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Undergraduate Honors Thesis

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Some Renovations to *Anarchy, State, and Utopia's*
Libertarianism

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Abstract:

In this paper I make some renovations to the libertarianism developed by Robert Nozick in *Anarchy, State, and Utopia*. In §1, I defend Nozick's understanding of property rights from the criticism that he assumes a concept of 'full' ownership. In §2, I offer a foundation for the rights-as-side-constraints which are central to his theory, and then argue that this foundation implies that a rule of first possession determines the initial acquisition of property rights in resources. In §3, I explore what considerations justify limiting the property rights acquired by the rule of first possession; this task is to give content to what I call the Nozickian proviso. Because of space I am not able to complete the task of §3, but my hope is to have done enough to show how libertarianism may be made a challenge to other views.

Introduction

Thomas Nagel criticizes Robert Nozick for developing in *Anarchy, State, and Utopia* a libertarianism 'without foundations'.¹ Nagel has in mind that Nozick's case for the crucial theoretical device behind his libertarianism—rights as inviolable moral side constraints on how individuals may be treated—is inadequate. “To present a serious challenge to other views,” Nagel writes, “a discussion of libertarianism would have to explore the foundations of individual rights and the reasons for and against different conceptions of the relation between those rights and other values that the state may be in a position to promote.”² In fact Nozick seems to recognize that his work falls short on this score, but his forthrightness counts for little since it only makes the defect more glaring.ⁱ

This paper takes up the task which Nagel sets for libertarians. My aim is to strengthen the libertarianism developed in *Anarchy, State, and Utopia* by filling in some of its conspicuous holes. The problems to be dealt with will be approached by taking up three issues (corresponding to §§ 1, 2, and 3) with the property rights of the entitlement theory, the theory of distributive justice which is the core of Nozick's libertarianism. In taking up these three issues we are forced to address the challenges which Nagel identifies, regarding the origins of rights and the relations between rights and other values the state could promote. I present an argument for rights of the sort Nozick relies upon (rights-as-side-constraints) which also provides a framework for determining how those rights are circumscribed by other values or moral considerations. Because of space I am only able to evaluate five such considerations:

i Nozick concludes the first chapter, “The completely accurate statement of the moral background, including the precise statement of the moral theory and its underlying basis, would require a full-scale presentation and is a task for another time. (A lifetime?) That task is so crucial, the gap left without its accomplishment so yawning, that it is only a minor comfort to note that we here are following the respectable tradition of Locke, who does not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature in his *Second Treatise*.” (9)

opportunities to use resources absent their appropriation, utility, biological needs, fairness, and equality of shares. The conclusions reached about these five considerations preserve the libertarian character of Nozick's theory, but of course this character is not assured until those that remain are explored. That task is a large one, but in this paper I hope at least to take us a good deal closer to a libertarianism which presents a serious challenge to other views.

* * *

I said rather cryptically in the previous paragraph that the problems in Nozick's libertarianism which will be addressed in this paper will be approached by taking up three issues regarding the property rights of his entitlement theory. Just how this is so will become clear as we proceed. In one sentence Nozick puts in view the three issues which are the avenues for our discussion: "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened."³

§1 "...a permanent bequeathable property right..." – Nozick is criticized for understanding ownership to entail what Onora O'Neill calls "full capitalist property rights".⁴ This alleged understanding of ownership is seized upon by Nozick's critics as unjustified and yet crucial to his Wilt Chamberlain argument that liberty upsets patterns. I will argue that Nozick does not rely on such an understanding of ownership, and recognizing this sets the stage for §§ 2 and 3.

§2 "A process normally giving rise..." – The issue here, as the phrase suggests, is the nature of the interaction between an agent and a resource that serves as a necessary condition for appropriation—for acquiring property rights in an

unowned resource. Nozick uses this vague reference to a process because, though it seems clear there is something an agent must *do* with respect to a resource so that it becomes owned by her, he does not have a clear position on what the proper interaction is. I will argue that rights-as-side-constraints, including property rights, originate in what I call the presumption in favor of negative liberty, and this has as a consequence that property rights arise by a rule of first possession.

§3 “...if the position of others...is thereby worsened.” – This phrase reflects Nozick's interpretation of the spirit of the Lockean proviso that an appropriation of some resource leave 'enough and as good' for others to use. For Nozick property rights are subject to limitation by this interpretation of the Lockean proviso, which I will call the Nozickian proviso. I agree with Nozick that property rights are indeed subject to limitation by the Nozickian proviso, but I will have argued in §2 that the source of these rights is such that the Nozickian proviso is determined by evaluating the moral importance of certain positive liberties, namely, to live in a world in which alternative moral considerations like fairness and equality of shares circumscribe property rights. Nozick's phrasing, that one's situation not be worsened by others' appropriations, is correct, but properly evaluating worsening involves considering how other moral values might trump rights. Considering five such values is the subject of this section.

§ 1 – Varieties of Ownership

1.

Nozick is criticized for taking for granted, in his argument against what he calls end-state and patterned principles of distributive justice, an understanding of ownership as *full* ownership, as involving rights extending indefinitely into the future to do anything with one's property that does not violate moral side constraints against aggression.⁵ It is said that this understanding of ownership as conferring 'absolute entitlement'⁶ to or "full capitalist property rights"⁷ in what is owned begs the question Nozick seeks to answer in his Wilt Chamberlain argument, which is whether end-state and patterned principles can be principles of distributive justice. I will argue in the rest of §1 that these criticisms misunderstand Nozick's position.

It is not true that Nozick's Wilt Chamberlain argument assumes the property rights of his entitlement theory to confer full ownership of resources. G. A. Cohen is right to complain that overall Nozick's discussion of how property rights arise on the entitlement theory leaves much to be desired, but Nozick does say enough to meet the particular challenge being considered here.⁸ A. M. Honoré has distinguished eleven component elements which jointly comprise full ownership in a resource.⁹ Among them is the absence of term—"the indeterminate length of one's ownership rights".¹⁰ Notably, Nozick does not *assume* the appropriative process to give rise to such a component right. In discussing the case of someone who appropriates the total supply of a mysterious healing substance found in an out-of-the-way place, Nozick suggests that his interpretation of the Lockean proviso requires placing a time limit on ownership of the substance ("upon this fact might be based a limit to his property right in the substance so that others are not below their baseline position; for example, its bequest might be limited").¹¹ As

hinted earlier, Nozick's interpretation of the Lockean proviso will henceforth be referred to as the Nozickian proviso. We will discuss the Nozickian proviso in much greater depth in §3, but for now it is important to see, though the example may seem niggling, that Nozick clearly concedes that the property rights to which his theory gives rise are apt to be limited. They are not assumed to be full, but rather their extent is determined by reference to this so-far-vague notion of a person's baseline position.

This methodological approach to justifying property rights is, I think, a natural one. The first step is to identify what interaction between agent and unowned resource generates ownership claims generally (the appropriative process; §2), and the second step is to identify the considerations that justify limiting those claims in particular ways (the Nozickian proviso; §3). This approach seems to reflect a presumption to make an owner's rights in a resource as extensive as possible in the absence of countervailing reasons, that is, a presumption that after the appropriative-process condition has been satisfied departures from full ownership bear the justificatory burden. In §2.3 I offer an argument for why we should make such a presumption, but for now I will note my impression that even Nozick's critics share his approach here. I am not aware of a theory that assembles property rights in a resource piecemeal, by considering separately the justification for granting each of Honoré's elements of ownership. Nozick's critics do not properly take issue, I think, with his placing the justificatory burden on the limitation of property rights; they simply disagree with him over the relevant considerations that give rise to those limitations. So I will now attempt to show.

2.

Nozick's Wilt Chamberlain argument against end-state and patterned principles of

distributive justice runs as follows. Suppose your preferred end-state or patterned principle of distribution is realized—suppose, for ease of explanation here, it is an egalitarian principle that requires equality of holdings. By hypothesis, people are entitled to their holdings at this point. Now suppose lots of people decide to voluntarily exchange with Wilt Chamberlain some of their holdings in return for being entertained by his basketball skills. Inequality in holdings would result, disrupting the preferred pattern. Nozick wonders, though, how the resulting distribution would fail to be just, how individuals (most notably Wilt, who would be quite wealthy) would not be entitled to the holdings resulting from this voluntary exchange. “To maintain a pattern,” Nozick concludes, “one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them.”¹² Given that Nozick opens the section by claiming, “It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings,” and then proceeds to present the Wilt Chamberlain thought experiment, the implication is that such interference is morally unacceptable.¹³

The reply to Nozick's argument is obvious—it is to deny that, from a point of view concerned to achieve distributive justice, the importance of respecting the voluntary exchanges which upset the preferred pattern supersedes the importance of maintaining that pattern. That is, the reply is to deny that the interference necessary to preserve or restore (depending on whether it occurs *ex ante* or *ex post*) the pattern is morally unacceptable. If pattern is king, there is nothing wrong with forbidding exchanges or adjusting holdings after exchanges have been made, in order to maintain the pattern. Nozick only thinks there is, his critics would say, because he

does not think pattern is king. But what is his case for *that* position?

Nozick asks rhetorically, “what was it [i.e. a person's holding distributed under the pattern] for if not to do something with [such as give it to Wilt Chamberlain]?”¹⁴ If one is committed to people's having holdings at all, presumably this is because one wants them to be able to do certain things with their holdings. To Nozick it seems so obvious that there are benign uses to which one's holdings could be put (e.g. use in voluntary exchange) the results of which deserve to be respected, even though they may upset patterns.ⁱ And here we see where the charge of question-begging arises: to the pattern-defender such uses are not benign, precisely *because* they upset patterns. The issue is thus clearly a disagreement about the relative priority of pattern-maintenance versus liberty to use resources in ways that do not otherwise violate moral side constraints. Phrased in terms of property rights, the difference is that pattern-defenders place limitations on people's rights over their holdings in order to guarantee the maintenance of patterns, whereas Nozick places limitations on property rights in order not to worsen people relative to some (still vague) baseline situation. Nozick has not provided any argument to favor his limiting condition over the pattern-defenders', though; he has not shown the pattern-defender *why* she ought to care as Nozick does about the loss of liberty that her preference for patterns entails.

3.

Progress on that problem is left for §§ 2 and 3, but before proceeding I want to note an inaccuracy in Nagel and O'Neill's criticisms of Nozick's position. I have already shown that Nozick does not assume a notion of full ownership when discussing property rights, but neither

i Note that I have generalized from Nozick's particular argument involving voluntary exchange to any benign use of holdings that upsets patterns, because this most precisely captures the rub of the disagreement.

does the argument over pattern-maintenance most precisely *turn* on full ownership rights. One need not have the right to alienate a holding through voluntary exchange to be able to disrupt a pattern. If, for example, one has the right to destroy one's holding, or more mildly, to depreciate it through zealous personal use faster than one's fellows depreciate theirs, patterns can be disrupted. (Suppose I overzealously farm my lands, not leaving my fields fallow often enough for the soil to replenish its supply of nutrients, and so the soil becomes barren. Perhaps I do this because I know that the state enforces a rough pattern of equality of holdings, so when my crop income disappears the state will reimburse me.) Nagel is therefore wrong to pose the issue as one between a notion of 'absolute entitlement' which he attributes to Nozick and Nagel's own, of 'qualified entitlement'.¹⁵ The issue is between (a) being entitled to do *anything* with one's holdings that upsets patterns and having to live with the consequences—possible with only qualified entitlements—and (b) not being so entitled, or anyhow not having to live with the consequences (because the state constantly restores the pattern). Framed this way, the onus at this point seems equally on pattern-defenders to explain why pattern is king as it is on Nozick to explain why respect for liberty matters more.

§ 2 – The Appropriative Process

1.

As he does on many issues in *Anarchy, State, and Utopia*, Nozick leaves unclear his position on the appropriative process, the interaction between agent and unowned resource that is necessary to generate the agent's property rights in the resource. He discusses Locke's labor-mixing principle, the idea that by virtue of owning her labor an agent comes to own an unowned

thing with which she mixes her labor, but he does not endorse it. Far from it, in fact—he asks a host of difficult questions of it, the most decisive of which is also the most obvious: “But why isn't mixing what I own [i.e. my labor] with what I don't own a way of losing what I own rather than a way of gaining what I don't?”¹⁶ Nozick makes no progress towards a solution of this difficulty, except to add that an appeal to the value labor adds faces additional difficulties. His real interest in the Lockean theory of appropriation is with its proviso, the theory's way of accounting for how one person's appropriation affects the subsequent opportunities of others. If his theory is to persuade any of those not instinctively drawn to it, however, it must settle this matter of the appropriative process.

I will argue that the appropriative process we should recognize as generating property rights is one of first possession—put casually, it is a policy of 'first-come, first-served'. This offers an alternative to the Lockean labor theory, which I will not try to defend against Nozick's challenges. I will do this by first making a case for rights-as-side-constraints in order to provide a moral foundation for Nozick's libertarianism. I will then show what the rationale which gives rise to these rights implies for the subclass of property rights, namely, that a rule of first possession determines the initial assignment of rights in resources. The discussion of the Nozickian proviso, which determines the precise extent of property rights generated by the rule of first possession, is left for §3.

2.

The simplest version of my case for property rights limited by the Nozickian proviso begins with a presumption in favor of liberty. Put casually, this presumption is the view that freedom is a good thing, something which in the absence of a compelling reason otherwise we

should protect and promote. More rigorously, by a presumption in favor of liberty I mean the premise that in the absence of a countervailing reason why limiting individuals' liberty in some way is justified, that liberty must not be so limited. Liberty here is understood in both positive and negative senses: respectively, as the possession of the power to do something, and as a state of affairs in which interference by another agent with one's will in trying to do something is not morally permitted. I have a positive liberty to eat this cake if there is a cake in front of me and I could right now if I wanted to get it in my mouth, chew it, and swallow it. I have a negative liberty to eat this cake if no one is morally permitted to interfere with my doing so. The presumption in favor of liberty can therefore be separated into two different presumptions, the presumption in favor of positive liberty and the presumption in favor of negative liberty, and it is these more specific presumptions which we shall henceforth deal with. Each presumption in favor of a kind of liberty says that limiting someone's liberty of that kind must be justified, and if it cannot be, it is not permitted, morally.

The presumption in favor of negative liberty generates what we know as rights. (So does the presumption in favor of positive liberty, but out of considerations of space I will not elaborate.) If someone is not morally permitted to interfere with my will to do something, I (or a rights-enforcer I allow to act on my behalf) am morally permitted to use force to prevent a would-be interferer from interfering and to exact compensation for interference already committed. This privilege, to use force in order to obtain the performance of an act or forbearance by a person, or compensation if the act or forbearance is not performed, defines what we know as a right.¹⁷ Furthermore the rights generated by the presumption in favor of negative liberty are rights-as-side-constraints. This is so by hypothesis; we can build into what it means

in the definition of negative liberty for something to be morally permitted the understanding of inviolability which defines rights-as-side-constraints. This is a legitimate move, because it remains to consider what justifies circumscribing them. All we are doing now is making rights-as-side-constraints the default, departures from which must be justified. If we think about what this means for rights in resources, that is, for the subclass of rights we call property rights, we see that the presumption in favor of negative liberty makes property rights 'full', in the sense discussed in §1.1, in the absence of justification why they should not be.

Clearly, a regime of property rights affects people's liberty. If I acquire property rights in a previously unowned thing, I thereby limit the positive liberty of others. When I gain property rights in the cake, for example, nearby individuals no longer possess the power to eat the cake that they did before, because if they choose to try to they will often be impeded by me and/or the state's police agents. Because property rights thus limit people's positive liberty, the presumption in favor of positive liberty requires that granting such property rights be justified. Thus we have:

(i) Granting property rights must be justified.

Just as granting property rights limits people's *positive* liberty in relation to what it could be, *not* granting property rights limits people's *negative* liberty in relation to what it could be. This is because property rights generate negative liberty—what it means for me to have some property right is that you are not morally permitted to interfere with my doing something with a resource (and again if you do try to interfere, I or a right-enforcing authority acting on my behalf is morally permitted to use force to prevent you from interfering, and/or to force you to compensate me for successful interference). Because *not* granting property rights thus limits people's negative liberty, the presumption in favor of negative liberty requires that not granting

property rights be justified. Thus we also have:

(ii) Not granting property rights must be justified.

Obviously (i) and (ii) present a justificatory tension over property rights, arising from the presumptions in favor of both kinds of liberty. On behalf of positive liberty we have that granting property rights must be justified, and on behalf of negative liberty we have that not granting property rights be justified. What is the way out of this difficulty? I think we need not abandon either presumption in order to solve it.

Because property rights generate negative liberty, to the extent that we do not grant a person property rights we are guaranteed to limit her negative liberty. If we are to presume in favor of negative liberty, then, we cannot skirt the justificatory burden of (ii). The connection is not the same, though, between granting property rights and positive liberty; it is quite possible to grant someone property rights without adversely affecting others' positive liberty. Locke's example of a person taking a draught from a stream is a simple illustration of this fact.¹⁸ No one can complain if I take a drink from a stream and the stream keeps on flowing, even though those particular water molecules that I enjoyed are no longer around to be drunk by anyone.ⁱ This example shows that what we are concerned with when we worry about positive liberty is preserving *types* of opportunities for others, not every possible token of positive liberty. More precisely, what this example shows is that we care about positive liberty because we worry about certain sorts of consequences or results or situations befalling an individual as the joint product of her and others' actions, and not because every positive liberty an individual has has some absolute value in virtue of which it must not be affected. (Every action by an individual, simply

i Perhaps someone could legitimately complain, though, if I took the last draught from a desert oasis. The considerations behind this scenario will be explored in §3.2 and §3.4.

in virtue of her being a being that occupies space, affects other individuals' positive liberty, so that latter position would amount to a doctrine of original sin.)

Given, then, that we care about positive liberty because we worry about certain consequences befalling an individual (a likely example: not having enough water to drink), we can see that as long as the consequences of granting property rights are not adverse, in the sense of making anyone worse off with respect to the situation of positive liberties to which she is entitled, the justificatory burden of (i) is obviated. The conflict of (i) and (ii) can therefore be resolved, by leaving (ii) standing, which provides the reason why there should be any property rights as opposed to none, but also limiting those rights subject to the concerns over entitlements to positive liberties that lie behind (i). *This limiting condition on property rights just is the Nozickian proviso*: that the situation of others not be worsened, relative to some baseline whose fixing Nozick leaves an open problem and which we will deal with in §3.

Before proceeding, we can say at least two things now about this still-vague baseline situation of positive liberties to which people are entitled. First, we will not be able to argue against any particular alleged entitlement to a positive liberty by claiming that it would violate others' property rights, since property rights are *subject to* restriction by these considerations of entitlement. That is, a person's 'space' of negative liberty, and therefore what counts as a violation of her property rights, just is determined negatively by reference to whatever entitlements to positive liberty are established. Second, those entitlements to positive liberty cannot be established by an appeal back to the presumption in favor of positive liberty. The Lockean drinking example showed that what really is the concern behind the presumption in favor of positive liberty is a concern with people's having particular sorts of positive liberties.

There are obviously some criteria behind the presumption in favor of positive liberty, and which are perhaps responsible for its intuitive appeal, that determine what limitations of negative liberty are justified. We need to explore what those criteria are that stand on their own feet, to get down to the root and see what sorts of opportunities matter, whether they are indexable and can perhaps be traded off against each other, and so on.

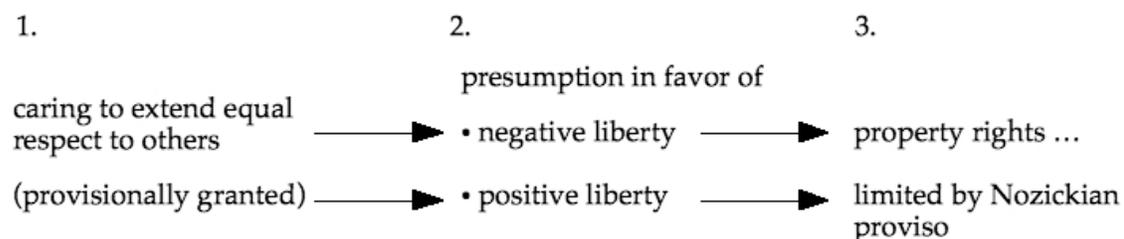
To sum up, the argument thus far for property rights limited by the Nozickian proviso is as follows. The presumption in favor of *negative* liberty will generate property rights wherever there is not a justification for not doing so. One possible justification for not granting the rights is that to grant them would sacrifice another person's positive liberties to which she has some moral entitlement. If there are such positive liberties to which people are entitled, the presumption in favor of negative liberty will therefore only generate property rights where those property rights do not infringe on the positive liberties. That is, it will generate property rights limited by the Nozickian proviso. When the Nozickian proviso is satisfied, the requirement which arises from the presumption in favor of *positive* liberty, that limitations of positive liberty be justified, is obviated. The Nozickian proviso ensures that one person's property rights do not come at another's expense, in terms of positive liberties that matter morally, so one who presumes in favor of positive liberty has no grounds to complain.

3.

Obviously the strength of this argument for property rights limited by the Nozickian proviso depends on the soundness of the presumptions in favor of negative and positive liberty from which those rights and the Nozickian proviso, respectively, arise. But what moral standing do these presumptions have? If someone has doubts, for example, about the moral preeminence

of negative liberty and therefore is not immediately willing to grant the presumption in favor of negative liberty, we must find some way to motivate that presumption, or else all the effort prior and subsequent to this section will have no purchase on someone so inclined. I will present in this section such an argument to motivate the presumption in favor of negative liberty. As for the presumption in favor of *positive* liberty, I am content to 'grant' it to the 'skeptics' of negative liberty, as long as it is understood that what is really being acknowledged are the valid concerns about entitlements to specific *types* of positive liberties which justify limiting the rights granted by the presumption in favor of negative liberty, concerns which once addressed obviate the justificatory requirements of the presumption in favor of positive liberty.

Before proceeding to the motivation of the presumption in favor of negative liberty, it is helpful to see the structure of the argument being developed in this and the previous section in a schematic.



The previous section (§2.2) explained the jump from 2 to 3, showing how the presumption in favor of negative liberty generates property rights and how the Nozickian proviso obviates the justificatory requirement of the presumption in favor of positive liberty. This section explains the jump from 1 to 2. One bit of this is the provisional granting, just noted, of the presumption in favor of positive liberty. In what remains I will argue that granting the presumption in favor of negative liberty is a matter of treating others with equal respect.

Our first step is to explore an egoistic line of argument which it might be thought could

motivate the presumption in favor of negative liberty. This argument from egoism would seek to show why one must, as a matter of rational self-interest, extend the presumption in favor of negative liberty to all individuals.

Thusly extending the presumption will be rationally required if it represents the dominant strategy to achieving one's ends.¹⁹ Now, it is evident why one would presume in favor of *one's own* negative liberty, but not immediately clear why one should extend that presumption to all others. Presuming in favor of one's own negative liberty would protect the pursuit of one's own ends with rights by default, and put the justificatory burden on those who would claim to interfere legitimately with one's pursuit of those ends.²⁰ It would be irrational not to presume in this way, because having rights to do whatever it is that one wills to do can only aid in the pursuit of one's ends. If one can win the support of others in recognizing and defending those rights one presumes one has, one stands to gain in the pursuit of one's ends from having that protection. And I think it is the case that one can often win such support: individuals will often protect others who claim their ends have the 'morally protected' status which rights confer, and this seems to me true regardless of whether those whom they protect reciprocate—people often show great selflessness and continually give others another chance to 'earn' past kindness. And if one *cannot* win the support of one's fellows, one loses nothing: one still has what one had before to protect the pursuit of one's ends, namely, one's own power. Presuming in favor of one's own negative liberty is thus certainly one aspect of the dominant strategy to achieving one's ends, and therefore rationally required.

But does rationality require extending this presumption to all others? If one's own ends involve interfering with the wills of others, extending the presumption to all others in effect

imposes a justificatory burden on oneself.ⁱ Could it ever make sense to do this? In fact it can, for reasons similar to those in the previous paragraph. If one can satisfy this justificatory burden, that is, justify to her fellows why her interference is morally legitimate, then she can benefit from the level of protection from her fellows which that status entails (a level which surely surpasses the level afforded when she did not extend the presumption to them, as in the previous paragraph). And if she cannot satisfy the burden, she does not lose anything: she still has the power she had before to protect the pursuit of her ends. Furthermore, it should not be thought that she loses something because by failing to satisfy the burden others will now more vigorously oppose her in pursuing her ends. They would surely have opposed at least as vigorously someone who interfered with them and did not consider them the kind of persons to whom justification is owed. So extending the presumption in favor of negative liberty *can* weakly dominate other strategies, such as 'going it alone' without extending the presumption to others.

We must show something stronger than this, however, to prove that extending the

i This is because the initial interferer bears the 'real' justificatory burden. What I mean by 'initial' and 'real' is clarified in the following.

The presumption in favor of A's negative liberty puts the justificatory burden on B, the person who would claim to interfere legitimately with A's will—that is, who believes A should not be morally permitted to use force in response to her (B's) interference. Suppose B wields a bludgeon and holds it threateningly as she runs toward A. B therefore interferes with A's will. Also, A's subsequent self-defense, or the state's defense of her, interferes with B's will. If B presumes in favor of B's negative liberty, B will think there is a burden on A to justify A's interference with B's will. If B presumes in favor of A's negative liberty, B will also think there is a burden on B to justify B's interference with A's will. Vice versa for A's presuming. Everyone's presuming in favor of everyone's negative liberty seems to produce a confusion about who 'really' bears the justificatory burden. So, whose justification or failure to justify counts, with respect to determining moral legitimacy?

The presumption in favor of liberty does not inscribe an enumerated set of rights in stone; it makes rights determined as-we-go, so to speak, by the success or failure of justification of interference. So we have B interfering with A. Whether A has the right to interfere with B in response, in order to enforce her right, depends on the success of B's justification, i.e. depends on whether B has the right to interfere with A in the first place. But whether B has the right to interfere with A does not depend on whether A can justify her interference with B's interference with her, for the successive nature of action guarantees that there will be a moment where this (A's interference) has not happened yet. In other words, B cannot count on A's having interfered in response as a way to shift the burden off of B. By the time interference with B comes up as a matter for justification by A, A's rights must have been settled, by the success or failure of B's justification. The 'real' justificatory burden in this bludgeon-wielding incident, then, is on B, because B's success or failure at justification settles the matter. For B to try to pass off the justificatory burden to A is to shirk the responsibility for justification which B bears as an interferer, and which results from her extending the presumption to A.

presumption to all individuals is rationally required. We must show that so extending the presumption is *always* everyone's best option, that it always represents the dominant strategy. It seems plain to see, though, that depending on one's situation, especially with regards to one's strength relative to others, extending the presumption to everyone may not be one's best option towards achieving one's ends. Perhaps one could do best for one's ends by extending the presumption to only a select few and forming a coalition with them, in order to subjugate others. Human history is the story of such coalitions of people acting rationally whose ends were furthered by pointedly not extending the presumption to all others, but rather by disrespecting them and completely disregarding their interests. Here, then, we can see where this egoistic line of argument quite simply falls short—extending the presumption to everyone else, while it can weakly dominate others strategies, is not necessarily the dominant strategy.

Fortunately there is another way to motivate extending the presumption in favor of negative liberty. It is to recast extending the presumption as according others equal respect as human beings who also have ends they care to achieve, the same respect which one must rationally show oneself. Recast this way I think most people would care to extend the presumption to all others, and those who do not we need not worry about. So I will now argue.

Presuming in favor of the negative liberty of all others commits one to justifying one's actions if they interfere with the wills of others. It is to put oneself 'on the hook' in a basic sort of way, the same way that, as shown earlier in this section, one rationally must hold others to be on the hook when their actions interfere with one's own will. If we can say that to hold others to be on the hook in that way is to have respect for one's own ends or simply, we might say, oneself, then extending the presumption to others is to accord them the same respect which one must

rationally have for oneself. I am of the mind that someone who does not have equal respect for her fellows in this way, who so could not be bothered to consider the wills of her fellows, but who treats her ends as so different in importance simply because they are *her* ends, is a contemptible person. I think most people would share a sentiment along these lines, and therefore care to extend the presumption in favor of negative liberty to all individuals.

Keep in mind that we have said nothing at this point about what counts as adequate justification. That is, it is no excuse for someone to say that she does not want to extend the presumption to others because she is afraid that what she counts as a justification will not be accepted by others, that is, because she is worried about the criteria by which it is determined what is justified. Those criteria can perhaps themselves be a matter for argument and justification, to some degree. And perhaps there will be irreconcilable positions on that matter and people will have no choice but to stake their lives on their ways of seeing things (or capitulate to others'); but at least an attempt will have been made to take into account the interests of others. *Extending the presumption simply grants that others are the kind of beings whose wills are due the sort of recognition which the genuine attempt to justify implies.* If someone does not care to hold her fellows in such regard I do not think I have an argument why she must, but I do not see why we should be worried by any complaints from someone who so could not care less about us about the way we end up treating her on the conception of the rules we reach. This completes our argument for property rights limited by the Nozickian proviso; it ultimately rests on the hypothetical imperative discussed in this section, that *if* we care to extend others equal respect, we will presume in favor of their negative liberty.

4.

Finally we can get to the stated aim of §2: determining the appropriative process. Among the community of people who presume in favor of individuals' negative liberty, the presumption in favor of negative liberty will determine who has the right of way, so to speak, when it comes to claims over resources.²¹ When the justificatory burden is placed on she who would interfere with another, the acquisition of property rights will be on a first-come, first-served basis. This is because a person who comes along and claims for herself what no one else already possesses does not interfere with anyone else. So property rights (limited by the Nozickian proviso) in what she first-possesses are granted her by the presumption in favor of negative liberty. The early bird gets the worm, and those who arrive on the scene later bear the justificatory burden if they want to interfere with the early bird's non-interfering exercise of her property rights.ⁱ

David Schmidtz is not sure whether the rule of first possession is actually a principle of justice. He says,

First possession may not itself be a principle of justice, but not every question is a question of what people are due. ... First possession is to some extent outside the realm of justice, and to some extent corrects justice and keeps justice in its place, for there are times when talking about what people are due is the last thing that would help to resolve conflict.²²

He seems to account for the rule as a sort of practical necessity, as one we cannot do without, because not to recognize it would be so fundamentally to disrespect people that we would invite an unacceptable level of conflict into our world. I do not know whether Schmidtz would endorse my account of the rule of first possession as arising from a presumption in favor of negative liberty, but I think my account does make sense of his comments.

i The presumption handily deals with the familiar issue of whether the world is initially unowned (equivalently, commonly owned) or jointly owned. It places the justificatory burden on the person who would interfere with another in the name of exercising the veto-power which joint ownership confers, which means the proposition that the world is jointly owned must be justified. I can see no justification, though, for that proposition; I think it can only be assumed.

Schmidtz conceives justice to be concerned with what people are due. It seems then that what it would mean for the rule of first possession itself to be a principle of justice is that a world in which property rights are initially acquired according to the rule of first possession is something people are due.²³ Now, I have claimed that the rule of first possession follows out of the presumption in favor of negative liberty, when that is considered with regard to the resources in the world. Thus on my view if people are due a world in which property rights are initially acquired according to first possession, it is because they are due the presumption in favor of negative liberty. But are people *due* the presumption in favor of negative liberty? That was not the conclusion of §2.3; rather, the conclusion was that people who do not extend the presumption to others are repugnant in an utterly disqualifying sort of way, and that most people will in fact care enough about others to extend them the basic, equal respect that the presumption implies. The line of argument seeking to show why someone must as a matter of rational self-interest extend the presumption to others fell short. So, on the argument I have been developing, people are not *due* a world in which property rights are initially acquired according to first possession; that is simply the rule that will be recognized if people care about respecting their fellow human beings in a fundamental way. In this way then, the rule of first possession is not itself a rule of justice, as Schmidtz suspects.

How can we make sense of Schmidtz's other comments, that the rule of first possession keeps justice in its place and conduces to reducing conflict? The presumption in favor of negative liberty keeps justice in its place by not allowing considerations of justice to reign over all matters of what people are protected to do. When interference with the wills of others would be committed under the banner of justice, it is these considerations of justice which must justify

themselves to negative liberty, so to speak. The rule of first possession which the presumption in favor of negative liberty begets is a way of ordering claims in the world, by defaulting to the people who are “minding their own business”, as Schmidtz says.²⁴ Those claims can be reordered by subsequent considerations of justice, but those considerations come *subsequently*. The presumption in favor of negative liberty serves to reduce conflict because deferring to people who are minding their own business gives us the best chance of all getting along. A world that does not defer to this policy of “live and let live”²⁵ will not be a peaceful world—if there is the appearance of peace, it is only because of the threat of brutal force or destitution, as in North Korea.

§ 3 – The Nozickian Proviso

1.

Now we come to the matter of considering what types of positive liberties individuals are entitled to which justify limiting others' rights acquired via the presumption in favor of negative liberty. Put differently, we have finally to fix the baseline situation which an individual's actual situation's being worse than justifies interfering with others and thereby limits their rights. To fix the baseline is to give content to the Nozickian proviso and is the objective of this section.

As alluded to in the motivation of the presumption in favor of negative liberty (§2.3), this will involve settling to some degree what counts as a justification. Is it enough to establish an entitlement to some positive liberty that I simply *want* to enjoy some positive liberty, that *I* want to interfere with your will in a particular way? If this were enough, there would be no point to presuming in favor of the negative liberty of others, because one's desires would everywhere

vitate it. It would be to deny others precisely the respect which the presumption grants them. Of course one could still *claim* that one presumes in favor of others' negative liberty, but this would be empty lip service to the idea. If it is enough to 'justify' your interference that it's *you* who wants to interfere, others are not being given equal respect as beings who also want to do what *they* want to do. So if one cares to grant others that respect, merely appealing to one's own desires cannot be enough to justify interferences with the wills of others. Clearly, then, we will have to appeal to less partial, i.e. more impartial, considerations to justify interferences.

Here is what I think is a comprehensive list of all such considerations with some *prima facie* plausibility, raised by theories of justice across the spectrum:

opportunities to use resources absent their appropriation, utility, biological needs, fairness, equality of shares, autonomy, fraternity, ability to self-respect, absence of exploitation, moral merit, effects on character, facilitation of flourishing, stupidity, enforcement of rights, and public goods.

These are not positive liberties themselves, of course; but a consideration from utility, for example, could require that a person's baseline situation include that he be subject to whatever procedures achieve overall utility maximization. In this way these considerations of justice can be connected to a person's positive liberty and incorporated into the theoretical framework I have built in this paper. Clearly, the theory of justice which we end up with will be *libertarian* to the extent that it rejects most of these considerations as justifying limiting rights. Unfortunately the list is too long and the issues too complex for me to be able to present in this paper my position on each consideration. In what remains I will deal with the first five listed above, and this will I think take us a good deal closer to a libertarian theory which challenges others. For clarity, I

have put the conclusion reached about each consideration at the top of each section.

2. Opportunities to Use Resources Absent Their Appropriation

Thesis: The idea that individuals are entitled to the levels of welfare they would have enjoyed with respect to opportunities to use resources if those resources had not been appropriated, i.e. taken out of common use, rests on intuition.

Nozick's discussion of the baseline situation at the heart of his own proviso is rather limited. He remarks, "This question of fixing the baseline needs more detailed investigation than we are able to give it here," and the reader is left to infer his principles from his comments on a few hypothetical scenarios.²⁶

Here is my understanding of his position based on those comments: an owner's rights over a resource R will be limited at time t_2 if any person's situation is on net worse with respect to her opportunities to use R than it would have been at t_2 if R had persisted in common use (i.e. in being unowned) until t_2 rather than be appropriated at t_1 . That is, Nozick seems to think that a person's baseline to be used in a comparison performed at time t_2 is defined by the level of welfare she would have enjoyed with respect to her opportunities to use R if R had not been appropriated at time t_1 but instead persisted in common use until t_2 . Arriving at this position is a complicated matter of exegesis, and I will not explain here how I have done so.

That is fair because, Nozick's position or not, we are ultimately after the correct understanding of the baseline. What, then, does the formulation I have attributed to him have to recommend or discredit it? G. A. Cohen, a charitable reading of whom I think attributes to Nozick the same position I have, objects to the fact that the baseline requires that R be held in common use up until t_2 , the time when the extent of the property rights in R is being considered.²⁷ Cohen's complaint is that Nozick does not consider "other intuitively relevant

counterfactuals” about what could have happened to R after t_1 .²⁸ If A appropriates R at t_1 , for example, it is possible that because of B's superior talent in making use of R's, A and B will both be worse off at t_2 compared to how they would have been then if B had appropriated R at t_1 or later. This point of course requires a certain definition of welfare (e.g. R is arable land, so welfare is measured in bushels of wheat, for instance), but Cohen is happy to propose such a definition for argument's sake since Nozick gives no real hint of one himself. Cohen thinks Nozick has, by building an object's non-appropriation into the baseline, “arbitrarily narrowed the class of alternatives with which we are to compare what happens when an appropriation occurs with a view to determining whether anyone is harmed by it”.²⁹

If the rationale in Cohen's complaint were carried to its logical extent in a formulation of the baseline, property rights in R would be limited at t_2 unless R were held by the person whose holding it made everyone on net the *best off* at t_2 with respect to the opportunity to use it that they could possibly be. Cohen claims that his point is not to advocate this sort of proviso, but rather to point out that B has a prima facie plausible “grievance that throws doubt on the legitimacy of A's appropriation”.³⁰ If that is so, the observation is not immediately troubling to the theory I am developing around the presumption in favor of negative liberty. Cohen is in effect asking, 'Why not a different baseline, in which R is not perpetually held in common? How do you dismiss any of those?' And this is not yet a threat, because it is the opponent who would interfere who must justify her proposed limitations of rights, not shift the justificatory burden back onto the rights-defender. Cohen needs to demonstrate an entitlement to one of those alternative baselines for his complaint to have force.

Of course, to avoid being hoisted by the same petard (our own), we still need to make

some case in favor of Nozick's formulation of the baseline. The only case I can see is not an argument *per se*, but involves a sort of priming of intuition. The claim under consideration is that people are entitled to the levels of welfare they would have enjoyed with respect to opportunities to use resources if those resources had persisted in common use. My aim is to reformulate this notion sufficiently to trigger a strong intuition or feeling of entitlement in others.

The positive liberties to which an entitlement is asserted here are those the human species entered the world with. They are very basic: to secure for oneself and one's dependents, with considerable but not gratuitousⁱ effort, sustenance, shelter, and perhaps a bit of leisure; to migrate, travel, or generally not be confined; and others which I am at a loss to think of. These are very basic, yet we might say that they comprise the freedom to make an existence for oneself, because they allow for the satisfaction of physiological needs and basic mobility. At a minimum I think one must hold that all human beings are entitled to a life with these opportunities. I cannot get away from the fact that these opportunities just are those which human beings evolved some hundred to two hundred thousand years ago to have. If the rules of the game we devise do not even guarantee that no one is worse off for playing that game instead of a game with *no* rules (which is more or less the game *homo sapiens* evolved playing), how good are those rules?

The proposed formulation of the baseline would ensure that as humanity marches along through time, no one is granted property rights which make someone else on net worse off with respect to her opportunities to use resources than she would have been had they never been appropriated. We can see how natural a response is Cohen's objection: why is our standard for comparison here that the resources remain in common use? Why don't we compare our

i By 'gratuitous' I mean to indicate that securing one's sustenance from resources held in common does not involve satisfying extraneous requirements, such as, to use an example from Philippe van Parijs, wearing scarlet underwear (14). As hinted at the end of this section, this observation does much to prevent many forms of what it would be asserted is exploitation.

essentially capitalist system here to socialism, or some mixture of capitalism and socialism, or any other system? Again we can reply, though, that this is not yet our question to answer, but rather the case for socialism or some other system must be made on its own merits. All that is being asserted here is that people are entitled to the positive liberties which provide the levels of welfare they would have enjoyed with respect to opportunities to use resources absent the appropriation of those resources; perhaps they are entitled to more, but that has yet to be explored.

The sentiment of the Cohenian response is well-taken, though. It is tempting to rephrase the basic question as, Why aren't we after the *best* possible system? I think we are; the best *system* should not be confused with a system that requires everyone to be the best off with respect to positive liberties that they could possibly be. I do not know how any system could satisfy that ideal, because the positive liberties enjoyed by human beings at a given time involve tradeoffs among human beings. This is not at all to suggest that society is a zero-sum game. Rather, it is to suggest what is my own view, that given that human beings have competing ends and arrive on the scene at different times, if we care to grant people equal respect, by presuming in favor of their choices about how they want to live their lives, this may be the best system. But again, there is still a ways to go on that score, because we have to consider other possible considerations to integrate into our theory of justice.

Before moving on to those, a number of questions still remain about the conception of the baseline I have defended so far. What exactly are all the ways in which resources may be used whose level of welfare with respect to which must be preserved? I am inclined to think the set is open; as I suggested earlier, I certainly do not have enough confidence to claim that I have

enumerated all of them. And how exactly is a person's level of welfare with respect to opportunities to use a resource to be measured over time? This is certainly murky territory, which I think the following examples illustrate.

Suppose we attach a value to freshwater streams—for their uses in swimming, drinking, fishing, transit, and simply as aesthetically pleasing geological features. Am I harmed with respect to my baseline situation if all of the freshwater streams in my country are polluted with industrial waste and their ecosystems destroyed? Certainly. In my state? Probably, but it perhaps depends on how large my state is, and whether there are other sources of freshwater around. In my county? Probably not. What about 10 percent of the streams in my country? Probably not, if the ruining is geographically dispersed. What about 40 percent in my country? 60 percent? You see the difficulty. Or to give another example, I cannot go bounding over hills and across the plains as human beings used to be able to, because the hills and plains have since been occupied. On the other hand I can now fly, drive, and sail to places I could not previously. To what extent are these opportunities comparable and capable of being incorporated into the same dimension of welfare? I do not have a principled way to solve these difficulties here. This is a major task for another occasion, and one which I acknowledge must be taken up to give completeness to the theory being developed here.

Only by working out that problem can we fully identify the political implications of the the moral entitlements that have been asserted here. We can still get some idea of what the state's role will be, though, from the opportunities to use resources identified earlier in the section. These were to secure for oneself and one's dependents, with considerable but not gratuitous effort, sustenance, shelter, and perhaps a bit of leisure; and to migrate, travel, or generally not be

confined. The former entitlement permits the state to guarantee individuals a minimum standard of living, by making up for the shortfalls between the welfare to which individuals are entitled in those various respects (i.e. sustenance, shelter, leisure) and what an individual's own efforts are able to secure. This will involve providing some amount of food, water, housing, and income to be used on leisure activities. If it is not practicable to guarantee this standard of living by making up for the *shortfall*, the state can act as an employer which compensates in the form of these goods. The former entitlement also permits the state to enforce workplace standards, to ensure that gratuitous conditions are not attached to the employment a person undertakes in order to make a living. The latter entitlement permits the state to guarantee the possibility of ground transit, by limiting property owners' rights in order to prevent others from being 'fenced in' by those property rights. In short we seem to have here a mildly interventionist and redistributive state.ⁱ Because the standard of living provided by this state will be very low, on account of the low level of welfare with respect to opportunities which must be guaranteed, I do not think we have what can be termed a 'welfare state', although the state certainly is in a sense in the business of guaranteeing welfare. Rather, compared to modern states, I think it is fair to call the state licensed here a libertarian state. But that status is only tentative at this point, for we need to explore the status of other values the state could promote.

3. Utility

Thesis: Considerations of utility do not justify limiting rights, because of the Kantian idea of separateness of persons, that people are not to be treated merely as means.

i Nozick is, I think, quite simply wrong in his beliefs that “the free operation of a market system will not actually run afoul of [his interpretation of] the Lockean proviso” and that the Nozickian proviso therefore “will not provide a significant opportunity for future state action” (182). There are certainly individuals, for example, who through no “previous *illegitimate* state action” but simply from contingency will find themselves in such extreme poverty that they have to steal a loaf of bread to feed themselves or their families (182). The entitlements asserted in this section would permit state action in such situations.

Are individuals entitled to live in a world in which rights are limited in order to maximize, or at least increase, overall utility (the sum of individual utilities)? Do considerations of utility justify limiting rights? My answer is no, but not because of any doubt about the nature of utility. I grant that we know what we're talking about when we speak of utility, and I grant that marginal utility diminishes in wealth, which has the consequence that actions which increase overall utility are easily identifiable. Thus I recognize the intuitive appeal of the notion that justice requires, say, forcibly taking wealth from Bill Gates and using it to purchase medication for a poor person who cannot afford it. But, along with Nozick, I deny that such considerations justify limiting rights, because of the Kantian notion of the separateness of persons.

This is the idea, an interpretation of Kant's second formulation of the categorical imperativeⁱ, that “There is no justified sacrifice of some of us for others”.³¹ “To use a person in this way [i.e. “for the benefit of others” against his will],” Nozick says, “does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.”³² In the endnote to this sentence Nozick points to Rawls' discussion of utilitarianism in §§ 5, 6, and 30 of *A Theory of Justice*. Now, Rawls' argument against utilitarianism is that individuals in the original position would not choose it as a principle of justice. This cannot be Nozick's argument against utilitarianism, though, not only because his approach is not contractualist, but also because Rawls' contractualist approach “is incapable of yielding an entitlement or historical conception of distributive justice,” to the defeat of a utilitarian conception.³³ Nozick's adoption of the Kantian separateness of persons, then, can only be founded on either intuition or Kant's derivation in the *Groundwork of the Metaphysics of Morals*. Nozick seems to go with intuition,

i “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” (Kant, §429)

as suggested by his experience-machine thought experiment, but in any case I will stand by Kant's derivation in the *Groundwork*.

Incorporating the Kantian separateness of persons (henceforth, the separateness condition) into the theory that has been developed in this paper has the important consequence of providing a standard with which to defeat many possible justifications of interferences. Against the (utility) monster, for example, who would claim to justify gratuitously murdering you without your consent because it would bring him a greater utility gain than it would loss to you, we can say that his action is not justified because it sacrifices you, treating you merely as a means to his end.³⁴ The separateness condition provides a standard to argue against *many* possible justifications of interferences, though, because it does not defeat all such, even for such acts as murdering someone against her consent.

Consider the marooned sailor who washes ashore on the small island which you inhabit (Scenario I). You are able to hack a meager existence out of the resources on the island, climbing the coconut trees, picking berries off the few bushes, and catching an occasional fish. But these resources are all the island affords, and they are not enough to sustain both of you. By the rule of first possession you acquired property rights over the island's resources, but the entitlements asserted in §3.2, which here amount to the level of welfare with respect to opportunities to use resources on the island prior to your acquisition of property rights in them, limit your rights once the sailor shows up. Those entitlements justify each of you in interfering with the other in order to obtain the sustenance which the island affords. If both of you have a strong enough will to live, the ensuing conflict will be a life-and-death struggle.

The victor of this struggle (suppose it's you), though a murderer, does not run afoul of the

separateness condition, however. For whatever reason it may be the case that you gain more utility from your continued survival than the sailor would have from his, but you did not treat the sailor merely as a means to your end—obtaining sustenance. In one sense it certainly seems true to say that the sailor was sacrificed: he was killed. But he was not sacrificed in the sense of being *used* for your benefit against his will, and this is the sense that counts for respecting the Kantian separateness of persons. Your action does not disrespect the fact that the sailor was a separate person and his life the only one he had; it reflects that the same fact is true of you, and that the situation in which you found yourselves required that at least one of you die.

The fact that this §3.2 entitlement does not fail to satisfy the demands of the separateness condition raises an important question: Will the entitlements asserted in §3.2 *always* satisfy the separateness condition? And this question itself raises an intriguing possibility: If *all and only* the §3.2 entitlements satisfy the separateness criterion, then we would have a conclusive answer to the question of §3, of what positive liberties define the Nozickian proviso. We would of course still need to rely on intuition to get the §3.2 entitlements off the ground, but we would at least be sure that the entitlements to positive liberties extended no further.

Unfortunately, however, we cannot even conclude that the §3.2 entitlements always satisfy the separateness condition. Consider the following variation on Scenario I (Scenario II). Suppose that the only source of food on the island when you arrived was the fish in the surrounding shallow waters. Before the sailor arrived, though, you foolishly and unnecessarily depleted the stock of fish. Luckily, you also had corn seeds in your pocket, and promptly planted them in the island's soil, which happened to be arable. Just as your stores of fish ran out, the supply of corn, enough to feed one person, became ready for harvest. At the same moment,

though, the sailor washes ashore. Again there is only enough food for one of you. Again by the entitlements of §3.2, the sailor is entitled to enjoy the levels of welfare with respect to opportunities to use the resources on the island which he would have enjoyed had you not come along and acquired property rights in them. Among other things, this means he is entitled to the level of welfare he would have enjoyed from eating the island's fish whose stock you depleted. The only way to achieve this level of welfare now, though, is to obtain the corn you have grown, so your rights in the corn are limited (more precisely, lost) and he is allowed to interfere with you to obtain it. Supposing the sailor wins the struggle this time, again it is clear that you are sacrificed in the sense that you are killed, but it seems at first glance that you are *also* sacrificed this time in the sense that you are *used*, since the corn obtained by the sailor embodies your labor, as the product of it.

I see no way to deny that the sailor uses you, and thereby violates the separateness condition, without denying that resources can embody individuals' labor or that one's labor counts as an extension of oneself and therefore carries the same protection as one's person not to be used merely as means to someone else's ends. And neither of these is something which I think anyone wants to deny, for consider the following final variation of the island scenario (Scenario III). Suppose there were not *any* food resources on the island when you arrived, but again you planted your corn seeds (and were able to survive with other provisions you had while the corn crop was growing). Then the sailor washes up. The entitlements asserted in §3.2 do not cover the sailor this time, because there would have been no sustenance possible for him at the time he washed up if you had not planted the corn. Clearly for the sailor to take your corn in this situation would be to use you merely as means to his ends and to violate the separateness

condition. Notably, Nozick mentions an analogous situation to this one: all the water holes in the desert dry up except for yours, because you took special precautions to preserve it. He implies that others do not have an entitlement to your water.³⁵ He does *not*, however, consider an intermediate scenario analogous to our Scenario II. Such an analogous intermediate scenario would be something like this: before you arrived at your current water hole, which you created by digging a well, you depleted a different, pre-existing water hole which would otherwise have been available for the others who are thirsty now to drink. If he had, I think he would have been forced to confront our conclusion.

Perhaps it will be thought that it counts for something in Scenario II that the sailor *would have* been able to enjoy the fish supply if it were not for your foolishness. This fact might be used to make the claim that it is your *fault* that you are now being used by the sailor who takes your corn. But it is nowhere apparent that the separateness condition responds to such counterfactuals and considerations of responsibility. The separateness condition seems only to be concerned with the present moment, with whether a possible action under consideration would use you against your will merely as means to another's end. Perhaps it will be replied to this that in depleting the stock of fish, *you* sacrifice the sailor's future welfare to satisfy your ends, and *you* therefore violate the separateness condition too. But this reply is not successful; it is true that the sailor's future welfare is affected for the sake of your fishing desires, but again this is not the sense of sacrificing that counts. The sailor here is not *being* used against his will in this way because he is not on the scene yet.

Unless one denies the soundness of the separateness condition, then, the conclusion we are forced to accept is that the separateness condition circumscribes the entitlements which the

intuition in §3.2 asserts people have. The separateness condition reduces those entitlements to those levels of welfare with respect to opportunities to use resources (1) which a person would have enjoyed if the resources had always remained in common use, *and* (2) whose acquisition does not treat the individuals whose rights in them are limited so that other individuals may attain these levels of welfare merely as means to this end of attaining these levels of welfare. To be clear, conditions (1) and (2) must be jointly satisfied. (1) derives from the assertion of entitlements in §3.2, and (2) derives from the separateness condition.

Condition (2) will not generally have the unfortunate consequences that it does for the sailor in Scenario II, though; it is in fact rather easily satisfied. Scenarios I-III suggest that (2) will be satisfied when the resources the owner's rights over which are being restricted do not embody the labor of the owner.ⁱ It might be thought this requirement is satisfied at the moment any voluntary exchange occurs, because what A acquires from B through voluntary exchange will not be the product of A's labor.ⁱⁱ I think we should not be so fastidious here, though, about what (2) requires. If you exchange with me the corn you have grown for my cash, it is fair to say that what you receive from me embodies the labor you expended in growing the corn, even if you did not literally labor upon what you received. To deny this would be to say that if I then steal the cash back from you, I do not use you merely as means to my ends.

There are some voluntary exchanges, however, in which one party, though it ends up with

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- i Appealing to the idea of embodied labor here does not conflict with the earlier disavowal of the Lockean labor-mixing principle. That principle concerns how rights originate, not how people are used merely as means to another's end. I think the Lockean labor-mixing principle has intuitive appeal *because* we do think that to use against her will what a person has put her labor into is to use her merely as a means; but I think this intuition is rightly regarded as not strong enough to generate rights.
 - ii It will of course sometimes be the case that someone will acquire through voluntary exchange some resource to which she added her labor earlier in the value-adding chain, and in this sense the resource received would embody her labor. It is my view that the resource does not in fact embody her labor in the sense relevant here, but it would take recasting the separateness criterion in terms of a theory of value to prove this point, which I do not have space to do.

resources, does not end up with resources in which its labor is embodied, and such transactions are not few, either. *Giving* is a form of voluntary exchange in which only one good or service changes hands. This is so by definition; resources 'given' in what is actually a sort of subtle quid pro quo are not really gifts, even if they are innocuous. The paradigm form of gift in the proper sense I mean here is bequest. Parents (most, anyway) do not leave wealth to their children as a reward for their children's labor, but rather just because of who they are—*their children*. The labor of gift recipients is not embodied in the gifts they receive at the time they receive them,ⁱ so resources given as gifts satisfy condition (2).

How, then, can the state finance the activities permitted it in §3.2 and whatever other activities the remaining moral considerations legitimate? By levying taxes on gifts, such as charitable donations and inheritances.

4. Biological Needs

Thesis: Physiological needs are covered by the entitlements of §3.2; the idea that we are entitled to the satisfaction of all biological needs as best that can be done, though, rests on intuition, an intuition which I do not share.

By biological needs I understand those needs related to the functioning of the body which must be satisfied if we are not to die. I consider our biological needs here because they are so fundamental; other things that we may be said to need (e.g. friendship) and claims that those needs serve as reasons why we should be entitled to interfere with the wills of others can be considered under other headings (e.g. fraternity). By physiological needs I understand those biological needs which are the *ordinary* requirements for continued human functioning: oxygen, food, water, sleep, excretion, and homeostasis.³⁶

i Again, it is conceivable that one receive as a gift some resource to which one added one's labor earlier in the value-adding chain, but one's labor is not embodied in the sense that matters for violating the separateness condition.

I do not intuitively feel entitled to the satisfaction of my biological needs, as best that can be done by current medical technology. I do feel entitled, though, to the satisfaction of my physiological needs, and that is because physiological needs are covered by the entitlements of §3.2, the entitlements to those levels of welfare I would have enjoyed with respect to opportunities to use resources if those resources had not been appropriated. I certainly realize that not everyone will instinctively share my position, so let's see what we can say about the matter.

I do not see a justification for the position that individuals are entitled to the satisfaction of all their biological needs as best that can be done, beyond an appeal to what is at stake—individuals will *die* if their biological needs are not satisfied. I am sympathetic to this style of argument, an appeal to intuition, because I used it in §3.2. But perhaps I can do something to motivate my position against such an intuition. Suppose you are sick with bacterial pneumonia. You need sophisticated antibiotics or you will die. Are you entitled to them, and thus to do what is necessary to obtain them—say, steal them from a hospital cabinet? The question is not whether you would in fact steal them, but rather whether you really feel entitled to do so. As strongly as I would feel about wanting them, I do not feel *entitled* to them. I know that innovations like sophisticated antibiotics come about through the peaceful cooperation of human beings. To obtain them against their owner's will, though, is not peaceful and in a small way is to militate against the process which is responsible for them. Certainly I could steal them and the whole edifice would not come crashing down, but the matter seems to me one of respect for the goose which lays the golden eggs. Perhaps this notion of respect for the innovative process will be more compelling if we can allay aggrievement related to bad luck in life, which is the subject

of the next section.

5. Fairness

Thesis: Fairness does not involve forcibly altering the distribution of natural endowments; though it is arbitrary, there is nothing unfair about that distribution to be corrected.

I assume that no one wants to position herself as an enemy of fairness, so I think it is safe to say that one of the positive liberties to which people are entitled is to live in a fair society. By a fair society I mean one in which the situations in which people live are fair, a product of the rules by which that society operates and which incorporate considerations of fairness. The debate here is to be had over what counts as fair and unfair and what the implications are of those statuses. I will explore one topic in fairness here: in our natural endowments.

It may be held that the fact that individuals' natural endowments (i.e. talents, abilities, "contingencies of social circumstance",³⁷ etc.) are distributed arbitrarily, from a moral point of view, justifies forcibly adjusting people's situations to make the game of life, as it were, fair. Rawls' difference principle accommodates this concern: moral arbitrariness is not strictly his argument for the difference principle, because the argument for the difference principle is that people would agree to it in the original position, but Rawls seems concerned to show that the difference principle lines up with this intuitive egalitarian concern about justice.³⁸

My view is that the dispensation of natural endowments, while arbitrary, is not unfair, and so correcting for this dispensation is not the business of a fair society. My argument is essentially David Schmidtz's, and it is against Rawls and to a lesser extent Herbert Spiegelberg.³⁹

There is no doubt that nature dispenses endowments arbitrarily, in the sense that people do not deserve whatever advantages or lack thereof they are born with. What is in doubt, though, is that this arbitrariness implies an unfairness which requires us to do something about it. No one

deserves her natural endowments *because* no one can *possibly* do anything to deserve those endowments. A salient example of a natural endowment is a person's genes: I do not deserve the genes I have been born with. I do not deserve them because I *could not* deserve them. To be a person who can deserve it is necessary to be born in the first place, which just is to acquire genes. There can be no ability to deserve antecedent to having genes, so there can be no deserving of genes. Likewise for other natural endowments: to be a person who can deserve it is necessary to be born in the first place, which just is to come into being with a set of natural endowments.

The impossibility of deserving natural endowments has an important consequence. No one is deserving of her natural endowments, but neither then is anyone *undeserving* of them. Natural endowments just *are* what people have, as a matter of luck from having come into this world. Put it this way. Barring certain mystical views, no one deserves to be in the path of a tornado. Neither does anyone not deserve to be in the path of a tornado. Tornadoes just happen, and go wherever they go. Whom they hurt is random, but not capricious. Tornadoes do not decide whose paths they cross, nor does anyone decide for them (again, barring certain mystical views). Whom they hurt is therefore arbitrary, but in a wholly benign (to use one of Schmitz's terms), rather than invidious (to use one of Nagel's), sense.⁴⁰ No one is *wronged* by tornadoes, because tornadoes don't do wrongs, so what could be *unfair* about the fact that there are tornadoes which randomly affect people's lives?

A final analogy will help to make this point clear. The dispensation of natural endowments can be likened to a situation in which each person, before she enters this world, is required to roll a die to determine her natural endowments. To begin with, let's consider a

standard six-sided die, with 1 representing the worst possible combination of natural endowments and 6 the best. In my view this is a fair situation, but what makes it fair? It is not fair in virtue of the fact that *the die* is fair, in the sense that each face is equally likely to land. The situation would still be fair if the die everyone rolled were weighted so that a 1 were, say, twice as likely to appear as any other number. Nor is the situation fair because of the range of values that happen to be on the faces of the die. A die with tiny LCD screens on each face whose values were variously determined by a random number generator would also be fair. What makes the situation fair is that everyone rolls *the same* die, so that everyone is equally subject to the element of chance in the same game. To put it another way, the situation is fair because the game is not rigged against some people, as it would be if some had to roll a die that showed a 1, say, 40 percent of the time while others rolled a die that showed 1 only 20 percent of the time.

A person reflecting on her natural endowments has no grounds to complain if she does not like them, because in coming into this world she has been forced to roll the same die as everyone else. The die wrongs no one; it dispenses good luck and bad luck as it does, and everyone is equally subject to its decrees on entering the world. This does not mean that people should not look on the less fortunate with compassion; it is only to say that the mechanism by which luck is dispersed is not unfair. If I may mix metaphors, life is “about playing the hand you are dealt,” not about compensating people for die-rolls that might have gone better.⁴¹

Rawls says that “we are led to the difference principle *if* we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return”.⁴² It is not clear why we should care to set up the system in such a way, though, if (as I

have argued) the arbitrariness of the distribution does not make it unfair. Rawls also says, which seems to agree with what I have argued, that “The natural distribution [of endowments] is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts.” But he adds, “What is just and unjust is the way that institutions deal with these facts,” and then objects to aristocratic and caste societies for their stratification which “incorporates the arbitrariness found in nature”.⁴³ It is not clear how these societies incorporate the arbitrariness found in nature which makes them objectionable to Rawls. If he means there is an injustice in treating individuals differently before the law according to such arbitrary factors (e.g. race), I certainly agree. But it is another matter whether it is unjust for, and therefore whether it should be to some extent illegal for, individuals to discriminate in their voluntary exchanges with others based on such arbitrary factors.⁴⁴ Rawls defends his difference principle as a “fair way of meeting the arbitrariness of fortune”, but the arbitrariness of fortune does not need to be met in any special way—it is not an arbitrariness that befalls unfairly.

If we think back to §3.3 and the sailor of Scenario II, it perhaps seemed severe that the separateness condition would not allow him to obtain your corn. In light of the argument of this section, we may think of the 'natural fact' that he washed up in Scenario II as characterizing one of his natural endowments (more specifically, perhaps what Rawls calls a contingency of social circumstance). It is a piece of luck, bad by comparison to Scenario I in which he is entitled to sustenance, but not unfair.

6. Equality of Shares

Thesis: A presumption in favor of equality of shares is not a matter of treating people with equal respect. I only see it getting off the ground by intuition.

Are individuals entitled to live in a world which maintains some pattern of equality of

shares? In the previous section on fairness, I mentioned that my argument was to an extent against Herbert Spiegelberg, as well as Rawls. Spiegelberg believes in a general principle of redress: “only morally deserved inequalities justify unequal lots: without such special justification all persons...ought to have equal shares”.⁴⁵ Now, his understanding of “morally deserved” here requires that something have “legitimizing support by a moral title such as moral desert”.⁴⁶ He does not elaborate but I presume another candidate for such moral title is moral right. On the argument of the previous section, then, I grant that inequalities of natural endowments are not legitimated by a title of moral desert; they are, however, legitimated by a title of right, generated by the presumption in favor of negative liberty, and which is not vitiated by the concern about fairness along these lines considered in the last section. Now, perhaps Spiegelberg would not grant the presumption in favor of negative liberty, and therefore not be moved by my talk of the rights it generates. The way of handling such a denial of the presumption was made in §2.3; we said that not to grant the presumption was utterly to disrespect one's fellows. But perhaps Spiegelberg *would* grant the presumption in favor of negative liberty, and yet still not be moved by the rights it generates, because he claims also to hold a presumption in favor of equality of shares—his principle of redress just is a presumption in favor of equality of shares, of the same form as my presumption in favor of negative liberty (“without such special justification...”).

We need to explore in more depth this possibility of competing moral presumptions. The only presumption I happen to make is a presumption in favor of negative liberty; I cannot say that I find Spiegelberg's presumption in favor of equality of shares intuitively appealing. But I recognize that others, like Spiegelberg, will find it very appealing, and that to those people it

likely counts for nothing that I do not share their presumption. Spiegelberg's presumption after all seems like a motion of equal respect—though for individuals' “shares” or “lots”, rather than for their wills (as mine is). And like me, Spiegelberg does not have an argument why someone *must* share his presumption—although he does feel quite strongly about it: he claims it “contains a truth which is at least as selfevident as any other ethical insight” and that the “severe moral disequilibrium which the violation of the demand for redress entails” is “apt to rouse in a person with a clearly developed sense of justice and fairness a feeling of outrage”.⁴⁷ The purpose of a presumption is to give moral force to such strong intuitions about what justice requires, to make a position that is not itself established by justification yet do some work. And the challenge it issues is a deceptively modest one: it says, 'Look, here is a dimension to human life which I believe is so important that our default should be to protect it in all individuals.' (Again, for my presumption in favor of negative liberty that dimension is the individual's will, and for Spiegelberg's presumption in favor of equality it is an individual's share or lot.) 'You may disagree, and feel there are many instances in which that dimension should not be protected in an individual, but all I ask is that you justify your behavior in those instances.' In discussing my presumption I said that I think it is very disagreeable to shirk this requirement of justification, so I am mindful that Spiegelberg would likely feel the same way about his presumption. All this, then, is to say that we must confront this possibility of competing moral presumptions and determine the implications it has for the theory that has been developed so far.

The main implication it has is to make possible an impasse which argumentation cannot resolve. This perhaps sounds fatal to the exercise undertaken in this paper, but I think in fact it is not so destructive. If I hold the presumption in favor of negative liberty, I require that limitations

of rights be justified and am licensed to use force to protect rights. If I hold the presumption in favor of equality of shares, I require that inequalities in shares be justified and am licensed to use force to maintain equality of shares. If I hold both presumptions, though, it is not clear which consideration (i.e. negative liberty or equality of shares) prevails, in placing the justificatory burden. Does either presumption satisfy the other's justificatory burden? I see no way to settle this question. If one cares sufficiently strongly about equality of shares one might insist that the presumption in favor of equality of shares protects a consideration (viz. equality of shares) which is of sufficient importance or priority that the presumption in favor of negative liberty's justificatory burden is satisfied or otherwise overcome. But if someone else does not feel the presumption in favor of equality to have such strong appeal, she would probably deny that simply making this presumption can satisfy the presumption in favor of negative liberty's justificatory burden. One person cares more about equality of shares than about rights, but for the other the reverse is true. Unless we can somehow motivate the presumption in favor of equality of shares, it seems these people will be at impasse over what justice requires.

So can the presumption in favor of equality of shares perhaps be reworked or boiled down to make it more compelling? The only candidate for how to do this that I can see is the same way used for the presumption in favor of negative liberty: appealing to a desire to grant equal respect. For the presumption in favor of negative liberty, it was argued that presuming in favor of one's *own* negative liberty is rationally required of an individual and suggested that this amounts to respecting herself, and so one would extend this presumption to others if one cares to grant others equal respect. If granting the presumption in favor of equality of shares could also be shown to be to treat others with equal respect, the presumption would then be on the same

footing as the presumption in favor of negative liberty. In my view, though, the presumption in favor of equality of shares cannot be so construed as a matter of equal respect, and this requires exploring very briefly how we understand respect.

I submit that to respect a person is to treat her as someone who 'counts'. I realize that respect is an incredibly complicated subject, but I think this understanding is a fair approximation of our everyday understanding of the phrase. On this definition, does the presumption in favor of a person's negative liberty treat her with respect? I think it will be agreed that to treat a person's ends as of sufficient worth and importance to be protected from interference by default is to treat her as someone who counts, so the answer is yes. But can we say something similar for the presumption in favor of equality of shares? I do not think so; I see no connection between presuming in favor of equality of shares and 'counting' someone. Certainly equality of shares is not something one must as a matter of rationality want; if one has better-than-average natural endowments, for example, one stands to lose by making the presumption. Nor do considerations of fairness do anything to establish a connection. As argued in the last section, it is true that a 'winner' of the lottery of natural endowments did no more (or less) to deserve her lot than a 'loser', but this does not create any opportunity for persons to be correctively 'counted' as a result; everyone counts equally before the lottery of natural endowments which everyone is forced to play. I think granting the presumption in favor of equality of shares *would* be a matter of 'counting' individuals, and therefore respecting them, if it could be shown, in Nagel's words, "that improvements in the lot of people lower on the scale of well-being [take] priority over greater improvements to those higher on the scale".⁴⁸ Perhaps such an argument has been developed which I am not familiar with, but in the absence of one (as

of 1975 Nagel did not believe there had been a successful one⁴⁹) I do not see how the presumption can be reframed as granting equal respect to individuals, in order to win the support of those who do not find themselves instinctively drawn to it.

The result, then, is that there seems no hope of reconciling those with fundamentally different views about the relative importance of equality of shares to achieving distributive justice. If an egalitarian insists that considerations of equality of shares are important enough to limit rights in various ways, I do not sense a resolution that argument can provide. If we think back to §1.2, where Nozick's liberty-upsets-patterns argument was discussed, we can now bring closure to the point raised by Nozick's critics that he gives no reason why they must privilege liberty over the maintenance of their preferred pattern, when that pattern is some form of equality of shares. It has been argued that if one cares about treating people with equal respect, one will make the presumption in favor of negative liberty for all individuals. But as for why one should privilege this liberty over the maintenance of some form of equality of shares—against the pattern-defender all we can do is note is that one unargued form of equality of shares is on as sound a footing as another.ⁱ If she nevertheless insists that her preferred pattern takes priority over liberty, she entrenches herself in a position which argument cannot overcome. I said at the beginning of this section that I do not think this result destroys the enterprise that has been undertaken here. Indeed I think it is valuable insofar as it indicates the extent to which debates about justice are shaped by irreducible convictions and makes sense of those debates' familiar intractability.

i If we imagine an egalitarian's presumed-for pattern of equality of shares to be represented by a Lorenz curve, the point being made here is that there are an infinite number of Lorenz curves (e.g. one of slightly more convexity, i.e. inequality) which could be presumed for which have the same claim to capturing distributive justice.

Conclusion

As I said in the Introduction, the aim of this paper has been to strengthen the libertarianism of *Anarchy, State, and Utopia* by filling in some of its conspicuous holes. We identified those holes by confronting three issues with Nozick's understanding of property rights. In §1 we clarified that Nozick does not assume a concept of full ownership (§1.1), nor is one necessary for his Wilt Chamberlain argument that liberty upsets patterns (§1.3). This discussion identified the crux of the disagreement about the Wilt Chamberlain argument (§1.2). In §2 the aim was to identify the appropriative process by which property rights in an unowned resource are acquired, a problem left open by Nozick. Towards that end we first built under Nozick's libertarian theory, so to speak, by providing a foundation for its rights-as-side-constraints, in the presumption in favor of negative liberty (§2.2). It was argued that individuals will grant the presumption in favor of negative liberty if they care to show others the respect they must rationally show themselves (§2.3). The presumption in favor of negative liberty, it was then argued, settles the issue of the appropriative process by giving rise to a rule of first possession (§2.4).

The subject of §3 was the Nozickian proviso; we took on the problem of fixing the baseline, of determining those positive liberties to which individuals are entitled and which justify limiting rights generated by the presumption in favor of negative liberty. We were only able to evaluate five considerations which might be thought to generate such entitlements, and our conclusions about these tentatively maintained the libertarian character of our theory. First it was asserted that people are entitled to those levels of welfare they would have enjoyed with respect to opportunities to use resources if the resources in the world had not been appropriated

(§3.2). Next it was denied that considerations of utility justify limiting rights, because of the Kantian idea of separateness of persons (§3.3). After that we considered biological needs—it was concluded that physiological needs are covered by the entitlements of §3.2, whereas entitlements to the satisfaction of all biological needs rest only on intuition (§3.4). I denied sharing such an intuition, but it was acknowledged that others will. This reliance on intuition was to reappear in the discussion of an entitlement to some form of equality of shares in society (§3.6), after denying that fairness requires correcting for the distribution of natural endowments, since that distribution is arbitrary but not unfair (§3.5).

This role of intuition, I believe, has the important result noted at the end of §3.6 of producing an impasse in debates about justice; how do we resolve disagreements about what justice requires which are traceable to deep feelings whose only strength is the insistence with which they are expressed? The role of intuition has another important consequence, though, in my view. Insofar as our libertarian theory, by resting on intuition to produce the entitlements of §3.2, has that much in common with, say, an egalitarian theory, which also rests on intuition to defend an entitlement to some sort of equality of shares, those theories share a footing of the same kind and are to that extent peers. We have explored the origins of rights-as-side-constraints and the relations between those rights and other values. To be sure, more work remains to be done on that score, including by giving a theoretical treatment of the welfare issues of §3.2; evaluating the remaining moral considerations on the list in §3.1; and taking up what Nozick refers to as rectification, the issue of how we go about correcting for past violations of rights. Nevertheless I think I have done enough here to meet Nagel's challenge and to show how the libertarianism of *Anarchy, State, and Utopia* can be made a serious challenge to other views.

Endnotes

- 1 Thomas Nagel, "Libertarianism without Foundations", 136-149. Robert Nozick, *Anarchy, State, and Utopia*.
- 2 Nagel, "Libertarianism without Foundations", 137.
- 3 Nozick, 178.
- 4 Onora O'Neill, "Nozick's Entitlements", 309.
- 5 See Nozick, 33-34 for his discussion of these 'libertarian' side constraints.
- 6 Nagel, "Libertarianism without Foundations", 147.
- 7 O'Neill, 309.
- 8 G. A. Cohen, *Self-Ownership, Freedom, and Equality*, 74.
- 9 They are the right to possess, the right to use, the right to manage, the right to the capital, the right to security, the power of transmissibility, the absence of term, the prohibition of harmful use, liability to execution, and residuary character. Lawrence Becker, *Property Rights: Philosophic Foundations*, 19.
- 10 Becker, 19.
- 11 Nozick, 181.
- 12 Nozick, 163.
- 13 Nozick, 160.
- 14 Nozick, 161.
- 15 Nagel, "Libertarianism without Foundations", 147.
- 16 Nozick, 174.
- 17 Becker, 8.
- 18 Locke, *Second Treatise*, §33.
- 19 Or more precisely, if presuming it is one aspect or part of the dominant strategy to achieving one's ends. "A strategy is dominant if, regardless of what any other players do, the strategy earns a player a larger payoff than any other. Hence, a strategy is dominant if it is always better than any other strategy, for any profile of other players' actions." ("Dominant Strategy – Game Theory .net", 20 Apr. 2009 <<http://www.gametheory.net/dictionary/DominantStrategy.html>>)
- 20 Or put differently, it would define the space of what one has moral protection to do *negatively*, as everything outside those interferences with one's will that others are morally permitted, and thus make that space by default as large as possible. This has the effect of placing the burden of proving moral legitimacy on interferences with a given individual's will, rather than on each specific exercise of that individual's will. Obviously for this to be coherent (i.e. for there to be a burden that can be *shifted*), it must be possible to exercise one's will, i.e. to act and thereby enjoy a positive liberty, without thereby *interfering* with another's will even though, as I said parenthetically in 2.2, every action by one person affects others' positive liberty, by changing the arrangement of matter in the world they occupy. I have not provided a rigorous definition of what it means to interfere but I think it is apparent that not all exercises of one's will will interfere with the wills of others. Again the Lockean drinking example comes to mind...
- 21 This notion of the 'right of way' from David Schmidtz, *Elements of Justice*, 157.
- 22 Schmidtz, 157.
- 23 It is also possible that Schmidtz means first possession is outside the realm of justice because it grants property rights to some people who are not due them in the sense that they do not *deserve* them, because those people did nothing to deserve being born into a situation in which they became first possessors. I do not think this is the correct interpretation, though, because Schmidtz could have used the language of desert, which is the subject of part 2 of his book, but does not.
- 24 Schmidtz, 157.
- 25 Schmidtz, 157.
- 26 Nozick, 177.
- 27 Cohen, 76-84.
- 28 Cohen, 78.
- 29 Cohen, 78.
- 30 Cohen, 81 n. 28.
- 31 Nozick, 33.
- 32 Nozick, 33.
- 33 Nozick, 202.
- 34 The idea of a utility monster is from Nozick, 41.
- 35 Nozick, 180 n.
- 36 Wikipedia is better on this subject of physiological needs, the lowest level of Maslow's hierarchy, than is the Gale Virtual Reference Library. Compare ("Maslow's hierarchy of needs", 30 Mar. 2009 <http://en.wikipedia.org/wiki/Maslow%27s_hierarchy>) to ("Maslow, Abraham", *Gale Encyclopedia of Psychology*. Ed.

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- 37 John Rawls, *A Theory of Justice* (revised edition), 87.
- 38 Rawls, 65.
- 39 Schmitz, 216-219. Herbert Spiegelberg, "A Defense of Human Equality", cited by Rawls, 86.
- 40 Schmitz, 217. Thomas Nagel, "Equality" in *Mortal Questions*, 119. Nagel, it should be noted, uses 'invidious' in acknowledging the objection I am making.
- 41 Schmitz, 218.
- 42 Rawls, 87, emphasis added.
- 43 Rawls, 88.
- 44 An example of the distinction from the American legal system is between Jim Crow laws and the Fair Housing Act of 1988, which mandates Equal Housing Lending for FDIC-insured banks.
- 45 Spiegelberg, 114.
- 46 Spiegelberg, 114.
- 47 Spiegelberg, 114.
- 48 Nagel, "Libertarianism without Foundations", 148.
- 49 Nagel, "Libertarianism without Foundations", 149.

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