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## LIBERTARIANISM

1. THE DIVERSITY OF RIGHT-WING  
POLITICAL THEORY

Libertarians defend market freedoms, and oppose the use of redistributive taxation schemes to implement a liberal theory of equality. But not everyone who favours the free market is a libertarian, for they do not all share the libertarian view that the free market is *inherently* just. For example, one common argument for unrestricted capitalism is its productivity, its claim to be maximally efficient at increasing social wealth. Many utilitarians, convinced of the truth of that claim, favour the free market, since its efficiency allows for the greatest overall satisfaction of preferences.<sup>1</sup> But the utilitarian commitment to capitalism is necessarily a contingent one. If, as most economists agree, there are circumstances where the free market is not maximally productive—e.g. cases of natural monopolies—then utilitarians would support government restrictions on property rights. Moreover, as we saw in Chapter 2, some utilitarians argue that redistribution can increase overall utility even when it decreases productivity. Because of declining marginal utility, those at the bottom gain more from redistribution than those at the top lose, even when redistribution lessens productivity.

Others defend capitalism not on the grounds of maximizing utility, but of minimizing the danger of tyranny. Giving governments the power to regulate economic exchanges centralizes power, and since power corrupts, market regulations are the first step on ‘the road to serfdom’, in Hayek’s memorable phrase. The more governments are able to control economic life, the more able (and willing) they will be to control all aspects of our lives. Hence capitalist freedoms are needed to preserve our civil and political liberties (Ha, .k 1960: 121; Gray 1986a: 62–8; 1986b: 180–5). But this defence of market freedom must also be a contingent one, for history does not reveal any invariable link between capitalism and civil liberties. Countries with essentially unrestricted capitalism have sometimes had poor human rights records (e.g. military dictatorships in capitalist Chile or Argentina; McCarthyism in the United States),

while countries with an extensive welfare state have sometimes had excellent records in defending civil and political rights (e.g. Sweden).

So these two defences of the free market are contingent ones. More importantly, they are *instrumental* defences of the free market. They tell us that market freedoms are a means for promoting maximal utility, or for protecting political and civil liberties. On these accounts, we do not favour the free market because people have rights to property. Rather we give people property rights as a way of increasing utility or stabilizing democracy, and if we could promote utility or stability some other way, then we could legitimately restrict property rights.

Libertarianism differs from other right-wing theories in its claim that redistributive taxation is inherently wrong, a violation of people’s rights.<sup>2</sup> People have a *right* to dispose freely of their goods and services, and they have this right whether or not it is the best way to ensure productivity. Put another way, government has no right to interfere in the market, even in order to increase efficiency. As Robert Nozick puts it, ‘Individuals have rights, and there are things which no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do’ (Nozick 1974: p. ix). Because people have a right to dispose of their holdings as they see fit, government interference is equivalent to forced labour—a violation, not of efficiency, but of our basic moral rights.

## (a) Nozick’s ‘Entitlement Theory’

How do libertarians relate justice and the market? I will focus on Nozick’s ‘entitlement theory’. The central claim in Nozick’s theory, as in most other libertarian theories, is this: if we assume that everyone is entitled to the goods they currently possess (their ‘holdings’), then a just distribution is simply whatever distribution results from people’s free exchanges. Any distribution that arises by free transfers from a just situation is itself just. For the government to coercively tax these exchanges against anyone’s will is unjust, even if the taxes are used to compensate for the extra costs of someone’s undeserved natural handicaps. The only legitimate taxation is to raise revenues for maintaining the background institutions needed to protect the system of free exchange—e.g. the police and justice system needed to enforce people’s free exchanges.

More precisely, there are three main principles of Nozick’s ‘entitlement theory’:

1. a principle of transfer—whatever is justly acquired can be freely transferred.
2. a principle of just initial acquisition—an account of how people come

initially to own the things which can be transferred in accordance with (1).

3. a principle of rectification of injustice—how to deal with holdings if they were unjustly acquired or transferred.

If I own a plot of land, then (1) says that I am free to engage in any transfers I wish to make concerning that land. Principle (2) tells us how the land initially came to be owned. Principle (3) tells us what to do in the event that (1) or (2) is violated. Taken together, they imply that if people's current holdings are justly acquired, then the formula for a just distribution is 'from each as they choose, to each as they are chosen' (Nozick 1974: 160).

The conclusion of Nozick's entitlement theory is that 'a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified' (Nozick 1974: p. ix).<sup>3</sup> Hence there is no public education, no public health care, transportation, roads, or parks. All of these involve the coercive taxation of some people against their will, violating the principle 'from each as they choose, to each as they are chosen'.

As we have seen, Rawls and Dworkin also emphasize that a just distribution must be sensitive to people's choices. But they believe that this is just half of the story. A just distribution must be ambition-sensitive, as Nozick's is, but it must also be endowment-insensitive, as Nozick's is not. It is unfair for the naturally disadvantaged to starve just because they have nothing to offer others in free exchange, or for children to go without health care or education just because they were born into a poor family. Hence liberal egalitarians favour taxing free exchanges in order to compensate the naturally and socially disadvantaged.

Nozick says this is unjust, because people are entitled to their holdings (if justly acquired), where 'entitled' means 'having an absolute right to freely dispose of it as one sees fit, so long as it does not involve force or fraud'. There are some limits on what I can do—my entitlement to my knife does not include the right to deposit it in your back, since you are entitled to your back. But otherwise I am free to do what I want with my resources. I can spend them on acquiring the goods and services of others, or I can simply give them away to others if I wish. Nozick does not object to this sort of voluntary private philanthropy—on the contrary, he says it is an excellent way to exercise one's property rights (Nozick 1974: 265–8). But I can also decide to withhold my resources from others (including the government). No one has the right to take them from me, even if it is to keep the disabled from starving.

Why should we accept Nozick's claim that people's property entitlements are such as to preclude a liberal redistributive scheme? Some critics argue that

Nozick has no argument—he gives us 'libertarianism without foundations' (Nagel 1981). But a more generous reading will detect two different arguments. As with Rawls, the first argument is an intuitive one, trying to draw out the attractive features of the free exercise of property rights. The second is a more philosophical argument which attempts to derive property rights from the premiss of 'self-ownership'. In line with my general approach, and I think with Nozick's intentions, I will interpret this self-ownership argument as an appeal to the idea of treating people as equals.

Other writers defend libertarianism by quite different arguments. Some libertarians argue that Nozick's entitlement theory is best defended by an appeal to liberty, rather than equality, while others attempt to defend it by an appeal to mutual advantage, as expressed in a contractarian theory of rational choice. So, in addition to Nozick's arguments, I will examine the idea of a right to liberty (s. 4), and the contractarian idea of mutual advantage (s. 3).

### (c) The intuitive argument: the Wilt Chamberlain example

First, then, Nozick's intuitive argument. As we have seen, his 'principle of transfer' says that if we have legitimately acquired something, we have absolute property rights over it. We can freely dispose of it as we see fit, even though the effect of these transfers is likely to be a massively unequal distribution of income and opportunity. Given that people are born with different natural talents, some people will be amply rewarded, while those who lack marketable skills will get few rewards. Due to these undeserved differences in natural talents, some people will flourish while others starve. And these inequalities will then affect the opportunities of children, some of whom are born into privileged circumstances, while others are born into poverty. These inequalities, which Nozick concedes are possible results of unrestrained capitalism, are the source of our intuitive objections to libertarianism.

How then can Nozick hope to provide an intuitive defence of these rights? He asks us to specify an initial distribution which we feel is legitimate, and then argues that we intuitively prefer his principle of transfer to liberal principles of redistribution as an account of what people can legitimately do with their resources. Let me quote his argument at length:

It is not clear how those holding alternative conceptions of distributive justice can reject the [entitlement theory]. For suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D<sub>1</sub>; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. . . . He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. . . . The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a

separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D<sub>2</sub>, unjust? If so, why? There is *no* question about whether each of the people was entitled to the control over the resources they held in D<sub>1</sub>; because that was the distribution (your favorite) that (for the purposes of argument) we assumed was acceptable. Each of these persons *chose* to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review*. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. If D<sub>1</sub> was a just distribution, and people voluntarily moved from it to D<sub>2</sub>, transferring parts of their shares they were given under D<sub>1</sub> (what was it for if not to do something with?), isn't D<sub>2</sub> also just? If the people were entitled to dispose of the resources to which they were entitled (under D<sub>1</sub>), didn't this include their being entitled to give it to, or exchange it with, Wilt Chamberlain? Can anyone else complain on grounds of justice? Each other person already has his legitimate share under D<sub>1</sub>. Under D<sub>1</sub>, there is nothing that anyone has that anyone else has a claim of justice against. After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed. By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party, who had no claim of justice on any holding of the others *before* the transfer? (Nozick 1974: 160–2)

Because D<sub>2</sub> seems legitimate, Nozick argues, his principle of transfer is more in line with our intuitions than redistributive principles like Rawls's difference principle.

What are we to make of this argument? It has some initial attraction because it emphasizes that the whole point of having a theory of fair shares is that it allows people to *do* certain things with them. It is perverse to say that it is very important that people get their fair share, but then prevent people from using that share in the way they desire. But does this confront our intuition about undeserved inequalities? Let us assume that I specified an initial distribution D<sub>1</sub> that was in line with Rawls's difference principle. Hence each person starts with an equal share of resources, regardless of their natural talents. But at the end of the basketball season, Chamberlain will have earned \$250,000, while the handicapped person, who may have no earning power, will have exhausted her resources, and will be on the verge of starvation. Surely our intuitions still tell us that we can tax Chamberlain's income to prevent that starvation. Nozick has persuasively drawn on our intuition about acting on our choices, but his example ignores our intuition about dealing fairly with unequal circumstances.

Indeed when Nozick does confront the question of unequal circumstances,

he concedes the intuitive strength of the liberal position. He admits that it seems unfair for people to suffer undeserved inequalities in their access to the benefits of social cooperation. He 'feels the power' of this objection. However,

The major objection to speaking of everyone's having a right *to* various things such as equality of opportunity, life, and so on, and enforcing this right, is that these 'rights' require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over. (Nozick 1974: 237–8).

In other words, we can not tax Wilt Chamberlain to pay for the costs of people's handicaps because he has absolute rights over his income. But Nozick concedes that our intuitions do not uniformly favour this account of property rights. On the contrary, he accepts that some of our most powerful intuitions favour compensating undeserved inequalities. The problem with fulfilling that intuitively attractive idea, however, is that people have rights over their income. While Mackie's idea of a general right to 'a fair go' in life is intuitively attractive, 'the particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition' (Nozick 1974: 238).

But why should we think that 'particular rights over things fill the space of rights', leaving no room for a right to a fair go in life? As Nozick acknowledges, this is not part of our everyday understanding of property rights, and is not intuitively attractive. However, he argues that this conception of absolute property rights is the unavoidable consequence of a deeper principle that we are strongly committed to: namely, the principle of self-ownership.

## 2. THE SELF-OWNERSHIP ARGUMENT

Nozick presents the principle of 'self-ownership' as an interpretation of the principle of treating people as 'ends in themselves'. This principle of treating people as ends in themselves, which was Kant's formula for expressing our moral equality, is also invoked by Rawls, and by utilitarians. It is indeed a principle to which we are strongly committed, and if Nozick can show that it yields self-ownership, and that self-ownership yields libertarianism, then he would have provided a strong defence of libertarianism. I will argue, however, that Nozick fails to derive either self-ownership or property-ownership from the idea of treating people as equals, or as ends in themselves.<sup>4</sup>

The heart of Nozick's theory, laid out in the first sentence of his book, is that 'individuals have rights, and there are things which no individual or group can do to them (without violating these rights)' (Nozick 1974: p. ix).

Society must respect these rights because they 'reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent' (Nozick 1974: 30–1). This 'Kantian principle' requires a strong theory of rights, for rights affirm our 'separate existences', and so take seriously 'the existence of distinct individuals who are not resources for others' (Nozick 1974: 33). Because we are distinct individuals each with our own distinct claims, there are limits to the sacrifices that can be asked of one person for the benefit of others, limits that are expressed by a theory of rights. This is why utilitarianism, which denies the existence of such limits, is unacceptable to Nozick. Respecting these rights is a necessary aspect of respecting people's claim to be treated as ends in themselves, not means for others. According to Nozick, a libertarian society treats individuals, not as 'instruments or resources', but as 'persons having individual rights with the dignity this constitutes. Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity' (Nozick 1974: 334).

There are important continuities here between Nozick and Rawls, not only in Nozick's appeal to the abstract principle of equality, but also in his more specific arguments against utilitarianism. It was an important part of Rawls's argument that utilitarianism fails to treat people as ends in themselves, since it allows some people to be sacrificed endlessly for the greater benefit of others. So both Rawls and Nozick agree that treating people as equals requires limits on the ways that one person can be used for the benefit of others, or for the benefit of society generally. Individuals have rights which a just society will respect, rights which are not subject to, or the product of, utilitarian calculations.

Rawls and Nozick differ, however, on the question of which rights are most important in treating people as ends in themselves. To oversimplify, we can say that for Rawls, one of the most important rights is a right to a certain share of society's resources. For Nozick, on the other hand, the most important rights are rights over oneself—the rights which constitute 'self-ownership'. The idea of having ownership rights over oneself may seem bizarre, as it suggests that there is a distinct thing, the self, which one owns. But the term 'self' in self-ownership has a purely reflexive significance. It signifies that what owns and what is owned are one and the same, namely, the whole person' (Cohen 1986a: 110). The basic idea of self-ownership can be understood by comparison with slavery—to have self-ownership is to have the rights over one's person that a slaveholder has over a chattel slave.

It is not immediately apparent what this difference amounts to. Why can't we accept both positions? After all, the claim that we own ourselves does not

yet say anything about owning external resources. And the claim that we have rights to a fair share of society's resources does not seem to preclude the possibility that we own ourselves. Nozick believes, however, that the two are not compatible. According to Nozick, Rawls's demand that goods produced by the talented be used to improve the well-being of the disadvantaged is incompatible with recognizing self-ownership. If I own my self, then I own my talents. And if I own my talents, then I own whatever I produce with my self-owned talents. Just as owning a piece of land means that I own what is produced by the land, so owning my talents means that I own what is produced by my talents. Hence the demand for redistributive taxation from the talented to the disadvantaged violates self-ownership.

The problem is not that Rawls and Dworkin believe that other people can own me or my talents, the way that a slave is owned by another person. On the contrary, as I have tried to show, their hypothetical positions are intended to model the claim that no one is the possession of any other (Ch. 3, pp. 61–4 above). There are many ways in which liberals respect individuals' claims over their own talents. Liberals accept that I am the legitimate possessor of my talents, and that I am free to use them in accordance with my chosen projects. So the liberal denial of self-ownership is a limited one. Liberals say that because it is a matter of brute luck that people have the talents they do, their rights over their talents do not include the right to accrue unequal rewards from the exercise of those talents. Because talents are undeserved, it is not a denial of moral equality for the government to consider people's talents as part of their circumstances, and hence as a possible ground for claims to compensation. People who are born with a natural disadvantage have a legitimate claim on those with advantages, and the naturally advantaged have a moral obligation to the disadvantaged. Thus, in Dworkin's theory, the talented owe insurance premiums that get paid out to the disadvantaged, while in Rawls's theory, the talented only benefit from their talents if it also benefits the disadvantaged.

For Nozick, this constitutes a denial of self-ownership. I cannot be said to own my talents if others have a legitimate claim on the fruits of those talents. Rawls's principles 'institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals' idea of self-ownership to a notion of (partial) property-rights in *other* people' (Nozick 1974: 172). According to Nozick, this liberal egalitarian view fails to treat people as equals, as ends in themselves. Like utilitarianism, it makes some people mere resources for the lives of others, since it makes part of them (i.e. their natural attributes) a resource for all. Since I have rights of self-ownership, the naturally disadvantaged have no legitimate claim over me or my talents. The same is true of all other interventions in free market exchanges. Only unrestricted capitalism can fully recognize my self-ownership.

We can summarize Nozick's argument in two claims:

1. Rawlsian redistribution (or other coercive government interventions in market exchanges) is incompatible with recognizing people as self-owners. Only unrestricted capitalism recognizes self-ownership.
2. recognizing people as self-owners is crucial to treating people as equals.

Nozick's conception of equality begins with rights over one's self, but he believes that these rights have implications for our rights to external resources, implications that conflict with liberal redistribution.

Two major objections to this position have been raised. First, many critics argue that Nozick is mistaken in believing that self-ownership necessarily yields absolute property rights. Self-ownership may be compatible with various regimes of property-ownership, including a Rawlsian one. Secondly, critics argue that the principle of self-ownership is an inadequate account of treating people as equals, even on Nozick's own view of what is important in our lives. If we try to reinterpret the idea of self-ownership to make it a more adequate conception of equality, and select an economic regime on that basis, we will be led towards, rather than away from, the liberal view of justice. I will examine these two objections in turn.

#### (a) Self-ownership and property-ownership

First, then, how does self-ownership yield property-ownership? Nozick claims that market exchanges involve the exercise of individuals' powers, and since individuals own their powers, they also own whatever comes from the exercise of those powers in the marketplace.

But, as Nozick acknowledges, this is too quick. Market exchanges involve more than the exercise of self-owned powers. They also involve legal rights over *things*, over external goods, and these things are not just created out of nothing by our self-owned powers. If I own some land, I may have improved the land, through the use of my self-owned powers. But I did not create the land, and so my title to the land (and hence my right to use the land in market exchanges) cannot be grounded solely in the exercise of my self-owned powers.

Nozick recognizes that market transactions involve more than the exercise of self-owned powers. In his theory, my title to external goods like land comes from the fact that others have transferred the title to me, in accordance with the principle of transfer. This assumes, of course, that the earlier owner had legitimate title. If someone sells me some land, my title to the land is only as good as her title, and her title was only as good as the one before her, and so on. But if the validity of my property rights depends on the validity of previous property rights, then determining the validity of my title over external goods requires going back down the chain of transfers to the beginning. But what is the beginning? Is it the point where someone created the land with their self-owned powers? No, for no one created the land. It existed before human beings existed.

The beginning of the series of transfers is not when the land was created, but rather when it was first appropriated by an individual as her private property. On Nozick's theory, we must go down the chain of transfers to see if the initial acquisition was legitimate. And nothing in the fact, if it is a fact, that we own our talents ensures that anyone can legitimately appropriate for themselves something they did not create with their talents. If the first person who took it did so illegitimately, then she has no legitimate title over it, and hence no legitimate right to transfer it to someone else, who would then have no legitimate right to transfer it to me. Hence, if I am to be entitled to all of the rewards which accrue to me from market exchanges, as Nozick believes I am, I must be the legitimate owner not only of my powers, but also of initially unowned external resources.

This question about the initial acquisition of external resources is prior to any question about legitimate transfer. If there was no legitimate initial acquisition, then there can be no legitimate transfer, on Nozick's theory. So Nozick owes us an account of how external resources come to be initially acquired by one individual for their own use. Nozick is aware that he needs such an account. There are times when he says that 'things come into the world attached to people, who have entitlements over them' (Nozick 1974: 160). But he realizes that everything which is owned today includes an element which did not come into the world as private property, legally or morally. Everything that is now owned has some element of nature in it. How then did these natural resources, which were not initially owned by anyone, come to be part of someone's private property?

#### (i) Initial acquisition

The historical answer is often that natural resources came to be someone's property by force. This is a rather embarrassing fact for those who hope Nozick's theory will defend existing inequalities. Either the use of force made the initial acquisition illegitimate, in which case current title is illegitimate, and there is no moral reason why government should not confiscate the wealth and redistribute it. Or the initial use of force did not necessarily render the acquisition illegitimate, in which case using force to take property away from its current owners and redistribute is also not necessarily illegitimate. Either way, the fact that initial acquisition often involved force means that there is no moral objection within Nozick's framework to redistributing existing wealth (Cohen 1988: 253–4).<sup>5</sup>

Nozick's response to this problem is the first one. The use of force makes acquisition illegitimate, so current title is illegitimate (Nozick 1974: 230–1). Hence those who currently possess scarce resources have no right to deprive others of access to them—e.g. capitalists are not entitled to deprive workers of access to the products or profits of the existing means of production. Ideally,

the effects of the illegitimate acquisition should be rectified, and the resources restored to their rightful owner. However, it is often impossible to know who the rightful owners are—we do not know from whom the resources were illegitimately taken. Nozick suggests that we could rectify the illegitimacy of existing title by a one-time general redistribution of resources in accordance with Rawls's difference principle. Only after this redistribution will the libertarian principle of transfer hold. Where we do know the rightful owners, however, we should restore the resources to them. For example, David Lyons argues that Nozick's view supports returning much of New England to the American Indians, whose initial title was unjustly taken away (Lyons 1981). Others have argued that Nozick's principle of rectification entails reparations for African-Americans, and that these reparations are best paid in the form of affirmative action programmes (Valls 1999).

This rejection of the legitimacy of current title is not a curiosity of Nozick's presentation that can be detached from the rest of his theory. If one really believes in Nozick's entitlement theory, then current title is only as legitimate as previous titles. If previous title was legitimate, then any new distribution which results from market exchanges is just. That is what libertarians propose as their theory of justice. But the corollary of that theory is that if previous title was illegitimate, so is the new distribution. The fact that the new distribution arose from market transactions is irrelevant, since no one had any right to transfer those resources through market exchanges. This, as much as the first case, is an essential part of Nozick's theory. They are two sides of the same coin.

Many defenders of property rights would like to avoid looking too deeply into the historical origins of their property. As Blackstone noted, 'there are very few that will give themselves the trouble to consider the origin and foundation of this [property] right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title.'<sup>6</sup> This sort of amnesia about history has much to say for it—trying to rectify past injustices in appropriation opens up a Pandora's Box (Waldron 1992). Common sense suggests that what really matters is whether the current distribution promotes people's freedom and fulfils their needs, and that we should just ignore any 'original sin' involved in the historic appropriation of resources (Sanders 1987). What matters, common sense suggests, is the end result, not the historic origins. But Nozick cannot invoke this common-sense reason for setting aside history, for his entire theory is premised on the idea that justice is a matter of 'history' not 'end states'. He rejects liberal and socialist theories precisely because they define justice in terms of 'end states' like the satisfaction of needs, the promotion of utility, or the rewarding of desert, whereas he insists there is no standard for assessing justice other than that of history. This

indeed is why he calls his theory a 'historical' conception of justice (Nozick 1974: 153–4).

Because most initial acquisition was in fact illegitimate, Nozick's theory cannot protect existing holdings from redistribution. But we still need to know how acquisition could have arisen legitimately. If we cannot answer that question, then we should not only postpone the implementation of Nozick's principle of transfer until historical titles are ascertained or rectified, we should reject it entirely. If there is no way that people can appropriate unowned resources for themselves without denying other people's claim to equal consideration, then Nozick's right of transfer never gets off the ground.

What sort of initial acquisition of absolute rights over unowned resources is consistent with the idea of treating people as equals? This is an old problem for libertarians. Nozick draws on John Locke's answer to it. In seventeenth-century England there was a movement towards the 'enclosure' (private appropriation) of land which had previously been held in common for general use. This land ('the commons') had been available to all for the grazing of animals, or for gathering wood, etc. As a result of this private appropriation, some people became wealthy while others lost their access to resources, and so lost their ability to sustain themselves. Locke wished to defend this process, and so needed to give an account of how people come, in a morally legitimate way, to have full ownership rights over the initially unowned world.

Locke's answer, or at any rate one of his answers, was that we are entitled to appropriate bits of the external world if we leave 'enough and as good' for others. An act of appropriation that meets this criterion is consistent with the equality of other individuals since they are not disadvantaged by that appropriation.<sup>7</sup>

Locke realized that most acts of appropriation do not leave enough and as good of the object being appropriated. Those who enclosed the land in seventeenth-century England clearly did not leave enough and as good land for others. But Locke says that appropriation is acceptable if it leaves people as well or better off *overall*. And he believed that enclosing the commons would indeed make everyone better off overall, even those left without any land available to them.

Why would this be? Part of the answer lies in the 'tragedy of the commons'. When land is held in common for general use, there is little incentive for any particular person to invest their time and effort in developing the land to improve its productivity. Since the land is common, there is no way for such an individual to ensure that she will benefit from her investment. Why invest my labour growing corn on the commons when anyone else has the right to come along and pick the corn? It is only rational to invest in improving the land if I can exclude those free-riders who would reap the rewards without

contributing to the labour. But this requires taking the land out of the commons, and assigning someone control over it including the right to exclude others from accessing or benefiting from it—i.e. it requires giving someone property rights over the land.

Indeed, the situation is even worse than that. Not only is it irrational for individuals to invest in improving land in the commons, but it may be rational to *deplete* the resources, once the population using the commons exceeds its carrying capacity. Consider overfishing in the oceans, which remain a kind of 'commons'. Fishing trawlers from various countries are taking so many fish from the ocean, or taking them so young (before they reproduce), that several species are endangered. This may seem irrational—people involved in the fishery are undermining their own living, and that of their children. But from the point of view of each fishing captain, or even each country, it is perfectly rational. If Canadian boats do not take the fish, the Spanish or Icelandic boats will. There is no point being environmentally responsible when no one else is: you would simply be leaving the resources in the commons unprotected for other less scrupulous people to take them. So we all rush in to be the first to take the fish, and to take them ever younger. The result is that the commons are not only left undeveloped, but in fact tend towards ruin. They are overfished, overharvested, overexploited.

So enclosing the commons is needed to avoid ruin, and to promote productive investments in the land. And if we do allow enclosure, we can safely predict that even those who are left without land will actually be better off than before. They lose the right to access the commons, but they did not in fact get much benefit from this. At best, they could only take small amounts of (undeveloped) resources from the (rapidly depleting) commons. In return, however, they are likely to be offered a job by the new landowner working on the enclosed land, and can use their wages to buy a new range of goods that were not produced before, because no one had the incentive to invest in their production before. Before they had to scramble to get a few apples from the (untended) apple trees on the commons before everyone else took them; now there are lots of apples and other foods produced on cultivated land available for a fraction of their wages. The propertyless have lost access to land, but have gained access to more of the goods that they used to get from that land.

The moral of the story is that, given the tragedy of the commons, enclosing the land is likely to make everyone, even the propertyless, better off overall than before. And this, Nozick argues, is the proper test of a legitimate appropriation: that it does not worsen anyone's overall condition. Nozick calls this the 'Lockean proviso', and he adopts it as his test of legitimate acquisition: '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' (Nozick 1974: 178).<sup>8</sup> Indeed,

David Schmidtz argues that it is not only *permissible* for people to enclose the commons, but is in fact morally *obligatory*. To leave resources in the commons, knowing that they will tend to be depleted, is itself to fail to ensure that 'enough and as good' is left for others. The only way to ensure that we leave enough and as good for our children is to prevent tragedies of the commons by allocating property rights over resources (Schmidtz 1990a).

So far, so good. Libertarians make a powerful case that there must be some way for particular people, or groups of people, to acquire control over particular bits of the natural world, and exclude others from it. And it seems plausible that the right test for the legitimacy of such appropriations is whether the condition of others is worsened. This enforces the principle of equal consideration of people's interests. Acquisition does not violate equal consideration if it does not worsen anyone's situation.

But what exactly does it mean to make someone worse off? Worse off in what ways, compared to what alternative? How we answer these questions will determine which sorts of appropriation pass the Lockean proviso. Nozick's answer is that appropriation of a particular object is legitimate if its withdrawal from general use does not make people worse off *in material terms* than they had been when it was *in general use*. For example, consider Amy and Ben, who both live off land which is initially under general use. Amy now appropriates so much of the land that Ben cannot live off the remaining land. That might seem to make Ben worse off. But Amy offers Ben a wage to work on her land which exceeds what he was originally producing on his own. Amy also gets more resources than she initially produced, due to the increased productivity arising from a division of labour, and the increase in her share is larger than the increase in his share. Ben must accept this, since there is not enough land left for him to live as he used to. He needs access to the land that she appropriated, and she is able to dictate the terms of that access, so that he gets less than half of the benefits of the division of labour. Amy's act of appropriation satisfies Nozick's proviso, since the situation after her appropriation is better than general use in terms of material resources, for both Amy and Ben. (Actually, it needn't be *better* for Ben, so long as it is not worse.)

In this way, the unowned world comes to be appropriated, with full property rights, by self-owning people. Nozick believes that the proviso is easily met, and so most of the world will quickly come to be privately appropriated. Hence, self-ownership yields absolute ownership of the external world. Since initial appropriation includes the right of transfer, we will soon have a fully developed market for productive resources (i.e. the land). And since this appropriation excludes some people from access to those productive resources, we will soon have a fully developed market in labour as well. And since people will then legitimately own both the powers and the property which are involved in market exchange, they will be legitimately entitled to all

the rewards which accrue from those exchanges. And since people will be entitled to all their market rewards, government redistribution to help the disadvantaged would be a violation of people's rights. It would be using some people as a resource for others.

(ii) *The Lockean proviso*

Has Nozick given us an acceptable account of fair initial acquisition? We can summarize it this way (cf. Cohen 1986a).

1. People own themselves.
2. The world is initially unowned.
3. You can acquire absolute rights over a disproportionate share of the world, if you do not worsen the condition of others.
4. It is relatively easy to acquire absolute rights over a disproportionate share of the world.

Therefore:

5. Once people have appropriated private property, a free market in capital and labour is morally required.

I will concentrate on Nozick's interpretation of (3), his account of what it is to worsen the conditions of others. His account has two relevant features: (a) it defines 'worse off' in terms of material welfare; (b) it defines pre-appropriation common usage as the standard of comparison. Critics have argued that both of these features are inadequate, and that any plausible revised test of initial acquisition will yield only limited property rights.

*Material Welfare.* The reason that Nozick emphasizes self-ownership, as we have seen, is that we are separate individuals, each with our own life to live (p. 108 above). Self-ownership protects our ability to pursue our own goals, our 'conceptions of ourselves', since it allows us to resist attempts by others to use us merely as means to their ends. One would expect Nozick's account of what it is for an act of appropriation to worsen the condition of others similarly to emphasize people's ability to act on their conception of themselves, and to object to any appropriation that puts someone in an unnecessary and undesirable position of subordination and dependence on the will of others.

But notice that the fact that Ben is now subject to Amy's decisions is not considered by Nozick in assessing the fairness of the appropriation. In fact, Amy's appropriation deprives Ben of two important freedoms: (a) he has no say over the status of the land he had been utilizing—Amy unilaterally appropriates it without asking or receiving Ben's consent; (b) Ben has no say over how his labour will be expended. He must accept Amy's conditions of employment, since he will die otherwise, and so he must relinquish control over how he spends much of his time. Before the appropriation, he may have

had a conception of himself as a shepherd living in harmony with nature. Now he must abandon those pursuits, and instead obey Amy's commands, which might involve activities that exploit nature. Given these effects, Ben may be made worse off by Amy's appropriating the land, even though it leads to a small increase in his material income.

Shouldn't Nozick consider these effects, on his own account of why self-ownership is important? He says that the freedom to lead our lives in accordance with our own conception of the good is the ultimate value, so important that it cannot be sacrificed for other social ideals (e.g. equality of opportunity). He claims that a concern for people's freedom to lead their own lives underlies his theory of unrestricted property rights. But his justification of the initial appropriation of property treats Ben's autonomy as irrelevant.

It is interesting that although Nozick claims that Ben is not made worse off by the appropriation, he does not require that Ben *consent* to the appropriation. If consent were required, Ben might well refuse. If Ben is right to refuse, since it really would make him worse off according to his own (non-materialistic) conception of the good, then the appropriation should not be allowed. Perhaps Ben would be mistaken in refusing, since the gain in material welfare outweighs the loss of autonomy. In that case, we might allow Amy's appropriation as an act of paternalism. But Nozick claims to be against such paternalism. For example, he is against mandatory health insurance or pension plans that are instituted for people's own benefit. But the private appropriation of common resources can contradict a person's will as much as levying a tax on him. If we exclude paternalism, and emphasize autonomy, as Nozick himself does elsewhere in his theory, then presumably Ben should have a veto over appropriations that exclude him from the commons. Given the tragedy of the commons, Ben is almost certainly going to accept some scheme for enclosing the commons, but he would be able to ensure that the agreement regarding enclosure enables him to continue to pursue his conception of himself.<sup>9</sup>

*Arbitrary Narrowing of the Options.* Nozick's proviso says that an act of appropriation must not make others worse off than they were when the land was in common use. But this ignores many relevant alternatives. Let's say that Ben, worried about the possibility of Amy unilaterally appropriating the land, decides to appropriate it for himself, and then offers Amy a wage to work on what is now his land, keeping to himself the bulk of the benefits of the increased productivity. This too passes Nozick's test. Nozick considers it irrelevant who does the appropriating, and who gets the profits, so long as the non-appropriator is not worsened by it. Nozick is, in effect, accepting a first-come, first-served doctrine of appropriation. But why should we accept this as a fair procedure for appropriation, rather than, for example, a system which equalizes chances for appropriation? Should the most important value—our



ability to lead our own lives—be dependent on the arbitrariness of a first-come, first-served doctrine?

Consider another alternative. This time Ben, who is a better organizer of labour, appropriates the land, and organizes an even greater increase in productivity, allowing both to get more than they got when Amy appropriated the land. They are both worse off when Amy appropriates than they would be when Ben appropriates. Yet Nozick allows Amy to appropriate, and denies that Ben is thereby made worse off, since he does better under Amy's appropriation than he did under common use of the land, which is the only alternative Nozick considers relevant.

Finally, what if Amy and Ben appropriate the land collectively, exercising ownership rights jointly, and dividing the labour consensually? If appropriation is going to take place amongst a community of self-owners, then why should Ben not have the option of collective ownership, rather than having Amy unilaterally deprive him of his ability to pursue his own conception of the good?

According to Nozick's proviso, all these alternatives are irrelevant. It does not matter to the legitimacy of an appropriation that some other appropriation is fairer or more efficient, or better serves people's material interests or their autonomy. Yet each of these alternatives spares somebody a harm that will occur under Nozick's scheme. Why are these harms not relevant in determining whether someone is made worse off by initial appropriations?

These problems with Nozick's proviso are made clearer if we move to the level of capitalism as an ongoing system. The acts of initial appropriation which Nozick allows will quickly lead to a situation in which there are no more accessible useful unowned things. Those who were able to appropriate may have vast wealth, while others are entirely without property. These differences will be passed on to the next generation, some of whom will be forced to work at an early age, while others have all the privileges in life. This is acceptable to Nozick, so long as the system of appropriation and transfer continues to meet the Lockean proviso—i.e. capitalism as an ongoing system is just if no one is worse off than they would have been in the commons, prior to the privatization of the external world.

Nozick assures us capitalism passes this test of not worsening people compared to their fate in the commons (Nozick 1974: 177). Of course, given the tragedy of the commons, virtually any system of property-ownership would pass this test, including state ownership, worker self-ownership, kibbutz-like communal ownership. Or consider various forms of limited rather than absolute individual property rights, such as use rights rather than ownership rights, or limited ownership rights that do not include the right to bequeath property. All of these property regimes grant some set of people sufficient control over resources to ensure that free-riders are excluded, and hence

provide incentives to develop resources and to avoid depleting them. Virtually every human society that has gone beyond the hunter-gatherer stage has developed some form of property-system that avoids the tragedy of the commons—humans would have not survived otherwise—but few of them (if any) have been purely capitalist. So the mere fact that capitalism does better than the commons is not saying much, and is not a reason to prefer it over any other system for establishing property rights.<sup>10</sup>

Notice, moreover, that capitalism passes that test even though the propertyless are dependent for their survival on those with property wanting to buy their labour, and even though some people may starve because no one does want to buy their labour. This is acceptable to Nozick since untalented people would have starved anyway had the land remained unowned. The propertyless lack a just grievance because 'those who do manage to sell their labour power will get at least as much and probably more in exchange for it than they could have hoped to get by applying it in a rude state of nature; and those proletarians whose labour power is not worth buying, although they will therefore, in Nozick's non-welfare state, die (in the absence of charity), would have died in a state of nature anyway' (Cohen 1986b: 85 n. 11).

This is a very weak requirement. It is odd to say that a person who starves to death is not made worse off by Nozick's system of appropriation when there are other systems in which that person would not have died. A more plausible test of legitimate appropriation would consider all the relevant alternatives, keeping in mind people's interest in both material goods and autonomy. Can we modify the Lockean proviso to include these considerations, while retaining its intuitive point that the test of appropriation is whether it worsens someone's condition? We might say that a system of appropriation worsens someone's condition if there is another possible scheme in which they would do better. Unfortunately, every system of property allocation will fail that test. The untalented person would be worse off in Nozick's pure capitalism than he would be under Rawls's difference principle; the talented person would be worse off under Rawls's regime than under Nozick's. In any given system, there will be someone who would do better in another system. That test is unreasonable anyway, for no one has a legitimate claim that the world be maximally adapted to suit their preferences. The fact that there is a possible arrangement in which I would be better off does not show that the existing system has harmed me in any morally significant sense. We want to know whether a system of appropriation makes people worse off, not compared to a world which is maximally adapted to their particular interests, but compared to a world in which their interests are fairly attended to.

It is an insufficient test of justice that people benefit relative to the initial state of common holdings. But nor can people demand that they have whatever system benefits them the most. The proviso requires a middle ground. It

is difficult to say what that middle ground is, or how different it would be from the principles of Rawls and Dworkin. John Arthur argues that the appropriate test is an egalitarian one—appropriation worsens someone's condition if, as a result, they get less than an equal share of the value of the world's natural resources. This is the only decision that makes sense, he argues, 'in light of the fact that [each person] is as entitled to the resources as anyone else. He wasn't born deserving a smaller share of the earth's wealth, nor is anybody else naturally entitled to a larger than average share' (Arthur 1987: 344; cf. Steiner 1977: 49). Cohen argues that Rawls's difference principle might provide a fair standard of legitimate appropriation (Cohen 1986a: 133–4). Van Parijs argues that appropriators should be required to fund a basic income scheme as a condition of legitimate appropriation, as compensation for those who are left propertyless (Van Parijs 1992: 9–11). There is in fact a voluminous literature offering various models of fair initial acquisition, each of which produces somewhat different results. But virtually no one thinks that a plausible test of fair acquisition would generate Nozick's view that people can appropriate unrestricted property rights over unequal amounts of resources.<sup>11</sup> If the proviso recognizes the full range of interests and alternatives that self-owners have, then it will probably not generate unrestricted rights over substantially unequal amounts of resources. Some people will be made worse off in important ways, compared to morally relevant alternatives, by a system which allows people to appropriate unequal amounts of the external world. And if, as Nozick himself says, 'each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation' (Nozick 1974: 180), then it is quite possible that 'the shadow thrown by [the proviso] so entirely envelops such titles as to render them indiscernible'—i.e. any title that self-owning people acquire over unequal resources will be heavily qualified by the claims of the propertyless (Steiner 1977: 48).

*Initial Ownership of the World.* There is another problem with Nozick's proviso that blocks the move from self-ownership to unrestricted capitalism. Recall my summary of Nozick's argument:

1. People own themselves.
2. The world is initially unowned.
3. You can acquire absolute rights over a disproportionate share of the world, if you do not worsen the conditions of others.
4. It is relatively easy to acquire absolute rights over a disproportionate share of the world.

Therefore:

5. Once private property has been appropriated, a free market in capital and labour is morally required.

We have just examined Nozick's interpretation of (3), which seems too weak, so that (4) is false. But there is a second problem. Why accept (2), the claim that the world is initially unowned, and hence up for grabs? Why not suppose that the world is jointly owned, such that each person has an equal veto over the disposal of the land (Exdell 1977: 146–9; Cohen 1986b: 80–7)? Nozick never considers this option, but others, including some libertarians, claim that it is the most defensible account of world-ownership (Locke himself believed that the world initially belonged to everyone, not no one, for God 'hath given to men the world in common'—cf. Christman 1986b: 159–64).

What would happen if the world were jointly owned, and hence not subject to unilateral privatization? There are a variety of possible outcomes, but in general they will negate the inegalitarian implications of self-ownership. For example, the disadvantaged might be able to use their veto to bargain for a distributive scheme like Rawls's difference principle. We might end up in this way with a Rawlsian distribution, not because we deny self-ownership (such that the disadvantaged have a direct claim on the advantaged), but because we are joint owners of the external world (such that the untalented can veto uses of the land that benefit the talented without also benefiting them). A similar result might also arise if we view the external world as neither up for grabs, nor jointly owned, but as divided equally amongst all the members of the human community (Cohen 1986b: 87–90).

All of these accounts of the moral status of the external world are compatible with the principle of self-ownership, since self-ownership says nothing about what kind of ownership we have over external resources. And indeed various libertarians have endorsed these other options. There is a long tradition of 'left-libertarianism', going back to Thomas Paine, Henry George, and Léon Walras in the eighteenth and nineteenth centuries, and defended today by Hillel Steiner and Peter Vallentyne, which starts from the premiss of self-ownership, but recognizes the insurmountable difficulties in justifying unequal appropriation of the initially unowned world, and so accepts nationalization or equalization of natural resources, or compensation for those left propertyless.<sup>12</sup> Each of these options would have to be evaluated in terms of the underlying values that Nozick appeals to. Nozick does not undertake this sort of evaluation, but it seems clear that absolute property rights over unequal bits of the world are only secured if we invoke weak and arbitrary premisses about appropriation and the status of the external world.

### (b) Self-ownership and equality

I have tried to show that the principle of self-ownership does not by itself generate a moral defence of capitalism, since a capitalist requires not only ownership of her self, but also ownership of resources. Nozick believes that self-ownership inevitably leads to unrestricted property rights, but we are in

fact confronted by a variety of economic regimes that are compatible with self-ownership, depending on our theory of legitimate appropriation, and our assumptions about the status of the external world.<sup>13</sup> Nozick believes that self-ownership requires that people be entitled to all the rewards of their market exchanges, but different regimes vary in the extent to which they allow self-owning individuals to retain their market rewards. Some will allow the naturally talented to parlay their talents into unequal ownership of the external world (although not necessarily to the extent allowed by Nozick), others will redistribute market income so as to ensure that the naturally disadvantaged have equal access to resources (as in Rawls or Dworkin). Self-ownership is compatible with all these options.

Is there any reason for self-owners to prefer libertarian regimes over liberal egalitarian ones? I can think of three possible arguments that draw on aspects of, but also go beyond, the idea of self-ownership, since that idea by itself is insufficient to identify a just distribution. One argument concerns consent, the second concerns the idea of self-determination, the third concerns dignity.

Nozick might say that the choice of economic regime should be decided, if possible, by the consent of self-owning people. And, he might claim, self-owning people would all choose a libertarian regime, were it up to them. But that is dubious. As we have seen, Nozick's own scheme of acquisition depended on Ben not having to give his consent to Amy's appropriation. Different people would do best in different economic regimes, and so would consent to different regimes. One could try to ensure unanimous consent by seeking agreement behind a veil of ignorance, as Rawls does. But as we have seen, that leads to liberal, not libertarian, results.

Secondly, Nozick might claim that the assumptions which lead to liberal results, while formally compatible with self-ownership, in fact undermine the value of self-ownership. For example, the assumption that the world is jointly owned, or that it should be collectively appropriated, would nullify the value of self-ownership. For how can I be said to own myself if I may do nothing without the permission of others? In a world of joint ownership, don't Amy and Ben jointly own not only the world but also *in effect* each other? Amy and Ben may have legal rights over themselves (unlike the chattel slave), but they lack independent access to resources. Their legal rights of self-ownership are therefore purely formal, since they require each other's permission whenever they wish to use resources in the pursuit of their goals. We should select a regime that contains not only formal self-ownership, but also a more substantive self-ownership that provides one with effective control over one's life.

Following Charles Fried, I will use the term 'self-determination' to describe this more substantive conception of self-ownership. He says that it requires a 'determinate domain . . . free of the claims of others' (Fried 1983: 55).

Similarly, Jon Elster says that substantive self-ownership involves 'the right to choose which of one's abilities to develop' (Elster 1986: 101). Common to both these interpretations of substantive self-ownership is the idea that in the central areas of one's life, in our most important projects, we should be free to act on our own conceptions of the good. Both argue that respecting self-determination is an important part of treating people as ends not means, as distinct individuals each with their own life to lead.

I think that Nozick appeals to both the formal and substantive conceptions of self-ownership. He explicitly defends the formal conception, dealing with legal rights over one's physical being. But at least part of Nozick's defence of formal self-ownership is that it promotes substantive self-ownership—it promotes our ability to act effectively on our conception of ourselves. Indeed, he says it is precisely this capacity for substantive self-ownership—the 'ability to form a picture of one's whole life . . . and to act in terms of some overall conception of the life one wishes to lead'—which is the fundamental basis of his theory of rights. It is this ability to form and pursue a conception of the good which gives life meaning, and it is because we can lead meaningful lives that we should be treated as ends in ourselves (Nozick 1974: 51).

So it seems plausible that Nozick would endorse selecting the regime which best promotes substantive self-ownership (within the constraints imposed by formal self-ownership). While different economic regimes are compatible with formal self-ownership, he might argue that liberal regimes render self-ownership purely formal, whereas the more libertarian regimes ensure substantive self-ownership, since libertarian property rights leave people free to act without others' permission.

The difficulty, of course, is that in a libertarian regime not everyone can parlay their formal self-ownership into substantive self-determination. Libertarians cannot guarantee each person substantive control over their lives, and indeed, Nozick explicitly says that formal self-ownership is all that people can legitimately claim. He says that the worker who lacks any property, and who must sell her labour on adverse terms to the capitalist, has 'full' self-ownership (Nozick 1974: 262–4). She has full self-ownership even though, Nozick concedes, she may be forced to agree to whatever terms the capitalist is offering her in order to survive. The resulting 'agreement' might well, as in Victorian England, be essentially equivalent to the enslavement of the worker. The fact that the worker has formal rights of self-ownership means that she cannot be the legal possession of another person (unlike the chattel slave), but economic necessity may force her to agree to terms which are almost as adverse.

Lack of property can be just as oppressive as lack of legal rights. As Mill put it:

No longer enslaved or made dependent by force of law, the great majority are so by force of poverty; they are chained to a place, to an occupation, and to conformity with the will of an employer, and debarred by the accident of birth both from the enjoyments, and from the mental and moral advantages, which others inherit without exertion and independently of desert. That this is an evil equal to almost any of those against which mankind have hitherto struggled, the poor are not wrong in believing. (Mill 1967: 710)

The 'full' self-ownership of the propertyless worker is no more substantive than the self-ownership of Amy or Ben in a world of collective ownership. Amy has no access to productive resources without Ben's permission, but the same is true of the worker who is dependent on the agreement of the capitalist. In fact, people in a situation of collective ownership have more real control over their lives, since Amy and Ben must strike a deal in order to use their resources, whereas a capitalist need not strike an agreement with any particular worker in order to survive, especially if the worker is untalented, or if there is a large pool of unemployed.

Libertarianism not only restricts the self-determination of the propertyless worker, it makes her a resource for others. Those who enter the market after others have appropriated all the available property are 'limited to gifts and jobs others are willing to bestow on them', and so 'if they are compelled to cooperate in the scheme of holdings, they are forced to benefit others. This forced compliance with the property system constitutes a form of exploitation and is inconsistent with the most basic of [Nozick's] root ideas, rendering as it does the latecomers mere resources for others' (Bogart 1985: 833–4).

What regime best promotes substantive self-ownership? Self-determination requires resources as well as rights over one's physical being. We are only able to pursue our most important projects, free from the demands of others, if we are not forced by economic necessity to accept whatever conditions others impose on us in return for access to needed resources. Since meaningful self-determination requires both resources and liberties, and since each of us has a separate existence, each person should have an equal claim to these resources and liberties.

But, if so, then the concern for self-determination leads us towards liberal regimes, not libertarian ones. Libertarians claim that liberal welfare programmes, by limiting property rights, unduly limit people's self-determination. Hence the removal of welfare redistribution programmes (Nozick), or their limitation to an absolute minimum (Fried), would be an improvement in terms of self-determination. But while redistributive programmes do restrict the self-determination of the well-off to a limited degree, they also give real control over their lives to people who previously lacked it. Liberal redistribution doesn't sacrifice self-determination for some other goal. Rather, it aims at a fairer distribution of the means required for

self-determination. Libertarianism, by contrast, allows undeserved inequalities in that distribution—its concern with self-determination does not extend to ensuring the fair distribution of the conditions required for self-determination.

A liberal regime which taxes the unequal rewards of undeserved talents does limit some people's self-determination. But is this a serious or unacceptable limitation? Being free to choose one's own career is crucial to self-determination, but being subject to taxation on the rewards which accrue from undeserved natural talents does not seriously impair one's self-determination. Even if one's income is taxed in accordance with Rawlsian principles, one still has a fair share of resources and liberties with which to control the essential features of one's life. Taxing income from the exercise of natural talents does not unfairly disadvantage anyone in their substantive self-ownership—i.e. in their ability to act according to their conception of themselves.<sup>14</sup>

Finally, Nozick might argue that welfare redistribution denies people's dignity, and this dignity is crucial to treating people as equals (e.g. Nozick 1974: 334). Indeed Nozick often writes as if the idea that other people have claims on the fruits of my talents is an assault on my dignity. But why is taxation an assault on my dignity? Nozick often ties dignity to self-determination, but if so, then one could argue that it is liberal regimes, not libertarian ones, which best promote each person's dignity, since they ensure that everyone has the capacity for self-determination. In any event, dignity is predicated on, or a by-product of, other moral beliefs. We only feel something to be an attack on our dignity if we are already convinced that it is wrong. Redistribution will feel like an assault on dignity only if we believe it is morally wrong. If we believe instead that redistribution is a required part of treating people as equals, then it will serve to promote, rather than attack, people's sense of equal dignity.

So there are serious difficulties confronting any attempt to defend libertarianism in terms of self-ownership, consent, self-determination, or dignity. All of these are either indeterminate or support liberal egalitarianism. Self-ownership does not preclude redistributive taxation, since many different economic regimes are formally compatible with self-ownership. And if we look beyond formal self-ownership to those regimes which best ensure substantive self-ownership, then Nozick has not given us any reason to prefer libertarian inequalities to liberal equality.

But why should we be concerned with formal self-ownership at all? In the above argument, I used the idea of substantive self-ownership as a test for deciding between those regimes that are compatible with formal self-ownership. But if we contrast these two conceptions, surely substantive self-determination is more fundamental. We do not endorse self-determination because it promotes formal self-ownership. Rather, we will endorse formal

self-ownership in so far as it promotes self-determination. Indeed, as I mentioned earlier, Nozick himself sometimes treats the substantive conception as the more fundamental. So why not just start with self-determination as our preferred conception of treating people as equals? Rather than ask which of the regimes that are compatible with formal self-ownership best promotes self-determination, why not just ask which regime best promotes self-determination? It may be that the best regime, assessed in terms of self-determination, not only goes beyond formal self-ownership, but also limits it. In that case, formal self-ownership should give way to the substantive self-determination that really matters to us (Cohen 1986*b*: 86; Kernohan 1990).

This seems so obviously preferable that an explanation is needed for Nozick's emphasis on formal self-ownership. Nozick, like the classical liberals, wants to articulate a conception of equality which denies that anyone is by nature or by right subordinate to another. No one is merely a resource for others, the way a slave is the resource of his owner. If slavery is the paradigm case of a denial of equality, it might seem that the best way to affirm equality is to give each person the legal rights over himself that slave-owners have over their slave; the best way to prevent the enslavement of one person to another is to give each person ownership over himself. Unfortunately, the fact that I have legal rights of self-ownership does not mean that I have the ability to avoid what is in effect enslavement to another. Even if the capitalist does not have the same legal rights over me that slave-owners had over slaves, I may not have any real ability to decide on the nature and terms of my living. The best way to prevent the sort of denial of equality that occurs in slavery is not to reverse the legal rights involved, but rather to equalize the substantive control each person possesses, in the form of equal liberties and resources.

Indeed, Susan Okin argues that Nozick's principle of self-ownership actually leads back to a form of 'matriarchal slavery'. Nozick talks about people's claim to the products of their labour, but he ignores the fact that people are themselves the product of someone else's labour—namely, their mother's. Why then does the mother not own her baby? As Okin notes, a woman who buys or is given sperm, and who buys or is given all the food involved in sustaining the fetus, meets all of Nozick's criteria for legitimate ownership of the resulting product. If we own whatever we produce with our talents, using only goods that were freely transferred to us, then mothers would seem to own their children (or perhaps co-own them with the father, if he made co-ownership a condition for the sale or gift of the sperm). She concludes that Nozick's entire theory rests on the implicit exclusion of women, and on the assumption that the work of bearing and raising children operates according to some other set of principles that he ignores (Okin 1989*b*: ch. 4). To avoid this problem, the principle of self-ownership will need serious reformulation. (For one attempt, see Jeske 1996.)

Nozick's emphasis on the idea of formal self-ownership may also be due to the undifferentiated nature of that concept. The idea of self-ownership misleadingly suggests that we either have or lack self-ownership, as if the various rights and powers which constitute self-ownership must be accepted or rejected as a package. If that was indeed our choice, then it would make sense to emphasize self-ownership. But in reality there is a range of options, involving different kinds of control over one's choices and one's circumstances. The idea of self-ownership tends to prevent people from considering all the relevant options, as Nozick's own discussion reveals. The claim that undifferentiated self-ownership is crucial to treating each person as an end in herself is only plausible if it is being compared with the single option of the undifferentiated denial of self-ownership.

We need to distinguish different elements involved in controlling one's self, and see how they relate to the different elements involved in controlling external resources. We should consider each of these rights and powers on its own terms, to see in what ways it promotes each person's essential interests. Which combination of rights and resources contributes to each person's ability to act on their goals and projects, their conception of themselves? The best mix will involve more than formal self-ownership (e.g. access to resources), but it may also involve less, for it may be worth giving up some formal self-ownership for the sake of substantive self-determination.

To summarize this section, I have argued that Rawlsian redistribution is compatible with formal self-ownership, and that it does a better job than libertarianism in fairly promoting substantive self-ownership. I have also argued that formal self-ownership is a red herring, for substantive self-determination is the more fundamental value. But there is a deeper problem with Nozick's self-ownership argument. Nozick has not adequately confronted Rawls's claim that people do not have a legitimate claim to the rewards of the exercise of their undeserved talents. I've tried to show that we can get a Rawlsian distributive scheme even without denying self-ownership, since redistribution could arise from the requirements of a fair theory of access to external resources. But I still think that Rawls's denial of self-ownership was perfectly sound. I think that we can treat people's talents as part of their circumstances, and hence as possible grounds, in and of themselves, for compensation. People have rights to the possession and exercise of their talents, but the disadvantaged may also have rights to some compensation for their disadvantage. It is wrong for people to suffer from undeserved inequalities in circumstances, and the disadvantaged have direct claims on the more fortunate, quite independently of the question of access to external resources. As I said in discussing his Wilt Chamberlain example, Nozick has not given us any reason to reject that Rawlsian intuition.

### 3. LIBERTARIANISM AS MUTUAL ADVANTAGE

Many libertarians acknowledge that Nozick's argument fails. The problem, they say, is not with Nozick's conclusions, but with his attempt to defend them by appeal to Kant's egalitarian idea of treating people as ends in themselves. If we start with the idea that each person matters equally, then justice will require something other than Nozickian self-ownership. But, they claim, that just shows that libertarianism is not properly viewed as a theory of treating people as equals. What then is it a theory of? There are two main possibilities: in this section, I will consider libertarianism as a theory of mutual advantage; in the next section, I will consider it as a theory of freedom.

Mutual advantage theories of libertarianism are often presented in contractarian terms. This can be confusing, since liberal egalitarian theories have also been presented in contractarian terms, and the shared use of the contract device can obscure the fundamental differences between them. Before evaluating the mutual advantage defence of libertarianism, therefore, I will lay out some of the differences between the Rawlsian and mutual advantage versions of contractarianism.

For Rawls, the contract device is tied to our 'natural duty of justice'. We have a natural duty to treat others fairly, for they are 'self-originating sources of valid claims'. People matter, from the moral point of view, not because they can harm or benefit us, but because they are 'ends in themselves' (Rawls 1971: 179–80), and so are entitled to equal consideration. This is a 'natural' duty because it is not derived from consent or mutual advantage, but simply owed to persons as such (Rawls 1971: 115–16). The contract device helps us determine the content of this natural duty, for it requires that each party take into consideration the needs of others 'as free and equal beings'. To ensure that the contract gives equal consideration to each of the contractors, Rawls's original position abstracts from differences in talent and strength that might create unequal bargaining power. By removing these arbitrary differences, the contract device 'substitutes a moral equality for a physical inequality' (Diggs 1981: 277), and thereby 'represents equality between human beings as moral persons' (Rawls 1971: 19). For Rawls, then, the contract is a useful device for determining the content of our natural duty of justice, because it properly represents our moral equality (Ch. 3, s. 3 above).

Mutual advantage theorists also use a contract device, but for opposite reasons. For them, there are no natural duties or self-originating moral claims. There is no moral equality underneath our natural physical inequality. The modern world view, they say, rules out the traditional idea that people and actions have any inherent moral status. What people take to be objective

moral values are just the subjective preferences of individuals (J. Buchanan 1975: 1; Gauthier 1986: 55–8; Narveson 1988: 110–21).

So there is nothing naturally 'right' or 'wrong' about one's actions, even if they involve harming others. However, while there is nothing inherently wrong in harming you, I would be better off by refraining from doing so if every other person refrains from harming me. Adopting a convention against injury is mutually advantageous—we do not have to waste resources defending our own person and property, and it enables us to enter into stable cooperation. It may be in our short-term self-interest to violate such an agreement on occasion, but acting on short-term self-interest makes mutual cooperation and constraint unstable, and thereby harms our long-term self-interest (it eventually leads to Hobbes's 'war of all against all'). While injury is not inherently wrong, each person gains in the long run by accepting conventions that define it as 'wrong' and 'unjust'.

The content of such conventions will be the subject of bargaining—each person will want the convention to protect their own interests as much as possible while constraining them as little as possible. While conventions are not really contracts, we can view this bargaining over mutually advantageous conventions as the process by which a community establishes its 'social contract'. While this contract, unlike Rawls's, is not an elaboration of our traditional notions of moral and political obligation, it will include some of the constraints that Rawls and others take to be 'natural duties'—for example, the duty not to steal, or the duty to share the benefits of cooperation fairly amongst the contributors. Mutually advantageous conventions occupy some of the place of traditional morality, and, for that reason, can be seen as providing a 'moral' code, even though it is 'generated as a rational constraint from the non-moral premises of rational choice' (Gauthier 1986: 4).

This sort of theory is aptly described by David Gauthier, its best-known proponent, as 'moral artifice', for it is an artificial way of identifying constraints on what people are naturally entitled to do. It involves 'artifice' in another sense as well: it requires society to establish complex mechanisms to actually enforce these self-interested agreements against individuals, coercively if necessary. The need for such coercive enforcement may not immediately be clear: if the agreements are in everyone's self-interest, why cannot we rely on everyone to voluntarily comply with them? Why would we need some artificial social mechanism to enforce the agreements?

The difficulty is that while it is in everyone's interests to *agree* to the contract or convention, it may not be in everyone's interests actually to *comply* with it. Consider the case of overfishing in the oceans I discussed earlier. It is clearly in everyone's interests to agree to a set of rules limiting fishing to an environmentally sustainable level. Each person's livelihood is in jeopardy if the species is fished to extinction. But it is not in my interest actually to stop

overfishing unless I am confident that everyone else will do so as well. If others continue to overfish, then my abstinence will make little or no difference—I cannot save the species on my own. I am simply letting others benefit from the plundering of the seas. In the language of game theory, I have no reason to ‘cooperate’ if I suspect that others will ‘defect’.

Even if I do trust others to cooperate, we then face another problem. It may be rational for me to defect precisely because I can trust others to cooperate. If I can assume that everyone else will abide by environmentally responsible harvesting rules, then why shouldn’t I go out and do some extra fishing over my limit? So long as others abide by the rules, my small amount of overfishing will not harm the species. If others do not overfish, my defection will make little difference—I cannot destroy the species on my own. This may seem ‘unfair’, from a moral point of view, but on a mutual advantage approach, this is irrelevant, since there is no such thing as a ‘moral point of view’ independent of self-interest. Yet if everyone reasons that their individual defection will make no difference, then everyone will defect, and the system breaks down.

In short, while it is in my self-interest to agree to a set of environmentally responsible rules, there may be circumstances when it is not in my self-interest actually to abide by the rules. Each person, rationally pursuing their own self-interest, will make choices that lead to collectively irrational outcomes. This is an example of what is called a ‘collective action’ problem. Another classic example is the so-called ‘Prisoner’s Dilemma’. Imagine that you and your partner-in-crime are jailed (in separate rooms) on suspicion of robbery, and the prosecutor gives each of you the following offer:<sup>15</sup>

‘I don’t have enough evidence to convict you or your partner of robbery, but I can convict you both of breaking and entering, which carries a sentence of one year. However, if you will confess to robbery, and give evidence against your partner, then, if she doesn’t confess, you will go free without penalty. If she also confesses, you will both get five years. And if you do not confess, and your partner does, then you will get twenty years and she will go free.’

Let’s assume that both prisoners are motivated solely by self-interest (i.e. they want to minimize their time in jail), and do not know what the other prisoner is doing. The options facing each prisoner can be put this way:

- 1st-best outcome: I confess, partner doesn’t confess  
(I go free, she gets twenty years)
- 2nd-best outcome: I don’t confess; partner doesn’t confess  
(we both get one year)
- 3rd-best outcome: I confess; partner confesses  
(we both get five years)
- 4th-best outcome: I don’t confess, my partner confesses  
(I get twenty years, my partner goes free)

It would obviously be rational for the prisoners to agree in advance—perhaps before they even commit the crime—not to confess. Let’s imagine that they have indeed made such an advance agreement. Yet when the time comes actually to decide whether to confess, each prisoner now faces a dilemma. Let’s assume that what my partner does is not affected by what I do: she will confess or not regardless of what I do. If so, then it is rational for me to confess, since whatever my partner does, I am better off by confessing. If she confesses, then I will get my third-best outcome by also confessing, rather than my fourth-best outcome. If she does not confess, then I will get my first-best outcome by confessing, rather than my second-best outcome. So I will do better by confessing, no matter what my partner does.

And of course my partner is in precisely the same situation. She is better off confessing no matter what I do. So she will confess. The result, then, is that we end up in the third-best option: we both get five years. If we had both stayed silent, we could have got the second-best outcome—one year each. Not confessing is the collectively rational outcome. But confessing is the individually rational choice. To achieve the collectively rational outcome, we need somehow to prevent people from acting on their rational self-interest.

Scholars disagree about how widespread these sorts of collective action problems are, and how people overcome them. For example, confessing may not be rational if it precludes future opportunities for cooperation with my partner. Confessing may be rational in a ‘single-play’ Prisoner’s Dilemma, but not in an ‘iterated’ or multi-play PD, where the two prisoners will meet again.<sup>16</sup>

But the central point remains: to ensure collectively rational outcomes, it is not enough to agree to certain conventions. It is also necessary to establish some mechanism to compel compliance with them: i.e. some mechanism to prevent people from defecting (by overfishing or confessing) even when it is individually rational to do so.<sup>17</sup> The usual Hobbesian response is to give the state the power to punish us for defecting, thereby increasing the costs of not cooperating with the rules. We have to add the risk of fines or jail into our calculations, and this may tip the balance in favour of cooperating rather than defecting. (Similarly, gangs and organized crime syndicates attempt to prevent their members from confessing to the police by threatening to punish them or their family. The fear of punishment discourages many criminals from ‘defecting’ from the rules of the gang or syndicate.)

Gauthier himself, however, thinks that this reliance on coercive enforcement is an inadequate response to the problem. For example, I will not fear punishment if I know that the state lacks the personnel or resources to monitor my behaviour properly, or if I know that the police or judges can be bribed. But to establish a comprehensive system of policing and justice that

avoids these problems would be very expensive, and perhaps even unworkable.<sup>18</sup>

Gauthier instead suggests that people can overcome collective action problems without the threat of punishment from a coercive state, if they adopt the principle of 'constrained maximization'. Constrained maximization is a disposition to comply with mutually advantageous conventions, without calculating whether it might be rational to defect, so long as one is sure that others will cooperate as well. Gauthier assumes that people are ultimately motivated by self-interest, but argues that they will only in fact maximize their well-being if they accept that their pursuit of self-interest should be constrained by principles of 'morality', as defined by mutually advantageous conventions. People must agree that they 'ought' to follow these conventions, so long as others can be trusted to follow them as well, even when it is rational to defect. Indeed, people should be socialized to think of defection as 'wrong' or 'unfair' under these circumstances. If the social convention itself is 'just' (i.e. mutually advantageous), and if others can be trusted to cooperate, then people should view cooperation as a 'moral' obligation that precludes the possibility of defecting for self-interested reasons. It is rational, from a self-interested point of view, to commit oneself to being a 'constrained maximizer' rather than a 'straightforward maximizer'—i.e. to commit oneself to *not* acting on self-interest in deciding whether to cooperate with other constrained maximizers in following mutually advantageous conventions.<sup>19</sup>

On Gauthier's view, then, mutual advantage theories mimic traditional morality not only in establishing rules which limit what we are naturally free to do, but also in requiring that we view these rules as taking precedence over the unconstrained pursuit of self-interest. The rules may themselves be grounded in mutual advantage, but to achieve the mutually advantageous outcome, we need to view these rules as 'obligations' which partially pre-empt self-interested decision-making.

Many critics have questioned whether Gauthier's notion of 'constrained maximization' is coherent or psychologically feasible, and argue that in the end mutual advantage theories must rely heavily on coercive enforcement to overcome collective action problems.<sup>20</sup> I will set those concerns aside, and focus instead on whether these mutually advantageous conventions, however enforced, are a plausible basis for defending libertarianism. These conventions will certainly incorporate some of the duties and obligations we traditionally associate with morality. However, the overlap between mutual advantage and morality as traditionally understood is far from complete. Whether it is advantageous to follow a particular convention depends on one's preferences and powers. Those who are strong and talented will do better than those who are weak and infirm, since they have much greater bargaining power. The infirm produce little of benefit to others, and what little they do produce may

be simply expropriated by others without fear of retaliation. Since there is little to gain from cooperation with the infirm, and nothing to fear from retaliation, the strong do not gain from accepting conventions which recognize or protect the interests of the infirm.

This is precisely what Rawls objected to in traditional state of nature arguments—they allow differences in bargaining power that should be irrelevant when determining principles of justice. He devised his 'original position' to eliminate differences in bargaining power. Gauthier, however, is using the contract device to determine principles of mutual advantage, rather than principles of impartial morality, and so differences in bargaining power are central to his enterprise. The resulting conventions will accord rights to various people, but since these rights depend on one's bargaining power, mutual advantage contractarianism does 'not afford each individual an inherent moral status in relation to her fellows' (Gauthier 1986: 222).

It is hard to exaggerate the difference between these two versions of contractarianism. Rawls uses the device of a contract to develop our traditional notions of moral obligation, whereas Gauthier uses it to replace them; Rawls uses the idea of the contract to express the inherent moral standing of persons, whereas Gauthier uses it to generate an artificial moral standing; Rawls uses the device of the contract to negate differences in bargaining power, whereas Gauthier uses it to reflect them. In both premisses and conclusions, these two strands of contract theory are, morally speaking, a world apart.

I will question the plausibility of the mutual advantage approach momentarily. But, even if we accept it, how does it justify a libertarian regime in which each person has unfettered freedom of individual contract over her self and her holdings? It cannot, of course, yield self-ownership as a natural right. As Gauthier says, mutual advantage theories do not offer people an 'inherent moral status', and if there are no natural duties to respect others, then obviously there is no natural duty to respect their self-ownership, and hence no duty to treat them in ways they would voluntarily consent or contract to. But libertarians argue that respecting self-ownership is mutually advantageous—it is in each person's interest to accord self-ownership rights to others, and not try to coerce them into promoting our good, so long as they reciprocate. The costs of coercing others are too high, and the payoffs too low, to be worth the risk of being coerced oneself. Mutual advantage does not, however, justify any further rights—rights to a certain share of resources under Rawls's difference principle, for example. The poor would gain from such a right, but the rich have an interest in protecting their resources, and the poor lack sufficient power to take the resources, or to make the costs of protection exceed its benefits. Mutual advantage yields libertarianism, therefore, because everyone has both the interest and the ability to insist on self-ownership, but only some



people have an interest in redistribution, and they do not have the ability to insist on it (Harman 1983: 321–2; cf. Barry 1986: ch. 5).

Does mutual advantage justify granting each person rights of self-ownership? Since people lack inherent moral status, whether one has the unfettered right of contract over one's talents and holdings depends on whether one has the power to defend one's talents and holdings against coercion by others. Mutual advantage libertarians claim that everyone does, in fact, have this power. They claim that humans are by nature equal, not in Rawls's sense of sharing a fundamental equality of natural right—rather, equality of rights 'is derivative from a fundamental *factual* equality of condition, in fact an equal vulnerability to the invasions of others' (Lessnoff 1986: 107). As Hobbes put it, 'as to strength of body, the weakest hath enough to kill the strongest'. People are, by nature, more or less equal in their ability to harm others and their vulnerability to being harmed—and this factual equality grounds equal respect for self-ownership.

But this is unrealistic. Many people lack the power to defend themselves, and so cannot claim the right of self-ownership on mutual advantage grounds. As James Buchanan says, 'if personal differences are sufficiently great', then the strong may have the capacity to 'eliminate' the weak, or perhaps to seize any goods produced by the weak, and thereby set up 'something similar to the slave contract' (J. Buchanan 1975: 59–60). These are not abstract possibilities—personal differences *are* that great. It is an inescapable consequence of mutual advantage theories that the congenitally infirm 'fall beyond the pale' of justice (Gauthier 1986: 268), as do young children since 'there is little the child can do to retaliate against those jeopardizing its well-being' (Lomasky 1987: 161; Grice 1967: 147–8).

It is doubtful that many mutual advantage theorists really believe in this assumption of a natural equality in bargaining power. Their claim in the end is not that people are in fact equals by nature, but rather that *justice is only possible in so far as this is so*. By nature, everyone is entitled to use whatever means are available to them, and the only way moral constraints will arise is if people are more or less equal in their powers and vulnerabilities. For only then does each person gain more from the protection of their own person and property than they lose by refraining from using other people's bodies or resources. Natural equality is not sufficient, however, for people of similar physical capacities may find themselves with radically unequal technological capacities, and 'those with a more advanced technology are in a position to dictate the terms of interaction to their fellows' (Gauthier 1986: 231; Hampton 1986: 255). Indeed, technology may get us to the point where, as Hobbes put it, there is a 'power irresistible' on earth, and for Hobbes and his contemporary followers, such power 'justifieth all actions really and properly, in whomsoever it is found'. No one could claim rights of self-ownership against such power.<sup>21</sup>

Mutual advantage, therefore, subordinates individual self-ownership to the power of others. This is why Nozick made self-ownership a matter of our natural rights. Coercing others is wrong for Nozick, not because it is too costly for the coercer, but because people are ends in themselves, and coercion violates people's inherent moral status by treating them as a means. Nozick's defence of libertarianism, therefore, relies precisely on the premiss that Gauthier denies—namely, that people have inherent moral status. But neither approach actually yields libertarianism. Nozick's approach explains why everyone has equal rights, regardless of their bargaining power, but cannot explain why people's rights do not include some claim on social resources. Gauthier's approach explains why the vulnerable and weak do not have a claim on resources, but can't explain why they have an equal claim to self-ownership, despite their unequal bargaining power. Treating people as ends in themselves requires more than (or other than) respecting their self-ownership (contra Nozick); treating people according to mutual advantage often requires less than respect for self-ownership (contra Gauthier).<sup>22</sup>

Let's assume, however, that mutual advantage does lead to libertarianism. Perhaps Lomasky is right that it costs too much to determine who one can enslave and who one must treat as an equal, so that the strong would agree to conventions that accord self-ownership to even the weakest person (Lomasky 1987: 77). How would this constitute a *defence* of libertarianism? On our everyday view, mutually advantageous activities are only legitimate if they respect the rights of others (including the rights of those too weak to defend their interests). It may not be advantageous for the strong to refrain from killing or enslaving the weak, but the weak have prior claims of justice against the strong. To deny this is 'a hollow mockery of the idea of justice—adding insult to injury. Justice is normally thought of not as ceasing to be relevant in conditions of extreme inequality in power but, rather, as being especially relevant in such conditions' (Barry 1989a: 163). Exploiting the defenceless is, on our everyday view, the worst injustice, whereas mutual advantage theorists say we have no obligations at all to the defenceless.

This appeal to everyday morality begs the question, since the whole point of the mutual advantage approach is that there are no natural duties to others—it challenges those who believe there is 'a real moral difference between right and wrong which all men [have] a duty to respect' (Gough 1957: 118). As Buchanan puts it, there simply is no such thing as a natural moral equality underlying our natural physical inequality, and so everyday morality is 'highly vulnerable' to empirical 'refutation' (J. Buchanan 1975: 54; cf. Gauthier 1986: 55–8). To say that Gauthier ignores our duty to protect the vulnerable is not to give an argument against his theory, for the existence of such duties is the very issue in question.

But, precisely because it abandons the idea that people have inherent moral

status, the mutual advantage approach is not an alternative account of justice, but rather an alternative to justice. While mutual advantage may generate just outcomes under conditions of natural and technological equality, it licences exploitation wherever 'personal differences are sufficiently great', and there are no grounds within the theory to prefer justice to exploitation. If people act justly, it is not because they see justice as a value, but only because they lack 'power irresistible' and so must settle for justice. From the point of view of everyday morality, therefore, mutual advantage contractarianism may provide a useful analysis of rational self-interest or of *realpolitik*, 'but why we should regard it as a method of moral justification remains utterly mysterious' (Sumner 1987: 158; cf. Barry 1989a: 284). As Rawls says, 'to each according to his threat advantage' simply does not count as a conception of justice (Rawls 1971: 134).

None of this will perturb the mutual advantage theorist. If one rejects the idea that people or actions have inherent moral status, then moral constraints must be artificial, not natural, resting on mutually advantageous conventions. And if mutually advantageous conventions conflict with everyday morality, then 'so much the worse for morality' (Morris 1988: 120). Mutual advantage may be the best we can hope for in a world without natural duties or objective moral values.

The mutual advantage approach will be attractive to those who share its scepticism about moral claims. Most political philosophy in the Western tradition, however, shares the opposite view that there are obligation-generating rights and wrongs which all persons have a duty to respect. I share this assumption. It is true that our claims about natural duties are not observable or testable, but different kinds of objectivity apply to different areas of knowledge, and there is no reason to expect or desire that moral duties have the same kind of objectivity as the physical sciences. As Nagel says, 'if any values are objective, they are objective *values*, not objective anything else' (Nagel 1980: 98).

Even if we can identify such norms of justice, there remains the difficult question of *motivation*: why should I care about what I morally ought to do? Mutual advantage theorists argue that I only have a reason to do something if the action satisfies some desire of mine, so that 'if something's being just is to count as a good reason for doing it, justice must be shown to be in the interest of the agent' (Barry 1989a: 363). If moral actions do not increase my desire satisfaction, I have no reason to perform them. This theory of rationality may be true even if there are objective moral values or natural duties. Rawls's approach may give a true account of justice, and yet 'be only an intellectual activity, a way of looking at the world that can have no motivational effect on human action' (Hampton 1986: 32).<sup>23</sup>

Why should people who possess unequal power refrain from using it in

their own interests? Buchanan argues that the powerful will treat others as moral equals only if they are 'artificially' motivated to do so 'through general adherence to internal ethical norms' (J. Buchanan 1975: 175–6). And indeed Rawls does invoke 'adherence to internal ethical norms'—namely a pre-existing disposition to act justly—in explaining the rationality of moral action (Rawls 1971: 487–9). Similarly, Brian Barry argues that the desire to behave in ways that respect others as moral equals 'must be admitted as an irreducible motive' (Barry 1989a: 167). In calling this appeal to internal ethical norms 'artificial', Buchanan implies that Rawls and Barry have failed to find a 'real' motivation for acting justly. But why shouldn't our motivation for acting justly be a moral motivation? Why shouldn't we say, with Kant, that morality 'is a sufficient and *original* source of determination within us' that does not need 'a ground of determination external to itself'? (Kant, quoted in Riley 1982: 251 n. 47). Why cannot people be motivated to act morally simply by coming to understand the moral reasons for doing so?

This may seem 'artificial' to those who accept a mutual advantage view of rationality, but the acceptability of that view is precisely what is at issue. As Barry notes, the Hobbesian equation of rationality with the efficient pursuit of self-interest is 'pure assertion'. While 'it is not possible to refute egoism in the literal sense of showing it to be logically inconsistent', the recognition that others are fundamentally like ourselves in having needs and goals gives us 'powerful reasons for accepting the claims of impartial morality' (Barry 1989a: 285, 273). The 'proof' of moral equality, therefore, is based on 'what we might call human consistency', and the 'virtually unanimous concurrence of the human race in caring about the defensibility of actions in a way that does not simply appeal to power' suggests that this 'human consistency' is indeed a powerful motivation (Barry 1989a: 288, 285, 174–5).<sup>24</sup>

Of course, even if we accept the possible existence of irreducibly moral motivations, this does not yet tell us anything about how effective these moral motivations are. Is the recognition that other people are like ourselves sufficient to motivate us to accept the sorts of sacrifices or burdens which moral equality may require? Are liberal theories of justice unrealistic in the extent to which they expect people to give precedence to moral reasons over self-interested reasons? I will return to this question in subsequent chapters, since one of the major concerns of communitarians, civic republicans, and feminists has been that liberals offer an inadequate account of our moral motivation.

These are difficult issues, and some people will remain sceptical about the existence of moral duties and/or moral motivations. If so, then mutual advantage may be all we have with which to construct social rules. But none of this helps the libertarian, for mutually advantageous conventions may often be non-libertarian. Some people will have the ability to coerce others,

violating their self-ownership, and some people will have the ability to take other's property, violating their property-ownership. Mutual advantage, therefore, provides only a very limited defence of property rights, and what little defence it does provide is not a recognizably moral defence.

#### 4. LIBERTARIANISM AS LIBERTY

Some people argue that libertarianism is not a theory of equality or mutual advantage. Rather, as the name suggests, it is a theory of *liberty*. On this view, equality and liberty are rivals for our moral allegiance, and what defines libertarianism is precisely its avowal of liberty as a foundational moral premiss, and its refusal to compromise liberty with equality (unlike the welfare state liberal).

This is not a plausible interpretation of Nozick's theory. Nozick does say that we are free, morally speaking, to use our powers as we wish. But this self-ownership is not derived from any principle of liberty. He does not say that freedom comes first, and that, in order to be free, we need self-ownership. He gives us no purchase on the idea of freedom as something prior to self-ownership from which we might derive self-ownership. His view, rather, is that the scope and nature of the freedom we ought to enjoy is a function of our self-ownership.

Other libertarians, however, say that libertarianism is based on a principle of liberty. What does it mean for a theory to be based on a principle of liberty, and how does such a principle serve to defend capitalism? One obvious answer is this:

1. an unrestricted market involves more freedom;
2. freedom is the fundamental value;
3. therefore, the free market is morally required.

This view, while very common in popular discourse, is not widely found in the philosophical literature, perhaps because it is very difficult to sustain. Attempts to measure freedom are notoriously complicated, as are attempts to assign an intrinsic value to freedom as such. We value different kinds of freedoms for different reasons, and the idea that we should maximize freedom as such is neither clear nor obviously desirable.

##### (a) The value of liberty

###### (i) *The role of liberty in egalitarian theories*

Let's start with premiss (2), concerning the value of liberty. Before examining the claim that liberty is a fundamental value, it is important to clarify the role of liberty in the theories we have examined so far. I have argued that utili-

itarianism, liberalism, and Nozick's libertarianism are all egalitarian theories in the sense of being premised on moral equality. While liberty is not the fundamental value in these theories, that does not mean that they are unconcerned with liberty. On the contrary, the protection of certain liberties was of great importance in each theory. This is obvious in the case of Nozick, who emphasizes the formal liberties of self-ownership, and Rawls, who assigns lexical priority to the basic civil and political liberties. But it is also true of most utilitarians, like Mill, who felt that utility was maximized by according people the freedom to choose their own way of life.

In deciding which liberties should be protected, theorists of moral equality situate these liberties within an account of equal concern for people's interests. They ask whether a particular liberty promotes people's interests; if so, then it should be promoted because people's interests should be promoted. For example, if each person has an important interest in the freedom to choose their marital partner, then denying someone that liberty denies her the respect and concern she is entitled to, denies her equal standing as a human being whose well-being is a matter of equal concern. Defending a particular liberty, therefore, involves answering the following two questions:

- (a) which liberties are important, given our account of people's interests?
- (b) what distribution of important liberties gives equal consideration to each person's interests?

In other words, egalitarian theorists ask how a particular liberty fits into a theory of people's interests, and then ask how a distribution of that liberty fits into a theory of equal concern for people's interests. In Rawls's case, for example, we ask what scheme of liberties would be chosen from a contracting position that represents impartial concern for people's interests. In this way, particular liberties can come to play an important role in theories of moral equality. I will call this the 'Rawlsian approach' to assessing liberties.

Mutual advantage theories assess liberty in a similar way. Like Rawls, they ask which particular liberties promote people's interests, and then ask what distribution of these liberties follows from a proper weighing of people's interests. The only difference is that in mutual advantage theories people's interests are weighed according to their bargaining power, not according to impartial concern. In Gauthier's case, for example, we ask what scheme of liberties would be agreed to by contractors negotiating for mutual advantage on the basis of their interests.

As we have seen, many libertarians defend their preferred liberties (e.g. the freedom to exercise one's talents in the market) in one of these two ways. Indeed, some of the libertarians who say that their theory is 'liberty-based' also defend their preferred liberties in terms of consideration for people's interests, weighed according to the criteria of equality or mutual advantage.

They call that a liberty-based argument, to emphasize their belief that our essential interest is an interest in certain kinds of liberty, but this new label does not affect the underlying argument. And, regardless of the label, assessing liberties in terms of either moral equality or mutual advantage will not yield libertarianism, for reasons I have discussed.

Can the defence of libertarianism be liberty-based in a way that is genuinely different from a defence based on equality or mutual advantage? What would it mean for libertarians to defend their preferred freedoms by appealing to a principle of liberty? There are two possibilities. One principle of liberty is that freedom should be maximized in society. Libertarians who appeal to this principle defend their preferred liberties by claiming that the recognition of these particular liberties maximizes freedom in society. The second principle of liberty is that people have a right to the most extensive liberty compatible with a like liberty for all. Libertarians who appeal to this principle defend their preferred liberties by claiming that recognizing these particular liberties increases each person's overall freedom. I will argue that the first principle is absurd, and has no attraction to anyone, including libertarians; and the second principle is either a confused way of restating the egalitarian argument, or it rests on an indeterminate and unattractive conception of freedom. Moreover, even if we accept the absurd or unattractive interpretations of the principle of liberty, they still will not defend libertarianism.

### (ii) *Teleological liberty*

The first candidate for a foundational principle of liberty says that we should aim to maximize the amount of freedom in society. If freedom is the ultimate value, why not have as much of it as possible? This is the way teleological utilitarians argue for the maximization of utility, so I will call this the 'teleological' liberty principle. But, as we saw in Chapter 2, this sort of theory loses touch with our most basic understanding of morality. Because teleological theories take concern for the good (e.g. freedom or utility) as fundamental, and concern for people as derivative, promoting the good becomes detached from promoting people's interests. For example, we could increase the amount of freedom in society by increasing the number of people, even if each person's freedom is unchanged. Yet a more populous country is not, for that reason alone, more free in any morally relevant sense.

Indeed, it may be possible to promote the good by sacrificing people. For example, a teleological principle could require that we coerce people to bear and raise children and thereby increase the population. This deprives existing people of a freedom, but the result would increase the overall amount of freedom, since the many freedoms of the new population outweigh the loss of one freedom amongst the earlier population. The principle could also justify unequally distributing liberties. If five people enslave me, there is no reason to

assume that the loss of my freedom outweighs the increased freedom of the five slave-owners. They may gain more options or choices collectively from the freedom to dispose of my labour than I lose (assuming that it is possible to measure such things—see pp. 143–5 below). No libertarian supports such policies, for they violate fundamental rights.

Whatever libertarians mean by saying their theory is liberty-based, it cannot be this. Yet this is a natural interpretation of the claim that freedom is the fundamental value, and it is encouraged by the libertarian's rhetorical rejection of equality. Libertarians believe in equal rights of self-ownership, but many of them do not want to defend this by appeal to any principle of equality. They try to find a liberty-based reason for equally distributing liberties. Thus some libertarians say that they favour equal liberties because they believe in freedom, and since each individual can be free, each individual should be free.<sup>25</sup> But if this really was the explanation of the libertarian commitment to equal liberty, then they should increase the population, since future people too can be free. Libertarians reject increasing the overall amount of freedom through increasing the population, and they reject it for the same reason they reject increasing the overall amount of freedom by unequally distributing liberties—namely, their theory is equality-based. As Peter Jones puts it, 'to prefer equal liberty to unequal liberty is to prefer equality to inequality, rather than freedom to unfreedom' (Jones 1982: 233). So long as libertarians are committed to equal liberty for each person, they are adopting an equality-based theory.

### (iii) *Neutral liberty*

The second, and more promising, candidate for a foundational principle of liberty says that each person is entitled to the most extensive liberty compatible with a like liberty for all. I will call this the 'greatest equal liberty' principle. This principle works within the general framework of an egalitarian theory, since now equal liberty cannot be sacrificed for a greater overall liberty, but it is importantly different from the Rawlsian approach (p. 139 above). The Rawlsian approach assessed particular liberties by asking how they promote our interests. The greatest equal liberty approach assesses particular liberties by asking how much freedom they give us, on the assumption that we have an interest in freedom as such, in maximizing our overall freedom. Both approaches connect the value of particular liberties to an account of our interests. But the Rawlsian approach did not say that we have an interest in freedom as such, or that our interest in any particular liberty corresponds to how much freedom it contains, or that it even makes sense to compare the amount of freedom contained in different liberties. Different liberties promote different interests for many different reasons, and there is no reason to assume that the liberties which are most valuable to us are the ones

with the most freedom. The greatest equal liberty approach, however, says that the value of any particular liberty just is how much freedom it contains, for our interest in particular liberties stems from our interest in freedom as such. Unlike the Rawlsian approach, judgements of the value of different liberties require, and are derived from, judgements of greater or lesser freedom.

If libertarianism appeals to this greatest equal liberty principle, then it is not a 'liberty-based' theory in the strict sense, for (unlike a teleological liberty-based theory) rights to liberty are derived from the claims of people to equal consideration. But it is liberty-based in a looser sense, for (unlike the Rawlsian approach to liberty) it derives judgements of the value of particular liberties from judgements of greater or lesser freedom. Can the libertarian defend his preferred liberties by appeal to the greatest equal liberty principle? Before we can answer that question, we need some way of measuring freedom, so that we can determine whether the free market, for example, maximizes each individual's freedom.

In order to measure freedom, we need to define it. There are many definitions of freedom in the literature, but some of these definitions can be excluded for our purposes. For example, some people define freedom in terms of the exercise of our *rights*. Whether or not a restriction decreases our freedom depends on whether or not we had a right to do the restricted thing. For example, preventing someone from stealing is not a restriction on their liberty, on this view, since they had no right to steal. This is a 'moralized' definition of liberty, since it presupposes a prior theory of rights. This sort of moralized definition reflects a very common way of talking about freedom in everyday discourse. However, it cannot be used here. If the greatest equal liberty principle is to be foundational, such 'moralized' definitions must be excluded. If we are trying to derive rights from judgements of greater or lesser liberty, our definition of liberty cannot presuppose some principle of rights. Libertarians who appeal to the greatest equal liberty principle believe that whether we have a right to appropriate unowned resources, for example, depends on whether that right increases each person's freedom. But on a moralized definition of freedom, we first need to know whether people have a right to appropriate unowned resources in order to know whether a restriction on appropriation is a restriction on their freedom.

So if the greatest equal liberty principle is to do any work, we need to define liberty in a non-moralized way—as the presence of options or choices, for example—without assuming that we have a right to exercise those options. We can then assign rights so as to maximize each individual's freedom, compatible with a like freedom for all. Hence whether people have a right to appropriate previously unowned natural resources depends on whether according that right increases or decreases each person's freedom (cf. Sterba 1988: 11–15).

However, there are two different ways to give a non-moralized definition of liberty, which offer two different criteria for determining whether a particular liberty increases someone's overall freedom. The first 'neutral' view offers a purely quantitative measure of freedom, based on a simple counting up of possible actions or choices. The second 'purposive' view offers a more qualitative measure of freedom, based on some assessment of the value or importance of these different options.

Let's start with the 'neutral' view. On this view, we are free in so far as no one prevents us from acting on our (actual or potential) desires. This is a non-moralized definition since it does not presuppose that we have a right to act on these desires. Using this definition we may be able to make comparative judgements about the quantity of one's freedom. One can be more or less free, on this definition, since one can be free to act on some but not other desires. If we can make such quantitative judgements about the amount of freedom provided by different rights, then we can determine which rights are most valuable. If the principle of greatest equal liberty employs this definition of freedom, then each person is entitled to the greatest amount of neutral freedom compatible with a like freedom for all.

Does this provide a plausible standard for assessing the value of different liberties? There are two potential problems here. First, our intuitive judgements about the value of different liberties do not seem to be based on quantitative judgements of neutral freedom. Compare the inhabitants of London with citizens of an underdeveloped communist country like Albania (prior to 1989). We normally think of the average Londoner as better off in terms of freedom. After all, she has the right to vote, and practise her religion, as well as other civil and democratic liberties. The Albanian lacks these. On the other hand, Albania does not have many traffic lights, and those people who own cars face few if any legal restrictions on where or how they drive. The fact that Albania has fewer traffic restrictions does not change our sense that Albanians are worse off, in terms of freedom. But can we explain that fact by appealing to a quantitative judgement of neutral freedom?

If freedom can be neutrally quantified, so that we can measure the number of times each day that traffic lights legally prevent Londoners from acting in a certain way, there is no reason to assume that these will outnumber the times that Albanians are legally prevented from practising religion in public. As Charles Taylor (from whom I have taken the example) puts it, 'only a minority of Londoners practice some religion in public places, but all have to negotiate through traffic. Those who do practice a religion generally do so on one day of the week, while they are held up at traffic lights every day. In sheer quantitative terms, the number of acts restricted by traffic lights must be greater than that restricted by a ban on public religious practice' (Taylor 1985a: 219).

Why do we not accept Taylor's 'diabolical defence' of Albanian freedom—

why do we think that the Londoner is better off in terms of freedom? The answer, presumably, is that restrictions on civil and political liberty are more important than restrictions on traffic mobility. They are more important, not because they involve *more freedom*, neutrally defined, but because they involve *more important freedoms*. They are more important because, for example, they allow us to have greater control over the central projects in our lives, and so give us a greater degree of self-determination, in a way that traffic freedoms do not, whether or not they involve a smaller quantity of neutral freedom.

The neutral view of liberty says that each neutral freedom is as important as any other. But when we think about the value of different liberties in relation to people's interests, we see that some liberties are more important than others, and indeed some liberties are without value entirely—e.g. the freedom to libel others (Hart 1975: 245). Our theory must be able to explain the distinctions we make amongst different kinds of liberty.

The problems for neutral freedom go still deeper. The required judgements of greater or lesser freedom may be impossible to make, for there is no scale on which to measure quantities of neutral freedom. I said earlier that if we could count the number of free acts restricted by traffic laws and political censorship, traffic laws would probably restrict more free acts. But the idea of a 'free act' is an elusive one. How many free acts are involved in the simple waving of a hand? If a country outlaws such waving, how many acts has it forbidden? How do we compare that to a restriction on religious ceremonies? In each case, we could, with equally much or little justification, say that the laws have outlawed one act (waving a hand, celebrating religious belief), or that they have outlawed an infinite number of acts, which could have been performed an infinite number of times. But the principle of greatest equal liberty requires the ability to discriminate between these two cases. We need to be able to say, for example, that denying religious ceremonies takes away five units of free acts, whereas denying waving of one's hand takes away three. But how we could go about making such judgements is quite mysterious. As O'Neill puts it, 'We can, if we want to, take any liberty—e.g. the liberty to seek public office or the liberty to form a family—and divide it up into however many component liberties we find useful to distinguish—or for that matter into more than we find it useful to distinguish' (O'Neill 1980: 50). There is no non-arbitrary way of dividing up the world into actions and possible actions which would allow us to say that more neutral freedom is involved in denying free traffic movement than denying free speech. (The one exception involves comparing two essentially identical sets of rights, where the second set contains all the neutral freedoms in the first set, plus at least one more free act—see Arneson 1985: 442–5.)

Traffic laws and political oppression both restrict free acts. But any attempt to weigh the two on a single scale of neutral freedom, based on some

individuation and measurement of free acts, is implausible. There may be such a scale, but those libertarians who endorse a neutral version of the greatest equal liberty principle have not made many strenuous attempts to develop such a scale.<sup>26</sup> Moreover, as I discuss below in section 4*b*, there is no reason to assume that such a scale, if it could be defined, would support libertarianism.

#### (iv) *Purposive liberty*

Our most valued liberties (the ones that make us attracted to a principle of greatest equal liberty) do not seem to involve the greatest neutral freedom. The obvious move, for advocates of the greatest equal liberty principle, is to adopt a 'purposive' definition of liberty. On such a definition, the amount of freedom contained in a particular liberty depends on how important that liberty is to us, given our interests and purposes. As Taylor puts it, 'Freedom is important to us because we are purposive beings. But then there must be distinctions in the significance of different kinds of freedom based on the distinction in the significance of different purposes' (Taylor 1985*a*: 219). For example, religious liberty gives us more freedom than traffic liberty because it serves more important interests, even if it does not contain quantitatively more neutral freedom.<sup>27</sup>

A purposive definition of freedom requires some standard for assessing the importance of a liberty, in order to measure the amount of freedom it contains. There are two basic standards—a 'subjective' standard says the value of a particular liberty depends on how much an individual desires it; an 'objective' standard says that certain liberties are important whether or not a particular person desires them. The latter is often thought to be preferable because it avoids the problem of the 'contented slave' who does not desire legal rights, and hence, on a subjective standard, does not lack any important freedoms.

On either view, we assess someone's freedom by determining how valuable (subjectively or objectively) her specific liberties are. Those liberties that are more highly valued contain, for that reason, more purposive freedom. On the purposive version of the greatest equal liberty principle, therefore, each person is entitled to the greatest possible amount of purposive liberty compatible with a like liberty for all. Like the Rawlsian approach to assessing liberties, this allows for qualitative judgements of the value of particular liberties, but it differs from the Rawlsian approach in supposing that these liberties must be assessed in terms of a single scale of freedom.

This is more attractive than the neutral version, for it corresponds with our everyday view that some neutral freedoms are more valuable than others. The problem, however, is that the whole language of greater and lesser freedom is no longer doing any work in the argument. The purposive version of the greatest equal liberty principle is in fact just a confused way of restating the

Rawlsian approach. It seems to differ in saying that the reason we are entitled to important liberties is that we are entitled to the greatest amount of equal liberty, a step that is absent in the Rawlsian approach. But that step does not work in the argument, and indeed simply confuses the real issues.

The principle of greatest equal liberty provides the following argument for protecting a particular liberty:

1. each person's interests matter and matter equally.
2. people have an interest in the greatest amount of freedom.
3. therefore, people should have the greatest amount of freedom, consistent with the equal freedom of others.
4. the liberty to *x* is important, given our interests.
5. therefore, the liberty to *x* increases our freedom.
6. therefore, each person ought (*ceteris paribus*) to have the right to *x*, consistent with everyone else's right to *x*.

Contrast that with the Rawlsian argument:

1. each person's interests matter and matter equally.
4. the liberty to *x* is important, given our interests.
6. therefore, each person ought (*ceteris paribus*) to have the right to *x*, consistent with everyone else's right to *x*.

The first argument is a needlessly complex way of stating the second argument. The step from (4) to (5) adds nothing (and, as a result, steps (2) and (3) also add nothing). Libertarians, on this view, say that because a particular liberty is important, therefore it increases our freedom, and we should have as much freedom as possible. But, in fact, the argument for the liberty is completed with the assessment of its importance.

Consider Loewinson's theory of measuring freedom, which uses a subjective standard for measuring purposive freedom. He says that 'when force or the threat of penalties is used to prevent someone from pursuing some possible course of action, the degree to which his liberty is thereby curtailed depends . . . on how important the course of action in question is to him' (Loewinson 1977: 343; cf. Arneson 1985: 428). Hence the more I desire a liberty, the more freedom it provides me. If I desire religious liberty more than traffic liberty, because it promotes important spiritual interests, then it gives me more freedom than traffic liberty. But Loewinson does not explain what is gained by shifting from the language of 'a more desired liberty' to 'more freedom'. This redescription (the move from (4) to (5) in the above argument) adds nothing, and so the principle of greatest equal liberty ((2) and (3) above) is doing no work. I do not mean that it is impossible or illegitimate to redescribe more desired liberties as more extensive freedom, but the fact that we can redescribe them in this way does not mean that we have said anything of

moral significance, or that we have found a distinctly liberty-based way of assessing the value of particular liberties.

The greatest equal liberty premiss is not only unnecessary, it is confusing, for a number of reasons. For one thing, it falsely suggests that we have just one interest in liberty. Saying that we evaluate different liberties in terms of how much purposive freedom they provide suggests that these different liberties are important to us for the same reason, that they all promote the same interest. But in fact different liberties promote different interests in different ways. Religious liberties are important for self-determination—i.e. for acting on my deepest values and beliefs. Democratic liberties often serve a more symbolic interest—denying me the vote is an assault on my dignity, but may have no effect on my ability to pursue my goals. Some economic liberties have a purely instrumental value—I may desire free trade between countries because it reduces the price of consumer goods, but I would support restrictions on international trade if doing so lowered prices. I do not desire these different liberties for the same reason, and the strength of my desire is not based on the extent to which they promote a single interest.<sup>28</sup> Again, it is possible to redescribe these different interests as an interest in a more extensive purposive freedom, but it is needlessly confusing.

Moreover, talking about our interest in more extensive freedom, as opposed to our different interests in different liberties, obscures the relationship between freedom and other values. Whatever interest we have in a particular liberty—be it intrinsic or instrumental, symbolic or substantive—it is likely that we have the same interest in other things. For example, if the freedom to vote is important for its effect on our dignity, then anything else that promotes our dignity is also important (e.g. meeting basic needs, or preventing libel), and it is important for the very same reason. The defender of purposive freedom says that our concern is with important liberties, not just any old neutral liberty. But if we look at what makes liberties important to us, then freedom no longer systematically competes with other values like dignity, or material security, or autonomy, for these often are the very values which make particular liberties important. Describing more important liberties as more extensive freedom, however, invites this false contrast, for it pretends that the importance of particular liberties stems from the amount of freedom they contain.

So neither version of the greatest equal liberty principle offers a viable alternative to the Rawlsian approach to assessing liberties. It is worth noting that Rawls himself once endorsed a right to the most extensive equal liberty, and it was only in the final version of his theory that he adopted what I have called the Rawlsian approach. He now defends a principle of equal rights to 'basic liberties', while disavowing any claims about the possibility, or significance, of measurements of overall freedom (Rawls 1982a: 5–6; Hart 1975:

233–9). He recognized that in determining which are the basic liberties, we do not ask which liberties maximize our possession of a single commodity called ‘freedom’. His earlier claim that people should be maximally free was ‘merely elliptical for the claim that they [should be] free in every important respect, or in most important respects’ (MacCallum 1967: 329). But as Rawls now recognizes, once we say this, then the principle of greatest equal liberty does no work. For the reason it is important to be free in a particular respect is not the amount of freedom it provides, but the importance of the various interests it serves. As Dworkin puts it,

if we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats. (Dworkin 1977: 271)

In making liberty-claims, therefore, we are entitled, not to the greatest equal amount of this single commodity of freedom, but to equal consideration for the interests that make particular liberties important.<sup>29</sup>

### (b) Freedom and capitalism

It is often thought that libertarianism can best be understood and defended in terms of some principle of liberty. So far, I have considered three possible definitions of liberty that could be used in this defence. Moralized definitions will not work, because they presuppose a theory of rights. The neutral definition is not promising, because quantitative measurements of neutral freedom lead to indeterminate or implausible results. And the purposive definition simply obscures the real basis of our assessment of the value of liberties.

Some readers may feel a certain impatience at this point. Whatever the conceptual niceties, they might think, surely there is some important connection between freedom and the free market, or between liberty and libertarianism. Surely, in the end, is it not true that what distinguishes left-liberals from libertarians is that the former favour more government restrictions on individual freedom? This assumption is deeply ingrained in both academic and popular discourse. Anthony Flew, for example, claims that whereas liberals and socialists favour government restrictions, libertarianism is ‘opposed to any social and legal constraints on individual freedom’ (Flew 1979: 188; cf. Rothbard 1982: p. v). Flew thus identifies the welfare state with restrictions on freedom, and capitalism with the absence of restrictions on freedom.

This equation of capitalism with unrestricted freedom is even shared by some defenders of the welfare state, who agree that redistributive policies are a compromise between freedom and equality, and acknowledge that anyone who believed only in freedom should endorse capitalism.

But is it true that the free market involves more freedom than the welfare state? In order to assess this claim, we need first to define freedom. Flew seems to be assuming a non-moralized neutral definition of freedom. By eliminating welfare state redistribution, the free market eliminates some legal constraints on the disposal of one’s resources, and thereby creates some neutral freedoms. For example, if government funds a welfare programme by an 80 per cent tax on inheritance and capital gains, then it prevents people from giving their property to others. Flew does not tell us how much neutral freedom would be gained by removing this tax, but it clearly would allow someone to act in a way they otherwise could not. This expansion of neutral freedom is the most obvious sense in which capitalism increases freedom, but many of these neutral freedoms will also be valuable purposive freedoms, for there are important reasons why people might give their property to others. So capitalism does provide certain neutral and purposive freedoms unavailable under the welfare state.

However, we need to be more specific about this increased liberty. Every claim about freedom, to be meaningful, must have a triadic structure—it must be of the form ‘X is free from Y to do Z’, where X specifies the agent, Y specifies the preventing conditions, and Z specifies the action. Every freedom claim must have these three elements: it must specify who is free to do what from what obstacle (MacCallum 1967: 314). Flew has told us the last two elements—his claim concerns the freedom to dispose of property without legal constraint. But he has not told us the first—i.e. who has this freedom? As soon as we ask that question, Flew’s equation of capitalism with freedom is rendered problematic. For it is the owners of the resource who are made free to dispose of it, while non-owners are deprived of that freedom. Suppose that a large estate you would have inherited (in the absence of an inheritance tax), now becomes a public park or a low-income housing project (as a result of the tax). The inheritance tax does not *eliminate* the freedom to use the property, rather it *redistributes* that freedom. If you inherit the estate, then you are free to dispose of it as you see fit, but if I use your backyard for my picnic or garden without your permission, then I am breaking the law, and the government will intervene and coercively deprive me of the freedom to continue. On the other hand, my freedom to use and enjoy the property is increased when the welfare state taxes your inheritance to provide me with affordable housing or a public park. So the free market legally restrains my freedom, while the welfare state increases it. Again, this is most obvious on a neutral definition of freedom, but many of the neutral freedoms I gain from the inheritance tax are also important purposive ones.<sup>30</sup>

That property rights increase some people’s freedom by restricting others’ is obvious when we think of the origin of private property. When Amy unilaterally appropriated land that had previously been held in common, Ben was



legally deprived of his freedom to use the land. Since private ownership by one person presupposes non-ownership by others, the 'free market' restricts as well as creates liberties, just as welfare state redistribution both creates and restricts liberties. Hence, as Cohen puts it, 'private property is a distribution of freedom *and* unfreedom' (Cohen 1981: 227). As a result, 'the sentence "free enterprise constitutes economic liberty" is demonstrably false' (Cohen 1979: 12; cf. Gibbard 1985: 25; Goodin 1988: 312–13).

This undermines an important claim Nozick makes about the superiority of his theory of justice to liberal redistributive theories. He says that Rawls's theory cannot be 'continuously realized without continuous interference in people's lives' (Nozick 1974: 163). This is because people, left to their own devices, will engage in free exchanges that violate the difference principle, so that preserving the difference principle requires continually intervening in people's exchanges. Nozick claims that his theory avoids continuous interference in people's lives, for it does not require that people's free exchanges conform to a particular pattern, and hence does not require intervening in those exchanges.<sup>31</sup> Unfortunately, the system of exchanges which Nozick protects *itself* requires continuous interference in people's lives. It is only continuous state intervention that prevents people from violating Nozick's principles of justice. Nozick's property rights, therefore, just as much as Rawls's difference principle, can only be preserved by continuous interference in people's lives.

Since property rights entail legal restrictions on individual freedom, anyone like Flew who claims to oppose 'any social or legal constraints on individual freedom' should presumably reject state-enforced property rights, and endorse anarchism instead. But libertarians are not anarchists: they strongly believe that the state should impose constraints on individual freedom to uphold property rights.

Some libertarians might argue that the freedom acquired by the property-owner is greater than the freedom lost to others. But it is not clear how we would make such a measurement. And even if we could make this measurement, it is not clear how this would relate to the 'greatest equal liberty' principle. Increasing overall freedom by granting freedom to some at the expense of others seems to violate, not uphold, the greatest equal liberty principle, which says that people should have the greatest amount of freedom *consistent with the equal freedom of others*. Even if upholding property rights creates more freedom for property-owners than is lost to others, this is hardly a way of increasing equal liberty, unless there is some provision to ensure that everyone owns equal amounts of property.<sup>32</sup>

In any event, most libertarians do not claim that the free market creates more freedom than it takes away. They argue, with Flew, that it does not create any unfreedom at all: that capitalism involves no restrictions on individual

freedom. How can libertarians say this? The answer is that they have shifted to a moralized definition of freedom, which defines freedom in terms of the exercise of one's rights. The freedom of non-owners is not lessened in any way when they are prevented from trespassing on my property because they had no right to trespass. Since they had no right to trespass on my property, their (moralized) freedom is not diminished by the enforcement of my property rights.

Much of the popular rhetoric about how the free market increases freedom is dependent on this moralized definition of freedom. On any non-moralized definition of freedom, private property creates both freedom and non-freedom. On a moralized definition, however, we can say that the free market imposes no restrictions on anyone's freedom, since it only prevents people from doing what they have no right to do (i.e. make use of other people's property).

Of course, once libertarians adopt this moralized definition, the claim that the free market increases people's freedom requires a prior argument for the existence of property rights, an argument which cannot itself be liberty-based. To defend the claim that the free market increases freedom, morally defined, libertarians must show that people have a right to property. But this is not an argument from liberty to property rights. On the contrary, the liberty claim presupposes the existence of property rights—property rights only increase freedom if we have some prior and independent reason to view such rights as morally legitimate. And I have suggested that existing attempts to defend such rights by appeal to self-ownership or mutual advantage have failed.

In any event, once we define liberty as the freedom to do what one has a moral right to do, then liberty can no longer play a role in deciding between competing theories of rights. Every theory can argue that a government which acts on its conception of people's moral rights is not restricting (moralized) liberty. If one accepts the libertarian claim that people have a moral right to acquire absolute property rights over unequal amounts of the world, then capitalism involves no restriction on (moralized) freedom. But if we accept instead the liberal egalitarian view that people have no moral right to the benefits which accrue from their undeserved talents, then it is the welfare state which involves no restrictions on (moralized) freedom. If people do not have a moral right to benefit from their undeserved natural advantages, then the welfare state does not restrict any (moralized) freedom when it redistributes resources from the advantaged to the disadvantaged. Saying that people should be free to do what they have a right to do is of no help in resolving this dispute between liberals and libertarians. We can only choose between their accounts of moralized freedom by first choosing between their accounts of our moral rights.

We can now see the flaw in standard libertarian claims that equate the

welfare state with restrictions on freedom, and capitalism with the absence of restrictions on freedom. This claim trades on inconsistent definitions of freedom. Libertarians invoke the non-moralized definition of freedom when arguing that the welfare state restricts the freedom of property-owners. This claim is true, but capitalism equally restricts people's freedom on the non-moralized definition. To avoid this problem, libertarians shift to the moralized definition when arguing that capitalism does not restrict the freedom of non-owners.<sup>33</sup> That claim would be true if we accepted Nozick's or Gauthier's arguments in defence of property rights, but is not itself a reason to accept those arguments. So the usual claim that the welfare state restricts freedom whereas capitalism does not restrict freedom depends on shifting definitions of freedom halfway through the argument.

To properly sort out the relationship between capitalism and freedom, we need to pick one definition of freedom and stick to it. Can any definition of liberty, used consistently, support the claim that libertarianism provides greater equal freedom than a liberal redistributive regime?

What if libertarians stick consistently to the neutral definition of liberty, and claim that the free market increases one's overall amount of neutral freedom? First, one must show that the gains in neutral liberty from allowing private property outweigh the losses. It is not clear that this is true, or even that it is possible to carry out the required measurements. Moreover, even if capitalism did increase one's neutral freedom, we would still want to know how important these neutral freedoms are. If our attachment to the free market is only as strong as our attachment to the freedom to libel others, or to run through red lights, then we would not have a very strong defence of capitalism.

What if libertarians adopt the purposive definition, and claim that the free market provides us with the most important liberties? It is certainly true that control of property is essential to pursuing our purposes in life, and helps us achieve some measure of autonomy and privacy in our lives.<sup>34</sup> But unrestricted property rights only promote one's most important purposes if one actually has property. Being free to bequeath property can promote your most important purposes, but only if you have property to bequeath. So whatever the relationship between property and purposive freedom, the aim of providing the greatest equal freedom suggests an equal distribution of property, not unrestricted capitalism. Nozick denies this, by saying that formal rights of self-ownership are the most important liberties even to those who lack property. But, as we have seen, the notion of dignity and agency that Nozick relies on, based on the idea of acting on one's conception of oneself, requires control of resources as well as one's person. Having independent access to resources is important for our purposes, and hence our purposive freedom, and that argues for liberal equality not libertarianism.

What if libertarians stick to the moralized definition of liberty, and claim that the free market provides the freedom we have a right to? On a moralized definition, we can only say that respecting a certain liberty increases our freedom if we already know that we have a right to that liberty. I do not believe that libertarians have given us a plausible argument that there is such a moral right to unrestricted property-ownership. Such a right is unlikely to come out of a plausible theory of moral equality (because it allows undeserved inequalities to have too much influence), nor will it come out of a plausible theory of mutual advantage (because it allows undeserved inequalities to have too little influence). It is difficult to see how any other argument can avoid these objections. But even if we come up with a plausible conception of equality or mutual advantage which includes capitalist property rights, it is confusing to then say that it is an argument about freedom.

So it seems to me that none of the three definitions of liberty supports the view that libertarianism increases freedom. The failure of these three approaches suggests that the very idea of a liberty-based theory is confused. Our commitment to certain liberties does not derive from any general right to liberty, but from their role in the best theory of moral equality (or mutual advantage). The question we should ask is which specific liberties are most valuable to people, given their essential interests, and which distribution of those liberties is legitimate, given the demands of equality or mutual advantage. The idea of freedom as such, and lesser or greater amounts of it, does no work in political argument.

Scott Gordon objects to this elimination of 'freedom' as a category of political evaluation, and its replacement with the evaluation of specific freedoms: 'If one is driven . . . to greater and greater degrees of specification, freedom as a philosophical and political problem would disappear, obscured altogether by the innumerable specific "freedoms"' (Gordon 1980: 134). But, of course, this is just the point. There is no philosophical and political problem of freedom as such, only the real problem of assessing specific freedoms. Whenever someone says that we should have more freedom, we must ask who ought to be more free to do what from what obstacle? Contrary to Gordon, it's not the specification of these things, but the failure to specify them, that obscures the real issues.<sup>35</sup> Whenever someone tries to defend the free market, or anything else, on the grounds of freedom, we must demand that they specify which people are free to do which sorts of acts—and then ask why those people have a legitimate claim to those liberties—i.e. which interests are promoted by these liberties, and which account of equality or mutual advantage tells us that we ought to attend to those interests in that way. We cannot pre-empt these specific disputes by appealing to any principle or category of freedom as such.

## 5. THE POLITICS OF LIBERTARIANISM

Libertarianism shares with liberal equality a commitment to the principle of respect for people's choices, but rejects the principle of rectifying unequal circumstances. Taken to the extreme, this is not only intuitively unacceptable, but self-defeating as well, for the failure to rectify disadvantageous circumstances can undermine the very values (e.g. self-determination) that the principle of respect for choices is intended to promote. The libertarian denial that undeserved inequalities in circumstances give rise to moral claims suggests a failure to recognize the profound consequences of such differences for people's capacity for choices, agency, and dignity.

In practice, however, libertarianism may have a slightly different complexion. Libertarianism gains much of its popularity from a kind of 'slippery-slope' argument which draws attention to the ever-increasing costs of trying to meet the principle of equalizing circumstances. Like Rawls, the libertarian sees the popular conception of equality of opportunity as unstable. If we think social disadvantages should be rectified, then there is no reason not to rectify natural disadvantages. But, libertarians say, while unequal circumstances may *in principle* give rise to legitimate claims, the attempt to implement that principle inevitably leads *in practice* down a slippery slope to oppressive social intervention, centralized planning, and even human engineering. It leads down the road to serfdom, where the principle of respect for choices gets swallowed up by the requirement to equalize circumstances.

Why might this be? Liberals hope to balance the twin demands of respecting choices and rectifying circumstances. In some cases, this seems unproblematic. The attempt to equalize educational facilities—e.g. to ensure that state schools in predominantly black neighbourhoods are as good as predominantly white schools—does not impinge in an oppressive way on individual choice. Removing well-entrenched inequalities between different social groups requires little intervention in, or even attention to, discrete individual choices. The inequalities are so systematic that no one could suppose that they are traceable to different choices of individuals. But the principle of equalizing circumstances applies to disparities not only between social groups, but also between individuals, and it is less obvious whether those differences are due to choices or circumstances. Consider the problem of effort. In defending the principle of ambition-sensitivity, I used the example of the gardener and the tennis-player, who legitimately come to have differential income due to differential effort. It was important for the success of that example that the two people are similarly situated—i.e. there are no inequalities in skill or education which could prejudice one person's ability to make the relevant effort. But in the real world there are always some differences in

people's background which could be said to be the cause of their different choices.

For example, differences in effort are sometimes related to differences in self-respect, which are in turn often related to people's social environment. Some children have more supportive parents or friends, or simply benefit from the contingencies of social life (e.g. not being sick for a test). These different influences will not be obvious, and any serious attempt to establish their presence will be severely invasive. Rawls says that the 'social bases of self-respect' are perhaps the most important primary good (Rawls 1971: 440), but do we want governments measuring how supportive parents are?

Moreover, rather than compensate for the effect of unequal circumstances on effort, why not ensure that there are no differential influences on effort to begin with, by bringing up children identically?<sup>36</sup> Liberals regard that as an unacceptable restriction on choice. But the libertarian fears it is a logical culmination of the liberal egalitarian commitment to equalize circumstances. The liberal wants to equalize circumstances in order to more fully respect choices, but how do we ensure that the former will not swallow the latter?

And why not extend the principle of equalizing circumstances to genetic engineering, manipulating embryos to be more equal in their endowments (Reinders 2000; Brown 2001)? Or consider biological transfers: if one person is born blind and another person is born with two good eyes, why not require the transfer of one good eye to the blind man (Nozick 1974: 207–8; Flew 1989: 159)? Dworkin points out that there is a difference between changing things so that people are treated as equals, and changing people so that they are, as changed, equal. The principle of equalizing circumstances requires the former, for it is part of the more general requirement that we treat people as equals (Dworkin 1983: 39; Williams 1971: 133–4). That is a valid distinction, but it does not avoid all the problems, for on Dworkin's own theory, people's natural talents are part of their circumstances ('things used in pursuing the good'), not part of the person ('beliefs which define what a good life is about'). So why should eye transfers count as changing people, rather than simply changing their circumstances? Dworkin says that some features of our human embodiment can be both part of the person (in the sense of a constitutive part of our identity) and part of a person's circumstances (a resource). Again that seems sensible. But the lines will not be easy to draw. Where does blood fit in? Would we be changing people if we required healthy people to give blood to haemophiliacs? I do not think so. But what then about kidneys? Like blood, the presence of a second kidney is not an important part of our self-identity, but we are reluctant to view such transfers as a legitimate demand of justice.

Again we find a slippery slope problem. Once we start down the road of equalizing natural endowments, where do we stop? Dworkin recognizes this slippery slope, and says that we might decide to draw an inviolable line

around the body, regardless of how little any particular part of it is important to us, in order to ensure that the principle of equalizing circumstances does not violate our person. Libertarians, in practice, simply extend this strategy. If we can draw a line around the person, in order to ensure respect for individual personality, why not draw a line around her circumstances as well? In order to ensure that we do not end up with identical personalities due to identical upbringing, why not say that differential circumstances do not give rise to enforceable moral claims?<sup>37</sup>

If we view libertarianism in this way, its popularity becomes more understandable. It is inhumane to deny that unequal circumstances can create unfairness, but until we can find a clear and acceptable line between choices and circumstances, there will be some discomfort at making these forms of unfairness the basis of enforceable claims. Libertarianism capitalizes on that discomfort, by suggesting that we can avoid having to draw that line.

Having said that, it is important not to exaggerate the popularity of libertarianism, or its political influence. There has undoubtedly been a shift to the right in the 1980s and 1990s in many countries, with a retrenchment of the welfare state, a backlash against 'tax and spend liberals', and the election of 'conservative' or 'New Right' parties. But it would be a mistake, I think, to suppose that these changes are motivated by distinctly libertarian beliefs. Most supporters of this shift to the right acknowledge some obligation to redress unequal opportunities, and to protect the vulnerable. Their opposition to the welfare state is not necessarily rooted in any rejection of the liberal-egalitarian goal of an ambition-sensitive, endowment-sensitive distribution. Rather, they think that the welfare state has simply failed in practice to achieve either of these goals.

On the one hand, the welfare state is widely seen as taxing hard-working citizens to subsidize the lazy or indolent who simply do not want to work—a violation of the norm of ambition-sensitivity, and of the principle that people should be responsible for their choices. Public opinion polls suggest that people today are more likely than twenty years ago to say that people on unemployment insurance or welfare benefits are responsible for their condition, rather than being the victim of misfortune or unequal opportunities.

On the other hand, the welfare state is also seen as having failed to actually remedy the disadvantages facing the poor. Whereas liberal egalitarians have traditionally assumed that redistributive policies would enable the disadvantaged to enter the mainstream of society and effectively exercise their civil and political rights, the New Right argues that the welfare state has promoted passivity amongst the poor, without actually improving their life-chances, and created a culture of dependency. Far from being the solution, the welfare state has itself perpetuated the problem, by reducing citizens to passive dependants who are under bureaucratic tutelage. Hence the welfare state has failed in

practice to remedy unequal circumstances, and may instead have entrenched the poor in their disadvantaged position.

To overcome these failings of the welfare state, the New Right suggests that we must go 'beyond entitlement', and focus instead on people's responsibility to earn a living.<sup>38</sup> Since the welfare state discourages people from becoming self-reliant, the safety net should be cut back, and any remaining welfare benefits should have obligations tied to them. This is the idea behind one of the principal reforms of the welfare system in the 1980s: 'workfare' programmes, which require welfare recipients to work for their benefits, so as to reinforce the idea that citizens should be self-supporting. This approach, it is said, would do better than the welfare state in promoting responsibility and enabling people to escape from poverty or unemployment.

In so far as these are the ideas and beliefs which underlie popular disenchantment with the welfare state, and popular support for right-wing policies, it has very little to do with libertarianism in the philosophical sense. Citizens in Western democracies have not en masse rejected the principles of liberal equality, but many no longer believe that the welfare state achieves these principles. And so the debate between right-wing and left-wing parties is not over the principle of protecting the vulnerable—that is not disputed by either side—but over empirical questions about who really is involuntarily disadvantaged, and about whether redistributive policies actually help them overcome these disadvantages.

This suggests that people who currently support right-wing parties would endorse redistributive policies if they were confident these policies would work to remedy involuntary disadvantages without subsidizing the indolent.<sup>39</sup> Unfortunately, the perceived failings of the welfare state have not only contributed to a dissatisfaction with traditional redistributive policies, but have also generated widespread distrust of the government's capacity to actually achieve social justice. As Hugh Heclo notes, 'There is now a deeply embedded cynicism about the ability of government programs to produce desired social changes. This is the result, not only of conservative rhetoric, but of hard experience as well-meaning efforts have collided with the unforgiving complexity of social reality' (quoted in King 1999: 45). Many people have come to believe that the problem does not lie in the details of particular social policies, but in the very capacity of the state to 'engineer' society. And so many people assume that any new proposals for social policy will fail, and will just be a waste of taxpayers' money.<sup>40</sup>

This decline in 'managerial optimism' is widespread throughout the Western democracies, but has proceeded much further in some countries than others. Indeed, this is one of the crucial factors in explaining variations in social policy. It is often assumed that the reason why some countries have a more modest welfare state than others is that their citizens hold distinctively

individualistic or libertarian conceptions of justice. In fact, there are only minor differences between Western countries in popular beliefs about fairness, and/or the desirability of public policies that remedy involuntary disadvantage. The more significant difference is in the extent to which citizens trust the state to successfully implement such policies and/or trust their co-citizens to cooperate with them. According to Rothstein, it is differing levels of trust, not differing principles of justice, which primarily explain the variations in support for the welfare state across the Western democracies.<sup>41</sup>

There are various reasons, then, why many citizens have supported right-wing parties which seek to retrench the welfare state. (Of course, many people simply do not like paying high taxes, but that was always true, and hence does not explain why people today have become less willing to support the welfare state than twenty years ago.) But note that none of these reasons is rooted in libertarian arguments about the sanctity of self-ownership or property rights. The major arguments between the 'left' and the 'right' today are not about the importance of either holding people responsible for their choices or remedying unequal circumstances, but about several essentially empirical questions:

- (a) to what extent are people poor because of misfortune and unequal opportunities, or because of their own choices? If we redistribute money to the poor are we helping the victims of unequal circumstances (as the left tends to believe) or subsidizing expensive tastes and irresponsible choices (as the right tends to believe)?
- (b) has the welfare state helped the poor overcome their disadvantage and participate in society (as the left tends to believe), or has it created a class of welfare dependants caught in a poverty trap who are marginalized (as the right tends to believe)?
- (c) in cases where the condition of the poor is partly due to their own choices and partly due to unequal circumstances, which comes first? Should we insist that the poor prove they are capable of acting responsibly before they are eligible for assistance (as the right tends to believe), or should we equalize their circumstances before we hold them responsible for their choices (as the left tends to believe)?
- (d) does the state have the capacity to remedy involuntary disadvantages (as the left tends to believe), or are the sources of social ills like poverty, homelessness, high school drop-out rates, and so on so complex that state attempts to solve them will generally fail, and often worsen the problem (as the right tends to believe)?

These are all complex issues, not easy to resolve.<sup>42</sup> But none of the right-wing positions appeals to libertarian principles. Most right-wing arguments accept the desirability, in principle, of remedying unequal circumstances, but dispute the size of these inequalities, and the success of the welfare state in remedying

them. For libertarians, by contrast, the state has no obligation to remedy unequal circumstances. Indeed, libertarians insist that the state is *prohibited* from even trying to remedy such circumstances, since these attempts would violate sacred property rights. That sort of libertarian position is not widespread even in 'right-wing' circles, a fact acknowledged and bemoaned by many libertarians.<sup>43</sup>

## GUIDE TO FURTHER READING

For collections of recent libertarian thought, see Tibor Machan and Douglas Rasmussen (eds.), *Liberty for the Twenty-First Century: Contemporary Libertarian Thought* (Rowman and Littlefield, 1995), and David Boaz (ed.), *The Libertarian Reader: Classic and Contemporary Writings from Lao-tzu to Milton Friedman* (Free Press, 1997). The latter volume contains an extensive annotated bibliography to libertarian thought. Norman Barry provides an overview of contemporary libertarianism in his *Libertarianism in Philosophy and Politics* (Cambridge University Press, 1991). For a comprehensive critique, see Alan Haworth, *Anti-Libertarianism: Markets, Philosophy and Myth* (Routledge, 1994).

Although my focus in this chapter is on contemporary libertarian thought, the works of Friedrich Hayek remain profoundly influential, particularly his *Road to Serfdom* (University of Chicago Press, 1944) and *The Constitution of Liberty* (University of Chicago Press, 1960). For commentary, see Chandran Kukathas, *Hayek and Modern Liberalism* (Oxford University Press, 1989); and Roland Kley, *Hayek's Social and Political Thought* (Oxford University Press, 1994).

As noted in the chapter, the arguments for libertarianism have tended to fall into three main clusters: (a) self-ownership; (b) mutual advantage; (c) maximizing liberty. The most influential account of the *self-ownership* argument is Robert Nozick's *Anarchy, State, and Utopia* (Basic Books, 1974). The most powerful critique is G. A. Cohen's *Self-Ownership, Freedom and Equality* (Cambridge University Press, 1995). Cohen's critique of Nozick has been the subject of (at least) three symposia: in *Critical Review*, 12/3 (1998); *Journal of Ethics*, 2/1 (1998); and *Proceedings of the Aristotelian Society*, supplementary volume (1990). For more general overviews of the debate around Nozick's defence of libertarianism, see Jeffrey Paul (ed.), *Reading Nozick* (Rowman and Littlefield, 1981); and Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Stanford University Press, 1991).

While the idea of self-ownership has typically been invoked as a defence of right-wing libertarianism, there is in fact a long tradition of 'left-wing libertarianism', which seeks to combine a strong principle of self-ownership with an equally strong commitment to the principle of the equal ownership of external resources. For a comprehensive overview of this tradition, see the two-volume set edited by Peter Vallentyne and Hillel Steiner (*The Origins of Left-Libertarianism: An Anthology of Historical Writings and Left-Libertarianism and its Critics: The Contemporary Debate*, both published by Palgrave, 2000).

For clear statements of the *mutual advantage* argument for libertarianism, see David

Gauthier, *Morals by Agreement* (Oxford University Press, 1986), and Jan Narveson's *The Libertarian Idea* (Temple University Press, 1988). Gauthier's argument is evaluated by the contributors to *Contractarianism and Rational Choice: Essays on Gauthier*, edited by Peter Vallentyne (Cambridge University Press, 1991). For the definitive account of the social contract tradition Gauthier draws upon, see Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press, 1986).

Although the *maximizing liberty* argument is perhaps the one most commonly invoked in popular discussions of libertarianism, there have been surprisingly few attempts by academics to provide a theoretical elucidation of what it means to maximize liberty, or how we would try to measure amounts of liberty. For an influential attempt to show that the very idea is meaningless, see Charles Taylor, 'On Negative Freedom', in his *Philosophy and the Human Sciences: Philosophical Papers*, vol. ii (Cambridge University Press, 1985). For a heroic effort to meet this challenge, see Ian Carter, *A Measure of Freedom* (Oxford University Press, 1999).

In addition to these arguments, there is also a long-standing tradition which defends libertarianism and minimal government on purely *utilitarian* grounds, as ensuring the most efficient use of resources, and the greatest overall welfare. For influential statements of this efficiency/utilitarian defence of libertarianism, see Richard Epstein, *Takings* (Harvard University Press, 1985); *Bargaining with the State* (Princeton University Press, 1995); *Simple Rules for a Complex World* (Harvard University Press, 1995); James Buchanan and Gordon Tullock, *The Calculus of Consent* (University of Michigan Press, 1962); James Buchanan and Richard Congleton, *Politics by Principle, Not Interest* (Cambridge University Press, 1998); Richard Posner, *The Economics of Justice* (Harvard University Press, 1983); *Overcoming Law* (Harvard University Press, 1996). The claim that libertarian political arrangements maximize utility is, of course, controversial. For doubts, see Rick Tilman, *Ideology and Utopia in the Social Philosophy of the Libertarian Economists* (Greenwood, 2001). In any event, the basic philosophical issues raised by this utilitarian-libertarian position are the same as those raised by other forms of utilitarianism, discussed in Chapter 2.

There are several journals which specialize in libertarian philosophy, including *Critical Review*, *Social Philosophy and Policy*, *Journal of Libertarian Studies*, *Independent Review*.

Useful websites include:

- (a) Libertarian.org, which offers 'an introduction to libertarianism' and 'an overview of the libertarian philosophy and the libertarian movement'. It is affiliated with the larger Free-Market.Net: The Freedom Network ([www.libertarian.org](http://www.libertarian.org); [www.free-market.net](http://www.free-market.net)).
- (b) The Foundation for Economic Freedom, which publishes the magazine *Ideas on Liberty*. Its website contains lesson plans, bibliographies, and discussion forums on 'the economic and ethical advantages of free markets' ([www.fee.org](http://www.fee.org)).
- (c) The Libertarian Party (the 'party of principle'), perhaps the only school of thought discussed in this book with its own political party ([www.lp.org](http://www.lp.org)).
- (d) 'Critiques of Libertarianism', a website with an extensive set of links critiquing libertarian theories and policy proposals ([www.world.std.com/~mhuben/libindex.html](http://www.world.std.com/~mhuben/libindex.html)).

## NOTES

1. There is in fact a voluminous literature which aims to show that libertarianism ensures the maximally efficient use of resources, sometimes described as the 'law and economics' and 'public choice' literature. See, e.g., Posner 1983; 1996; Epstein 1985; 1995a; Buchanan and Tullock 1962; Buchanan and Congleton 1998; cf. N. Barry 1986: chs. 2–4.

2. It is particularly important to distinguish libertarians from 'neo-conservatives', even though both were part of the movement for free-market policies under Thatcher and Reagan, and so are sometimes lumped together under the label the 'New Right'. As we will see, libertarianism defends its commitment to the market by appeal to a broader notion of personal freedom—the right of each individual to decide freely how to employ their powers and possessions as they see fit. Libertarians therefore support the liberalization of laws concerning homosexuality, divorce, drugs, abortion, etc., and see this as continuous with their defence of the market. Neo-conservatives, on the other hand, 'are mainly interested in restoring traditional values, strengthening patriotic and family feelings, pursuing a strong nationalistic or anti-Communist foreign policy and reinforcing respect for authority', all of which may involve limiting 'disapproved lifestyles' (Brittan 1988: 213). The neo-conservative endorses market forces 'more because of the disciplines they impose than the freedom they provide. He or she may regard the welfare state, permissive morality, and 'inadequate' military spending, or preparedness to fight, as different examples of the excessive self-indulgence that is supposed to be sapping the West'. From the libertarian point of view, therefore, neo-conservatives are the 'New Spartans', and the chauvinistic foreign policy and moralistic social policy adopted by Reagan and Thatcher stand opposite to their commitment to personal freedom (Brittan 1988: 240–2; cf. Carey 1984).

3. In this passage, Nozick (like most libertarians) includes 'fraud' as one of the activities which a minimal state can and should prohibit. But can a libertarian theory consistently prohibit fraud? Fraud is not a violation of anyone's self-ownership, and on libertarian theories, the responsibility for determining the veracity of a seller's promises typically rests with the buyer, not the state ('caveat emptor': let the buyer beware). If the state can paternalistically protect people from fraud, why not also insist on mandatory labelling laws, or health and safety requirements, or mandatory testing of new foods or drugs? See Child 1994 for a detailed critique of the inconsistencies in libertarian discussions of the fraud standard. Cf. Katz 1999.

4. It is unclear whether Nozick himself would accept the claim that treating people as 'ends in themselves' is equivalent to treating them 'as equals', or whether he would accept Dworkin's egalitarian plateau. Rawls ties the idea of treating people as ends in themselves to a principle of equality (Rawls 1971: 251–7), and Kai Nielsen argues that Dworkin's egalitarian plateau 'is as much a part of Nozick's moral repertoire' as Rawls's (Nielsen 1985: 307). However, even if there is some distance between Nozick's 'Kantian principle' of treating people as ends in themselves and Dworkin's principle of treating people as equals, they are clearly related notions, and nothing in my subsequent arguments requires any tighter connection. All that matters, for my purposes, is that Nozick defends libertarianism by reference to some principle of respect for the moral status and intrinsic worth of each person.

5. Of course, there may be non-Nozickian reasons for respecting property rights even when initially acquired illegitimately—reasons of utility, or reasonable expectations. But these 'teleological' justifications for property rights conflict with Nozick's 'historical' or 'emergent' conception of justification (see Schmidt 1990b).

6. Blackstone, *Commentaries on the Law of England*, book 2.

7. Locke also gave other answers—e.g. that we can appropriate that with which we have mixed our labour. But Nozick rightly rejects this answer as unworkable. If I add some home-made tomato juice to the ocean, how much of the ocean do I now own? If I put a fence around a plot of land, do I own the land *inside* the fence, or just the land *under* the fence—it is only the latter I have actually mixed my labour with (Nozick 1974: 174).

8. Nozick's claim is ambiguous here. He does not tell us what the 'normal process' of appropriation is. Hence it is unclear whether 'not worsening' is merely a necessary condition for legitimate appropriation (in addition to the 'normal process'), or whether it is a sufficient condition (any process which does not worsen the conditions of others is legitimate). If it is not a sufficient condition, he does not tell us what is (Cohen 1986a: 123).

9. For the need to include autonomy, not just material well-being, in our account of 'not worsening', see Kernohan 1988: 70; Cohen 1986a: 127, 135. Milde 1999 argues that this same problem undermines Gauthier's mutual advantage account of property rights, discussed in the next section of the chapter.

10. See Schmidtz 1994, who emphasizes that public or communal ownership can also avoid the tragedy of the commons, and may indeed be better in certain circumstances at avoiding free-rider and externality problems, although he thinks this is true only in limited circumstances.

11. For a sample of this enormous literature, see Arneson 1991; Arthur 1987; Bogart 1985; Christman 1986; 1991; G. A. Cohen 1986a; 1986b; 1990b; 1998; Epstein 1998; Exdell 1977; Fealsanach 1998; Fox-Decent 1998; Gorr 1995; Ingram 1993; Kernohan 1988; 1990; 1993; Mack 1990; 1995; Michael 1997; Otsuka 1998b; Ryan 1994; Sanders 1987; Schmidtz 1990a; 1994; Schwartz 1992; Shapiro 1991; Vallentyne 1997; 1998; Weinberg 1997; 1998; Wenar 1998. For a courageous defender of Nozick's view, see Palmer 1998.

12. For a comprehensive overview of this tradition, see Vallentyne and Steiner 2000; cf. Steiner 1981: 561–2; Vogel 1988. Even Locke seemed to think that unequal property-ownership could not arise from any right of individual appropriation. It required collective consent, in the form of an acceptance of money (Christman 1986: 163). In his survey of contemporary libertarianism, Norman Barry argues that none of the different versions of libertarianism (utilitarian, contractarian, natural rights, egoistic) has an adequate account of original title (Barry 1986: 90–3, 100–1, 127–8, 158, 178).

13. This is not to say that self-ownership has no implications for property-ownership. Andrew Kernohan argues that some of the rights entailed in self-ownership logically entail access to resources. Owning one's powers, in the fullest legal sense, entails owning the exercise of these powers, and this requires the right to exercise those powers oneself, the managerial right to decide who else may exercise them, and the income right to any benefit which flows from their exercise. None of these rights can be fulfilled without some rights over external resources (Kernohan 1988: 66–7). However, this logical connection between self-ownership and property-ownership still leaves a wide range of legitimate property regimes. Indeed, the only regime it excludes is precisely the one Nozick wishes to defend—i.e. a regime where some people lack any access to resources. According to Kernohan, this lack of property-ownership is a denial of their self-ownership.

14. As Andrew Kernohan notes, the right to keep all of one's market income is not the only, or even the primary, component of self-ownership, and limiting it can strengthen other more important components of substantive self-ownership (Kernohan 1990).

15. I am taking this version of the PD from Darwall 1998: 58; cf. Gauthier 1986: 79–80.

16. For a comprehensive discussion of Prisoner's Dilemmas, and the various circumstances in which it is rational to cooperate or defect, see Campbell and Sowden 1985.

17. See Gauthier's helpful discussion of the difference between the 'bargaining problem'

(what is the mutually advantageous rule), and the 'compliance problem' (how to constrain people from defecting from mutually advantageous rules) (Gauthier 1991).

18. A self-interested fisherman will overfish unless monitored and punished by police officers. But a self-interested police officer would accept a bribe from the fisherman, unless monitored and punished by some superiors. And a self-interested superior would accept a bribe from the police officer, unless subject to some system of monitoring and punishment from an even higher-up authority. And so on . . .

19. This has interesting parallels with the problem facing utilitarians. As we saw in Chapter 2, attempting to decide how to act on the basis of utilitarian reasoning may be counter-productive and actually impede our ability to maximize overall utility in society. Similarly, deciding how to act on the basis of egoistic reasoning may be counter-productive and impede our ability to maximize our individual utility. And the solution offered in each case is similar: Gauthier's solution of 'constrained maximization' parallels the utilitarian solution of rule-utilitarianism. In each case, we are told to follow the rules, without calculating whether our decision to follow the rule maximizes overall utility or individual self-interest. Kavka calls Gauthier's solution 'rule-egoism', to bring out this parallel with rule-utilitarianism (Kavka 1986: ch. 9).

20. See the essays in Vallentyne 1991.

21. For futile attempts to show that mutual advantage is compatible with, and indeed requires, compulsory aid to the defenceless, see Voice 1993; Lomasky 1987: 161–2, 204–8; Waldron 1986: 481–2; Narveson 1988: 269–74; Grice 1967: 149. For a discussion of their futility, see D. Phillips 1999; Goodin 1988: 163; Copp 1991; Gauthier 1986: 286–7.

22. I have treated equality and mutual advantage approaches as mutually exclusive options, based on diametrically opposed assumptions about morality. But it is worth noting that some people have argued for a hybrid theory which would integrate the two perspectives. Such a hybrid approach is sometimes called a 'Humean' approach, since Hume is said to have combined elements of Kantian equality with Hobbesian mutual advantage (e.g. Sayre-McCord 1994). Barry argues, however, that Hume's theory, and its subsequent descendants, simply waver inconsistently between the two approaches, rather than coherently integrating them (Barry 1989a: 145–78). In any event, it is doubtful that such a third model would lead to libertarianism. For more on the distinction between these two approaches, see Barry 1989a; Kymlicka 1990; A. Buchanan 1990.

23. Or as Kant put it, we may recognize certain moral truths or moral reasons, and yet this recognition may 'be attended only with a cold and lifeless approbation and not with any moving force' (quoted in Riley 1982: 251 n. 47).

24. As Elster notes, there is ample empirical evidence for the salience of these moral motivations: 'The main political reforms of the last century have not been supported by instrumental considerations. Rather, they have been carried by social movements anchored in a conception of justice' (Elster 1987: 89). See also J. Cohen 1997 on the irreducible role of moral reasons in explaining the anti-slavery movement.

25. Left-wing theorists often make the same mistake. George Brenkert, for example, argues that Marx's commitment to freedom is not tied to any principle of equality (Brenkert 1983: 124, 158; but cf. Arneson 1981: 220–1; Geras 1989: 247–51).

26. For interesting attempts to define and measure neutral liberty, see Steiner 1983; 1994; Carter 1992; 1995a; 1995b; 1999. Carter tries to overcome some of the problems of individuating acts by distinguishing between 'act-types' (e.g. living in a house) and 'act-tokens' (e.g. living in this particular house at this particular time), and argues that we can measure the 'extents of action' involved in each act-token by references to its spatio-temporal dimensions. He suggests that using this framework allows us to refute Taylor's 'diabolical defence' of Albania as a free

country (Carter 1992: 45), although I confess I do not myself see how it shows that Britain is freer than Albania.

27. Proponents of this 'purposive' view of the definition of freedom include Loevinsohn 1977; Norman 1981; Raz 1986: 13–16; Sen 1990*b*; 1991; Arneson 1985; Connolly 1993: 171–2.

28. As these examples show, our interest in the freedom to do *x* is not simply our interest in doing *x*. I may care about the freedom to choose my own clothes, for example, even though I don't particularly care about choosing clothes. While my wardrobe is a matter of almost complete indifference, I would find any attempt by others to dictate my clothing to be an intolerable invasion of privacy. On the other hand, I may care about other freedoms, like the freedom to buy foreign goods without tariffs, only in so far they enable me to buy more goods. In yet other cases, our being free to do something, like religious worship, may be constitutive of the very value of that act. That we freely choose to celebrate religious belief is crucial to the value of religious celebration. So our interest in the freedom to do *x* may be instrumental to, intrinsic to, or quite independent of, our interest in *x*. Hence our interest in different freedoms varies, not only with our interest in each particular act, but also with the range of instrumental, intrinsic, and symbolic interests promoted by having the freedom to do that particular act. Needless to say, it is hopelessly confusing to say that all these different interests are really a single interest in a more extensive freedom.

29. For a more in-depth discussion, see Norman 1991*a*; 1991*b*, where he discusses the problem of "Taking 'Free Action' Too Seriously".

30. Steven Reiber argues that while a redistributive inheritance tax may simply redistribute the freedom to use the taxed resources, it does unilaterally reduce the freedom to bequeath property (Rieber 1996).

31. Nozick's claim here is not actually true. His theory does require that people's free exchanges preserve a particular pattern—namely, the Lockean proviso—and so it too requires continuously intervening in free exchanges to preserve a patterned distribution. This undermines Nozick's famous contrast between 'patterned theories', like Rawls's, and 'historical theories', like his own. All theories include both patterned and historical elements. Rawls, for example, allows people to come to have legitimate entitlements in virtue of their past actions and choices in conformity with the difference principle (a historical element), and Nozick requires that the pattern of distribution resulting from people's actions make no one worse off than they would have been in the state of nature (a patterned element). Nozick claims that the Lockean proviso is not a patterned requirement (Nozick 1974: 181), but if so, then nor is Rawls's difference principle (Bogart 1985: 828–32; Steiner 1977: 45–6). In any event, even if this contrast can be sustained, it is not a contrast between theories which interfere in people's lives and those which do not.

32. For a related discussion of some of the tensions in libertarianism between respecting each person's liberty and promoting overall liberty, see Kagan 1994.

33. To be fair, one can find liberal egalitarians using definitions of liberty in the same inconsistent way. They invoke the moralized definition to argue that the welfare state involves no restriction on freedom (since it only taxes resources that the advantaged had no moral right to), but invoked the non-moralized definition to argue that capitalism does restrict freedom (since it limits the freedom of non-owners to use resources owned by others).

34. For the importance of controlling property for these values, see Waldron 1991; Michelman 1996.

35. Gordon's subsequent discussion manifests these dangers. For example, he says that the free market increases people's freedom, but must be constrained in the name of justice. But he does not specify which people acquire which freedoms in the free market (specifying these things, he says, would obscure the problem of 'freedom as such'). As a result, he ignores the

loss of freedom caused by private property, and hence creates a false conflict between justice and freedom. For a similarly confused attempt to preserve the idea of 'freedom' as a separate value, see Raphael 1970: 140–1. He notes that a redistribution of property could be seen as redistributing freedom in the name of justice, rather than as sacrificing freedom for justice. But, he says, this would eliminate freedom as a separate value, and so 'it is more sensible to acknowledge the complexity of moral objectives to be pursued by the State, and to say that justice and the common good are not identical with freedom, although they are all closely related', and hence 'the State ought *not* to intervene in social life to the utmost extent in order to serve the objectives of justice and the common good' (Raphael 1970: 140–1). In order to preserve the alleged contrast between freedom and justice or equality, both Gordon and Raphael distort or ignore the actual freedom and unfreedoms involved. Other discussions of what it might mean for liberty to be 'accorded priority over other political goods or values' rest on similar confusions—e.g. invoking criteria to measure freedom that appeal to these other values, thus rendering the priority claim unintelligible (e.g. Gray 1989: 140–60; Loevinsohn 1977).

36. For responses to the worry that Rawlsian liberalism, taken to its logical conclusion, requires abolishing the family and replacing it with some form of equalized state child-raising, see Mallon 1999; Lloyd 1994; Fishkin 1983.

37. For an interesting comparison of liberal and libertarian (and feminist) approaches to disability, see Silvers, Wasserman, and Mahowald 1998.

38. *Beyond Entitlement* is the title of Lawrence Mead's influential New Right critique of the welfare state as promoting passivity and exclusion, see Mead 1986; cf. N. Barry 1990: 43–53.

39. For clear evidence to this effect, see Bowles and Gintis 1998; 1999; Gilens 1999.

40. Some people have argued that the infirmities of the welfare state are so great that even a strict Rawlsian, whose only concern is to maximally benefit the least well off, should reject policies such as public pensions and public health care and endorse free-market capitalism—e.g. D. Shapiro 1997; 1998. For empirical evidence to the contrary, see Sterba 2000: 471–4.

41. Rothstein 1998: 164–5. For empirical evidence on popular beliefs about justice in the Western democracies, and its relationship to philosophical theories of justice, see Miller 1992; 1999: ch. 4; Swift et al. 1995; Skitka and Tetlock 1993.

42. Consider the question of state capacity. It seems clear that liberal-egalitarian theories have operated with over-optimistic assumptions about state capacity. For example, in developing his theory of liberal equality, Bruce Ackerman explicitly appeals to the idea of a 'perfect technology of justice' (Ackerman 1980: 21; for similar assumptions, see Arneson 1990: 158; Roemer 1985*a*: 154). Of course, Ackerman knows that this is not available in the real world. But he does not tell us which parts of the resulting theory can be implemented, given our actually existing 'technology of justice'. The inherent limitations in the capacity of the state to achieve social objectives have been theorized by social scientists, both on the right (Glazer 1988) and the left (Rothstein 1998). But this literature has not yet permeated the philosophical debates. One looks in vain in the corpus of the major left-liberal political philosophers (Rawls, Dworkin, Cohen, Roemer, Arneson, Ackerman) for a discussion of the extent to which the state can or cannot fulfil the principles of justice they endorse.

43. Loren Lomasky, a prominent American defender of the (mutual advantage version of) libertarians, has written an article entitled 'Libertarianism as if (the Other 99 Percent of) People Mattered' (Lomasky 1998), which acknowledged that only a tiny fraction of Americans endorse libertarian ideals. His article addresses the question of how libertarians should act politically in a democracy, given that the vast majority of people do not agree with their principles.