to prove stable. It is far from certain that the default from anarchism will occur. What is more, were the minimal state to evolve its continued existence is not assured. The principle of compensation which features so prominently in the Nozickean derivation may undermine the minimal state by creating a demand for free or subsidised state (paying-member) protection. In the final analysis it looks to be an empirical matter, and if so the wisest conclusion to draw is no hard and fast conclusion either way. We may have anarchy, we might get a state. All we may be certain of is that whichever would fulfil the function of protecting our rights best is to be preferred.

All libertarians maintain that property is a moral right and uphold labouring as the basis of original property in things. My primary intention in this dissertation has been to show that on both counts they are right. Another has been to show that those libertarians are wrong who hold that only by mixing his labour or by being party to a free, uncoerced exchange can a person come into property. Orthodox libertarianism is, then, inadequate. Nozick's libertarianism, premised on defeasible rights, is closer to the mark. In common both with Locke's *First* and *Second Treatise*, the version of libertarianism defended here countenances coercive transfers. Each has a claim to so much out of another's plenty as will keep him from extreme want. Accordingly, I have called it Lockean libertarianism. Because I do not think it necessary for libertarianism that it be absolutist about rights, nor that it disavow all redistribution, the theory defended here may properly be called libertarian. It is a robust rights-based moral-political theory. What is more it is a property-centred theory of liberty, and that - to my mind - is sufficient to warrant the epithet *libertarian*.

My concerns in this dissertation have been somewhat localised, restricted to articulating and defending the basis of a libertarian moral-political theory I think correct. The more precise details are absent, and many issues of interest and importance are not dealt with. Perhaps the most important of these is the issue of the rectification of injustice. Rothbard has addressed this question. He says that if we know that resource r was unjustly acquired and we can find the victim or his heirs, r reverts to them - less any property p added by those who were not the actual aggressors.¹ Rothbard insists that the separability of p added to r by those who were the aggressors is a condition of their keeping it. If it is not separable they lose p to the just owner of r . We need not accept this condition. If p really does belong to whoever added it, then it belongs to him even if it is inseparable. I think that matters are more complex than Rothbard supposes, and that, accordingly, the issue of the rectification of injustice is considerably more intractable. There are many others. I should have liked to include them. Their omission is warranted on the grounds that the task of addressing them is beyond the scope of this dissertation. And besides, if the broader foundations are unsound, no addition of detail will help.

If it is yours by your honest labour, or by free transfer from someone who first had it by his honest labour, it is yours to keep - just so long as no-one else needs it.

¹ Rothbard, *The Ethics of Liberty*, pp.57-58.

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