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**NOZICK'S POLITICAL PHILOSOPHY**

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By

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**Nozick's Political Philosophy**

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## **Abstract**

Robert Nozick (1938-2002), an American political philosopher, was a pioneer of a particular form of libertarianism, known as deontological libertarianism, which is built upon a foundation of strict moral rules and property rights. This thesis evaluates three particular aspects of Nozick's libertarian philosophy, beginning with the foundational concept of full self-ownership. Special attention is paid to the compatibility of the full self-ownership thesis with the philosophies of classical liberal thinkers John Locke and Immanuel Kant. The next aspect discussed is the system of property rights advanced by Nozick and the entitlement theory of justice founded upon it. In this section, a model is sketched to evaluate the normative content of property rights in objects. Upon examination, the model implies that the inviolate property rights underpinning of the entitlement theory of justice is unlikely to result in a comprehensive system of justice. Finally, the thesis concludes by evaluating Nozick's side constraint construction of morality, which, as a challenge to utilitarianism, abandons all moral prescriptions and forbids non-contractual obligations. When compared to consequentialist moral systems, deontological libertarianism is shown to be undermined by its reliance on individual rights as the sole foundation.

Robert Nozick is one of the most influential political philosophers of the 20<sup>th</sup> century. His most important work, *Anarchy, State, and Utopia*, has often been cited as an indispensable philosophical grounding for the libertarian movement and his arguments are frequently espoused by the libertarian-minded. Nozick, along with his egalitarian counterpart John Rawls, is credited with helping to reinvigorate and set the agenda for the modern period of political philosophy. In *Anarchy*, Nozick takes the mantle of John Locke and endeavors to show that a right-based morality can only justify what he calls the “Minimal State”. His formulation builds upon Locke’s state of nature and introduces a rights-based morality enforced by side constraints, concluding that while the state could arise in a manner that does not violate moral side constraints, a more-than-minimal state would necessarily result in significant redistribution of resources. This would be morally impermissible, and he concludes that the more-than-minimal state cannot be allowed. Nozick’s influence on contemporary politics through modern libertarianism is evident.

While *Anarchy* ostensibly builds upon the liberal philosophical movement, Nozick comes to starkly different conclusions than do his predecessors. The purpose of this thesis project is to show that Robert Nozick’s formulation of the libertarian utopia is not only implausible, but actually forcefully contradicts the classical liberal thinkers that have influenced him. After a brief introduction to Nozick and the libertarian movement, this thesis proceeds in four sections.

The thesis begins with a brief summary of *Anarchy*. This brief sketch of the book will acquaint the reader with Nozick’s main theme of individual inviolability, his argument for the minimal state, notions of distributive justice (including the famous Wilt Chamberlain thought experiment), and his discussion of a libertarian meta-utopia. This

summary should highlight in the reader's mind the importance of Nozick's libertarian themes in contemporary American politics, which has seen, if not a renaissance, a resurgence in recent years.

The next section will critically analyze the normative underpinnings and moral foundations for the concept of libertarian self-ownership. Liberal thinkers such as Locke, Rousseau, and Kant (as well as a number of contemporary political theorists) are introduced to show that self-ownership is not generally accepted to be the fundamental principle upon which political rights are based.

The third section contains a critical review of Nozick's theory of justice, beginning with his entitlement theory and the system of property rights that underpins it. It also explores the recent literature regarding the system of distributional justice upon which Nozick evaluates patterned end-state principles. Finally, a descriptive model is introduced to explore the distinctions between the concepts of freedom and liberty.

The fourth section of this thesis will explore the limitations and complications brought about by Nozick's system of moral side constraints. In addition to the classical liberals mentioned before, the text engages with John Stuart Mill. While the initial line of argument offered by Mill is remarkably similar to Nozick's justification for moral side constraints, the two reach *very* different conclusions about ethics. A final argument is presented that undermines the Nozickian claim that property rights are a valid basis for a moral system, as well as the claim that all rights are equally absolute and inviolable.

This thesis concludes that Nozick's libertarianism, which still enjoys a great many followers, faces serious challenges as a moral theory, as a defense of individualism, and as a political solution that maximizes human flourishing.

## SUMMARY: ANARCHY

Nozick begins the body of his book with the question, “If the state did not exist, would it be necessary to invent it?”<sup>1</sup> This question is not rhetorical; Nozick intends to formulate a deontological justification for the state, ultimately providing a framework for how the state could arise without violating anyone’s rights.<sup>2</sup> Nozick begins with something roughly equivalent to Locke’s state of nature. While Locke solves the problem of his state of nature with his social contract theory, Nozick takes a different route. This route builds out from a simple agreement between individuals. This agreement is not a contract, however; the state arises through a cascading series of voluntary economic transactions.

To solve the inconveniences of the state of nature, Nozick asserts that individuals will form cooperatives with each other to secure their mutual protection from anyone violating their rights. He calls these cooperatives “protective associations”<sup>3</sup> whereby everyone committed to the group can be called upon to intervene when one member’s rights have been violated. The protective associations will not practice nonintervention and will develop some system of decision-making procedures when one member claims that his rights have been violated. What results is a rudimentary legal system that acts to punish those that violate others’ rights and determine what compensation shall be given to the victims. Early on, many protective associations may exist with varying decisions procedures, but quickly some enterprising entrepreneur will recognize that individuals may also find it inconvenient that they may be called upon to act as arbiters in any

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<sup>1</sup> Nozick. 1974. *Anarchy, State, and Utopia*. Hereafter cited as *ASU*.

<sup>2</sup> Nozick would upset both the Rawlsian egalitarians and Rothbardian anarcho-capitalists with *ASU* and find himself under attack from virtually all sides in resulting literature.

<sup>3</sup> *ASU*, 12.

number of disputes. The entrepreneur will form a business that sells its protective services to clients, and the market solution to the problem of mutual protection begins to take hold. Eventually the cooperative protective association will all but disappear within a geographical region, having been replaced by private protective agencies.

It is not difficult to imagine a scenario in which one protective agency is attempting to protect its client while a competing agency is attempting to exact compensation from that same client for some violation.<sup>4</sup> What happens when multiple coexisting private protective agencies come into conflict with each other? Nozick provides three possible outcomes arising from the inherently conflictual environment created by multiple protective agencies:

1. The agencies fight, one wins, and the winner gains more clients by demonstrating its effectiveness.
2. The agencies are geographically separated from one another, they fight, and the winning parties move closer to the center of power of the winning protective agency.
3. The agencies are of roughly equal power and realize the costs of continually doing battle with each other. They agree to adjudicate their disputes with a neutral third party, a judge. A court system emerges to deal between the competing agencies.

Regardless of which outcome prevails, the result is a common legal system under which all the residents of a particular geographical area are bound. A dominant protective agency emerges from repeated iterations of the first two scenarios outlined above and a court system emerges in the last one. The “invisible hand” of the market has brought about a sort of *de facto* ultraminimal state “out of anarchy, pressed by spontaneous

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<sup>4</sup> *ASU*, 16.



groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest.”<sup>5</sup>

In order for the dominant protection agency (DPA) to be considered the *de facto* minimal state (MS), however, it must satisfy a few conditions. First, the DPA must have a monopoly on the use of force within the area that it operates. In other words, the DPA gets to decide who may use force and under what circumstances they may do so. Individuals still have the right to use force in the case of immediate self-defense and they are not prohibited from settling disputes between each other privately, but the DPA prohibits others from enforcing unreliable procedures of justice as it sees fit.<sup>6</sup> Nozick calls this scenario the ultraminimal state when the DPA has the monopoly of force. The second prerequisite to be a MS is more problematic. The DPA must protect *everyone* within the territory under its power, even those who refuse or are unable to purchase protection (“independents”). For libertarians and anarcho-capitalists, this screams redistribution. However, Nozick justifies this redistribution by appealing to the principle of compensation. The DPA enforces its right to prohibit private enforcement of justice by prohibiting independents from doing so against its clients. The independents are disadvantaged by this prohibition. But the DPA *compensates* the independents by

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<sup>5</sup> *ASU*, 17. Nozick’s explanation for why a monopoly would arise in this market is that competing protective agencies simply cannot coexist with each other. Competition naturally leads to violent conflict. The “last man standing” becomes the dominant protective agency.

<sup>6</sup> *ASU*, 108. The DPA alone has the right to use the decision procedures that it deems to be correct on its clients. In effect, the clients are paying not only for protection, but for the assurance that only the procedures the DPA has approved will be used on them.

providing minimal protection to the independents against its clients.<sup>7</sup> Therefore, the DPA fulfills the second necessary condition for becoming the MS.

All of this is to say that Nozick believes he has defeated the anarchist position by providing a “fundamental potential explanation”<sup>8</sup> of how the state could emerge without violating anyone’s rights. It is important to note that while the invisible-hand explanation explains how the monopoly of force arises from Locke’s state of nature and therefore explains the ultraminimal state, the second necessary condition that protection be extended to everyone within the territory is a *moral* requirement. It is in keeping with the principle of compensation that protection be extended to independents in exchange for prohibiting private enforcement of justice.<sup>9</sup> As Nozick states, “those operating an ultraminimal state are morally required to transform it into a minimal state.”<sup>10</sup> Next, Nozick goes on to explain why this is the most extensive state that can be justified.

### **SUMMARY: STATE**

One way of thinking about any political or economic system is to characterize it based on how goods and resources are distributed. Every political philosopher has his own take on what makes a distribution of goods *just*. In Robert Nozick’s conception “a distribution is just if everyone is entitled to the holdings they possess under the

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<sup>7</sup> Independents have no protection from each other, which is one of Nozick’s key arguments against the free rider problem. If many people opt out of the DPA and elect to receive the free protection, then membership in the DPA becomes paradoxically more attractive (*ASU*, 113).

<sup>8</sup> *ASU*, 6.

<sup>9</sup> A troubling contradiction arises here. If, according to Nozick, the ultraminimal state arises from a process that ultimately violates no one’s rights, then why is the DPA required to compensate anyone for anything if it hasn’t violated rights first?

<sup>10</sup> *ASU*, 119.

distribution.”<sup>11</sup> It follows then to ask, “What makes a person entitled to a holding?”, the answer to which will require an entitlement theory. Nozick’s is simple and elegant, consisting of only two principles.

How does one acquire a holding to which he knows he will be entitled? There seems to be two routes. First, he may take an unowned thing for himself and stake a claim. On this point Nozick is notoriously vague about how to stake a claim or appropriate unowned land or resources.<sup>12</sup> Suffice to say, the individual is entitled to a holding if he acquired it through just means. Second, he may acquire a holding by just means from the person who was previously entitled to that holding. That second party is free to transfer his holding to the first, and as long as the buyer and seller have acted justly toward one another (meaning, no fraud, theft, or anything that violates individual rights), then the former is entitled to receive it and keep it. These two principles of this entitlement theory are known as *justice in acquisitions* and *justice in transfers*. Nozick’s entire theory of justice is based on his entitlement theory, also known as *justice in holdings*. The exact language of these principles is as follows:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.

2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else who is entitled to the holding, is entitled to the holding.

3. No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>13</sup>

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<sup>11</sup> *ASU*, 151.

<sup>12</sup> Muddying the water even further, Nozick goes on at some length about the deficiencies in Locke’s theories of property rights. *ASU*, 174-178 and 287-289. I discuss entitlement theory in a later section.

<sup>13</sup> *ASU*, 151.

Nozick's theory of justice in holdings is key to understanding his libertarian point of view. In Nozick's world, justice is *historical* and the distribution of goods is ideally *unpatterned*. When one endeavors to determine if a distribution is just, one must not examine the current distribution and justify it by saying that it *could have* come about by just means. One must be able to justify the distribution by looking at what has actually come before (by looking at history). For example, the distribution may look just on the surface, but upon closer inspection if one looks three generations back and sees a systematic violation of the rights of millions of people and resulting redistribution of goods (i.e. slavery), then one must conclude that the current distribution is unjust. The third principle of Nozick's distributional justice, the *principle of rectification of injustice*, would call upon the rectifier to somehow imagine how the distribution would most likely be (in accordance with entitlement theory) had the past injustice not occurred and try to approximate it.

Is it prudent or even permissible to look to the future and try to design a perfect distribution of goods? This is the central question of Nozick's passages on patterns. Most political thinkers focus on what society would look like in their utopia, how goods would be distributed, and how this redistribution will take place. Examples of patterned distributions can be found in egalitarianism, utilitarianism, Marxism, and in many other philosophical works. A proponent of a patterned distribution will examine a distribution, conclude that some people have too little and some have too much and that redistribution is required to realize the preferred pattern. But patterned distributions are in Nozick's view antithetical to individual liberty (which he believes is the overriding human interest), while the unpatterned distribution of holdings is ostensibly Kantian in the sense

that it treats individuals as ends rather than as means, hence Nozick's famous slogan, "From each as they choose; to each as they are chosen."<sup>14</sup> To illustrate this notion, he shows how "liberty upsets patterns"<sup>15</sup> with his allegory involving the legendary basketball player Wilt Chamberlain.

The Chamberlain story represents Nozick at his most clever. In the hypothetical, everyone in the state begins with the same amount of money and resources (or whatever preferred distribution the reader can imagine). Next, Wilt Chamberlain arrives in town and makes a deal with arena owners to collect one quarter from every dollar ticket sold for the basketball season. If every person in the area individually and voluntarily chose to transfer a small part of his wealth to Wilt Chamberlain for the pleasure of watching him play basketball so impressively, then the result would be a massively imbalanced distribution. Wilt Chamberlain would be the richest man in town, but one cannot deny that he became so without violating anyone's rights. He was paid for his services voluntarily by his customers who received just compensation. And yet this goes decisively against the patterned distribution that came before. Nozick's point here is that no matter what distribution one begins with, "no end-state principle or distributional patterned principle of justice can be realized without continuous interference with people's lives."<sup>16</sup> In a sense, any patterned distribution that looks toward the future is unjust because it will necessarily result in some sort of unjust redistribution.<sup>17</sup> Nozick's Minimal State is the only one that fits his criteria for a justifiable distribution.

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<sup>14</sup> *ASU*, 160.

<sup>15</sup> *Ibid.*

<sup>16</sup> *ASU*, 161.

<sup>17</sup> Here Nozick famously coined the phrase "Taxation of earnings from labor is on a par with forced labor." *ASU*, 169.

After a lengthy critique of John Rawls' *A Theory of Justice*, Nozick closes Part II of his book with a stunningly creative thought experiment entitled "Demoktesis". Reading like the primer to a dystopian science fiction novel, the passage represents an extension of the story of Nozick's minimal state in which people begin to sell shares of themselves to others. These shares represent the rights that one has to make decisions for himself, so one may sell the right to determine one's employment, to change one's hair color, and so on. And for some reason people desire these commodities so an entire market takes hold and blossoms. After some time, so many people have sold shares of themselves and bought shares of others<sup>18</sup> that ultimately everyone has a share in every other person in addition to a share in himself. Enormous shareholder conventions are held to decide the most trivial questions regarding each individual. But this system<sup>19</sup> is too large and unwieldy to be effective, so decisions come to be made on a universally binding basis. To further expedite the process, the shareholders elect the Board of Directors who are entrusted to make decisions on their behalf. The resultant conception is something akin to a modern democratic republic.

The point of "Demoktesis"<sup>20</sup> is to illustrate that the more-than-minimal state can arise justly from the minimal state and still be unjust. The strange democracy seen at the end of the section arrived through a series of steps which (arguably) did not violate anyone's rights and yet the final form is counterintuitive to notions of personal inviolability. With this complicated example, Nozick makes the argument that individuals can and should make judgments about institutional structures based on the principles of

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<sup>18</sup> Nozick supposes that very few people have sold the totality of their shares and that there are very few instances of complete slavery.

<sup>19</sup> "The Great Corporation".

<sup>20</sup> "Ownership of the people, by the people, and for the people." *ASU*, 290.

individual rights expressed by moral side constraints. His prescription is that those living in the modern world should accept “an institutional structure embodying only individual rights”<sup>21</sup> no matter how it came about, rectify past injustices in accordance with the principles of justice in holdings, and see what comes of it.

### **SUMMARY: UTOPIA**

The culmination of *Anarchy* is Nozick’s noble and inspiring defense of libertarianism, the principles of which are put to good use designing a utopia. Nozick recognizes that the minimal state is a suboptimal solution in view of the fact that human beings crave social interaction and prefer living in relative contact with one another. There is something fundamentally unsatisfying about simply allowing the night-watchman state to arise and letting the free market work. Certainly there must be more to designing a society than just the entitlement theory. The minimal state will not suffice. Nozick’s solution is simple and elegant: a utopia of utopias.

One must first recognize the inherent problems with designing a utopia, the most preeminent of which is the self-evident truth that people are different from each other. But a utopia is supposed to be “the best world imaginable”.<sup>22</sup> Imagined by whom? There are certain features of a possible world that would certainly be universally desired (access to land and resources) but the values on which a society should be based (if it were truly desired) are sure to be controversial. Nozick asks the reader to imagine that he could create his own world and inhabit it with other rational beings. The co-inhabitants may like the world that he have created or they may dislike it. If they dislike it, they may leave and join another world or create one of their own. The creator himself may even decide

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<sup>21</sup> *ASU*, 294.

<sup>22</sup> *ASU*, 298.

that he dislikes the world he has created and leave it himself. The best way to determine what would constitute a utopia is to look at worlds where people have emigrated to and chosen to stay. By choosing to stay in a world a person implicitly believes that said world is the best world that they can *imagine* by virtue of the fact that they could create and move to any better world, and yet they do not.<sup>23</sup> Nozick calls these worlds stable associations and these associations compete with each other to get the best people *for them*.<sup>24</sup>

What is to stop a person from imagining a world in which he is king? Wouldn't a rational being design a world that maximizes his own benefit at the expense of others? The simple answer is that no one would choose to live in that world when he could imagine a better one. The imaginary worlds built around the narcissistic whims of would-be monarchs quickly become unstable. Nozick's reasoning here is that the benefits of a diverse and roughly equal stable association outweigh the temporary windfall of benefits of a despotic unstable one. As such, the individual will ultimately settle into the stable association that values him the most and therefore maximizes his marginal contribution.<sup>25</sup>

This utopic model is not a model of a single utopian society but instead of a sort of meta-utopia. While there are significant differences between Nozick's possible-worlds model and our actual world,<sup>26</sup> one can intuitively see that the key principles behind it are worth considering. There are a vast variety of values systems among the people of the

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<sup>23</sup> The people living in these worlds remain rational beings. It is not allowed to populate one's world with people that want to live in it or under some condition that characterizes said world. As Nozick says, to do so will "trivialize our construction" (*ASU*, 303).

<sup>24</sup> "From no association will I be able to get something worth more to them than what I contribute is worth to them," (*ASU*, 301).

<sup>25</sup> *ASU*, 306.

<sup>26</sup> See *ASU*, 307-308 for a list of key discrepancies.



world and to attempt to design a single utopian society to fit all would defeat the purpose. The result would be a world where values systems clash on a daily basis and conflict is perpetual. In a world where individuals have wildly different views on what constitutes justice, fairness, the good life, etc., the only solution in Nozick's view is to have "many different and divergent communities in which people lead different kinds of lives under different institutions."<sup>27</sup> Even then the community will only approximate the preferences of its individual members, but the freedom to move allows individuals to find the best match. If it is possible to determine what the best kind of society is, Nozick believes that this is the best way toward discovering it.

This framework is intended to accomplish the task of finding utopias. To succeed, it will require mechanisms by which it to operate, and Nozick's elegant solution is the human desire to innovate. The first of these mechanisms is called the design device. Anyone can sit down, perhaps in collaboration with others, and plan out the community that he thinks would be the best fit for him and those like him. Perhaps the community would be an updated version of an old one, or it could be something completely new. While this task would be more complex by orders of magnitude, one likens it to an architect designing a building or a chef inventing a new recipe. Given the enormous complexities involved in considering which values will be expressed in a community and how they are weighted, the possibilities are seemingly endless that could emerge by the design device. But not all of these planned communities will come to fruition. The designer must persuade others to join with him in forming the community not unlike the inventor must persuade the investor to come on board.

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<sup>27</sup> "Utopia will consist of utopias," (*ASU*, 312).

The second mechanism is known as the filter device. Sometimes when a designer imagines a product to fill a demand he does not know what he explicitly wants, but he does know what he *doesn't want*. The designer can build in a set of filters to eliminate unwanted features until he has arrived at an end product that is acceptable. In the context of the utopian framework, the filter process at work is the process by which people join, try out, and eventually leave communities that they find incompatible with their tastes.<sup>28</sup> When a community disappears because it wasn't any good, the filter device has worked. Evidently Nozick favors the free market solution of utopias. The community, like a business, must suit the needs of its members efficiently or go under. There is a state of healthy competition among the diverse set of communities that continually improves each one and eliminates unsuccessful designs. The possible-worlds model predicts that this will happen. Thus mankind arrives closer to discovering the best society for all by observing the stable associations that emerge from the framework.

It is important to remember that the difference between Nozick's framework for utopia and other utopian theories is that the framework isn't really a normative utopian theory. Nozick plays agnostic about what would actually be the best society for men to live in and instead establishes the design and filter devices to answer the question. Rather than asserting his own views about utopia, he forms an open market in which the varying utopian designs can come in and compete. Nozick supposes that this important distinction means that most utopians will embrace this common ground on which to start.<sup>29</sup> The average utopian, confident that all men would want to live under his schema, wouldn't

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<sup>28</sup> *ASU*, 316.

<sup>29</sup> Some will not, of course. Those utopians who believe in total dominance would find the freedom of choice within the framework intolerable (*ASU*, 319).

object to operating under the superstructure of Nozick's framework providing he can freely put his ideas into practice with his volunteers and ultimately win the day.

What of the central authority that operates the framework for utopia? Is the institution of the framework to operate itself without enforcement mechanisms? Nozick largely sidesteps this particular detail but offers that it may be necessary for some central authority entity to prevent disruptions in the framework that may arise via inter-community aggression and conflict. If one views the hierarchy of multiple utopias under the loose protection of some sort of a minimal state, a picture of a confederation of communities begins to form. Are these communities to have contact with or knowledge of each other? The central authority must also secure a basket of individual rights. In order for the framework to operate correctly, each individual must have freedom of movement out of and into communities.<sup>30</sup> The central authority, then, has responsibilities similar to Nozick's minimal state whose sole justifiable purpose is to provide protection against the violation of rights. But what if a community refused to let a member leave on legitimate grounds? Would the central authority have to arbitrate disputes between communities and their members?

While the details are scarce in the final pages of the book, it must be said that Nozick's vision of a utopian framework is an inspiring one. Robert Nozick's unique voice, alternately commanding and slyly playful, inspired countless others to form a political movement that remains strong even today. And it is clear from *Anarchy* that he

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<sup>30</sup> This is not to say that the community must accept anyone who petitions to join. They are free to refuse, which brings up another question. What of the individuals that no community wants to accept?

respected the uniqueness of the individual and thought that it was the diversity of background, opinion, and talents that makes human beings worth believing in.

## DISCUSSION

As Alexis de Tocqueville identified, Americans have a strong predilection toward individualist thinking. He saw this predisposition as a potential problem for democracy in America when he cautioned that individualism could obstruct each man from forming connections to society when it “leads him back to himself and threatens to ultimately imprison him altogether in the loneliness of his own heart.”<sup>31</sup> While a concern for individual liberty is an essential component of a healthy democracy, Nozick’s libertarian philosophy represents an effort to codify individualism as the guiding principle for organizing a society. The radical individualism of Nozickian libertarianism is reflected by the “deontological” nature of the theory. As Rawls defined it (and as Nozick presumably agrees), a deontological theory “does not specify the good independently from the right, or does not interpret the right as maximizing the good,”<sup>32</sup> meaning that the theory of justice and the moral theory are essentially unified. In other words, an unjust action is any which violates the moral rules of society and vice versa. Nozick’s moral side constraints, which are never rightfully violated, are an extension of his deontological theory. The alternative would be a teleological theory, of which utilitarianism is an example. A teleological theory formulates judgments based on real-world outcomes, and in libertarianism this form is called “consequentialist”. In consequentialist theories one must formulate a conception of the “good”, and Nozick is critical of this methodology, holding

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<sup>31</sup> de Tocqueville [1840] 2004, 587. de Tocqueville coined the term “individualism” in *Democracy in America*.

<sup>32</sup> Rawls 1971, 26. “Justice as Fairness” is another example of a deontological theory.

instead that moral rules are only valid if they are valid in all cases, not only in cases where the “good” is maximized as a consequence, as it is in utilitarianism.

The following discussion will follow a three-track approach. First, I will discuss notions of libertarian self-ownership, specifically the full self-ownership thesis, and how its weaknesses threaten to undermine Nozick’s deontological theory. Second, I undertake a brief discussion of property rights and the theory of acquisition, closing with a glance at the Wilt Chamberlain parable. The conceptual notions of freedom and liberty enter into the discussion here where a model is sketched to explore the relationship between the two. Finally, I close with an analysis of the side constraint structure of Nozick’s rights-based morality, how the non-prioritization of rights is fundamentally implausible, and present an alternative conception of freedom and liberty.

### Libertarian Self-Ownership: “A Slave to Oneself”

Taking an adequate account of Nozick’s libertarian thesis requires that one establish a starting point from which to work outwards. If libertarianism is a doctrine of freedom, then, it might be said that the notion of freedom is in fact this starting point upon which everything else is built. But in order for freedom to be the grounding of Nozickian libertarianism, Nozick would have to establish that the nebulous concept of “freedom” is an *a priori* good. If freedom is the overriding human value from which individuals are to make moral judgments about every conceivable set of actions available to them, then it must be that freedom is a moral good in itself. But Nozick does not in fact think this, otherwise it would not be necessary to exit Locke’s state of nature, which Locke says is “a state of *perfect freedom* [for mankind] to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”<sup>33</sup> If liberty were truly the highest moral imperative, would it ever be justifiable to constrain it? Locke, and Nozick, agree that the state of nature is “a state of liberty, yet it is not a state of license.”<sup>34</sup> The implication is that freedom flows from, and sometimes comes into conflict with, an antecedent moral condition. This realm turns out to be the moral rights that each man has over himself, all originating in each individual’s self-ownership.

For Locke, each man in the state of nature owns himself (jointly with God<sup>35</sup>). This is not only an assertion of individual dignity, but the declaration of first property rights.

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<sup>33</sup> Locke, Sec. 4; emphasis mine.

<sup>34</sup> *ibid*, Sec. 6.

<sup>35</sup> I shall not indulge too deeply into the theological differences between Nozick and Locke. Suffice to say that Nozick’s formulation is wholly secular, devoid of any appeals to supernatural authority or scripture. It seems evident that Nozick doesn’t think his non-

But what does it mean to own something? In *Second Treatise*, the notion of ownership is inexorably tied to the moral right (“uncontrollable liberty”) that each man has to dispose of himself and his possessions free from interference<sup>36</sup>. Nozick defines property rights as “rights to determine which of a specified range of admissible options (those that do not cross another’s moral boundary) concerning something will be realized,”<sup>37</sup>. In other words, each man has the *natural right* to determine what he will do with his person and things, so long as he does not violate that same natural right of another individual. For Nozick and like-minded libertarians, each man is sovereign ruler of himself, free from external control, only constrained insofar as he must never violate the rights of others. Lockean self-ownership, however, is considerably more limited in what the individual may do. For each person being the creation of God in Locke’s universe, natural law prohibits acts such as suicide and selling oneself into slavery. Nozick, by contrast, abhors pronouncements such as these:

Locke would hold that you giving your permission cannot make it morally permissible for another to kill you, because you have no right to commit suicide. My nonpaternalistic position holds that someone may choose (or permit another) to do to himself *anything*, unless he has acquired an obligation to some third party not to do or allow it.<sup>38</sup>

This marks a serious point of departure between Locke and Nozick: the latter believes in full self-ownership, encompassing all aspects of being (life, liberty, person, property), while the former postulates a form of partial self-ownership. Some argue that Locke in

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theism disallows appeal to Locke and makes his differences known where appropriate. Some interesting departures arise between the two: Locke’s prohibition of suicide contra Nozick’s indifference, as well as Locke’s apparent assertion of the moral duty of man to use reason in order to cultivate the earth. Speaking in terms of political philosophy, these amount to a distinction without much of a difference.

<sup>36</sup> Locke, Sec. 6.

<sup>37</sup> *ASU*, 281-282.

<sup>38</sup> *ASU*, 58.

fact believes that one does not own his “life” or “liberty”,<sup>39</sup> since these are things that cannot be alienated from him. If I alienate my life, I cease to exist. And lacking the ability to alienate my own life, I necessarily lack the power to give another control over it (“Nobody can give more power than he has himself”).<sup>40</sup> Rousseau explicitly agreed with this view of life and liberty as inalienable in *A Discourse on Inequality*.<sup>41</sup> Nozick’s view of self-ownership is more straightforward and absolute: everything is up for grabs.

There is an intuitive aspect to this notion of self-ownership (that is not to say that self-ownership is self-evident, as I explore below). If one can ever own anything, one must be able to first own one’s own body. And the prohibition of bodily harm to and by others seems to line up nicely with the idea of self-ownership. The immorality of destroying or vandalizing the property of others without their express consent is commonly understood. However, there also seems to be something intuitively worse about cutting off someone’s arm than, say, setting his house on fire. Both acts are injurious to the victim and both require compensation, but the severed arm will result in actual physical pain and anguish while the smoldering house will require many phone calls to the insurance company and contractors, among many other inconveniences, to rectify. The victim may be able to rebuild his house even nicer than it was before the aggressor immolated it. Even if he lacks the financial resources to put his life back

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<sup>39</sup> Andrew, 1985.

<sup>40</sup> Locke, Sec. 23.

<sup>41</sup> See Rousseau [1755] 1984, 128. “Since the right to property is only conventional and of human institution, everyone may dispose at will of what he possesses; but this is not the case with the essential gifts of nature, such as life and liberty, which everyone is allowed to enjoy and of which it is at least doubtful whether anyone has the right to divest himself. By giving up liberty, a man degrades his being; by giving up life, he does his best to annihilate it, and since no temporal goods could compensate for the loss of either life or liberty, it would be an offence against both nature and reason to renounce them at any price whatsoever.”



together at the current moment and the liable party cannot adequately compensate him, the possibility remains of some future windfall that will leave him in at least as good a situation as before. Alternatively, he will never be able to grow another arm (at least not in the present state of technological innovation). The notion of property in oneself being the antecedent condition to property in the external world, I submit, places things in the correct order of importance. For while a fundamental right has been violated in both cases, dismemberment would plausibly cause greater outrage than catastrophic property damage.<sup>42</sup> For Nozick, however, there is no hierarchy of rights (that would open the door for a “utilitarianism of rights”; See Ch. 3 of *ASU* and a later section in this paper), which gives self-ownership equal moral standing with external world-ownership.

Nozick builds his case for unlimited<sup>43</sup> property rights from the self<sup>44</sup> outward. Evidently he accepts “classical liberals’ notions of self-ownership”<sup>45</sup>, which roughly entails “as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right, and he is entitled, morally speaking, to dispose over himself in the way such a slaveholder is entitled, legally speaking, to dispose over his slave.”<sup>46</sup> In other words, each individual has the exclusive moral right to his or her entire person, including all its parts, attributes, and efforts. Talents and capacities, those things that go into performing labor, are unique traits to their owner and as such are not and cannot be the property of another person. Thus, if one were to coerce another into the

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<sup>42</sup> Cohen 1995, 69.

<sup>43</sup> Property rights are ostensibly unlimited but must accord Nozick’s weak interpretation of the Lockean Proviso, which he doesn’t think will come into play in any significant way.

<sup>44</sup> Nozick says in *Philosophical Explanations* (1981) that a “self” refers to a being with the capacity for “reflexive self-reference”.

<sup>45</sup> *ASU*, 172.

<sup>46</sup> Cohen 1995, 68.

most trivial non-contractual obligation (forcing him against his will to work for another's benefit), then the former has, in effect, enslaved the latter. On the other hand, I can offer my consent to the most vile and cruel of tortures, and so long as my involvement remains voluntary, regardless of my mental or emotional state, nothing that ends up happening can be said to have violated moral law. This "fetishisation of consent"<sup>47</sup> calls into question the legitimacy of a moral system, known as rights-based, which allows and even mandates indifference to morally repugnant acts. Can such a scheme be deemed moral at all?

Nozick's rights-based morality is derived directly from the norm of universal self-ownership. G.A. Cohen summarizes Nozick's first premise in building a defense of rights-based morality:

1. No one is to any degree the slave of anyone else. Therefore
2. No one is owned, in whole or in part, by anyone else. Therefore
3. Each person is owned by himself. Therefore
4. Each person must be free to do as he pleases, if he does not harm anyone else; he is not required to help anyone else.<sup>48</sup>

From this line of argument, the reader is to accept that each and every person has full ownership rights over his person and as a result shall not be impeded from exercising his autonomy freely in a manner that does not harm others.<sup>49</sup> This is an entirely negative conception of rights: "I have the freedom to do as I please; conversely I do not have the freedom to interfere with your exercise of the same freedom". Nozick's formulation has

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<sup>47</sup> Arneson 2011, 24.

<sup>48</sup> Cohen, 1995, 113.

<sup>49</sup> *ASU*, 50.

to be structured this way because the inclusion of positive rights would present serious problems for the libertarian's philosophy.<sup>50</sup> For instance, if John insisted that he had a positive right to passage across bridge that Suzie owns, then John would be in effect forcing Suzie to assist him in violating her property rights. This, for libertarians like Nozick, would negate self-ownership and therefore be intolerable. The only way that individuals can have something akin to positive rights is through contracts enforcing mutual obligation. This mechanism will be the means by which Nozick postulates protective agencies, and how he eventually gets to his Minimal State. To be clear, however, there are no positive rights in Nozick's *Anarchy*.

It wouldn't benefit the opposition to disagree with Nozick that no one can rightfully own another person, but it may be useful to explore *why* this is so. It seems intuitively true (at least in the 21<sup>st</sup> century)<sup>51</sup> that individuals may not be owned as slaves by others. This maxim against enslavement reflects our basic understanding of equal moral standing among individual human beings. As Locke<sup>52</sup> forcefully argued in *Second Treatise*,<sup>53</sup> each man is born into a state of perfect freedom whereby he and only he can be the true arbiter of his will "in all things where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." Immanuel Kant's Categorical Imperatives strictly disallow slavery in all forms. Indeed, the dignity of the individual is a recurring theme in all of classical liberal philosophy. Nozick

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<sup>50</sup> Wolff 1991, 19.

<sup>51</sup> It is interesting to reflect that the injunction against slavery is a *learned* norm.

<sup>52</sup> Admittedly, Locke's record on the moral permissibility of slavery is a bit of a mixed bag. See Sec. 178-180 of *Second Treatise*.

<sup>53</sup> Locke, Sec. 22.

expresses this theme often by referring to the “inviolability of other persons”<sup>54</sup> and remarking on our separate existences as individuals. Deontological libertarianism (and all entitlement theory) rests on the fundamental principle of self-ownership. But does it follow that the absence of slavery leads to the concept of self-ownership? Is self-ownership a coherent idea to begin with? The following paragraphs present a few objections to the doctrine of property in self.

Kant, who Nozick cites approvingly several times in *Anarchy*,<sup>55</sup> clearly and decisively rejected the idea of self-ownership on the grounds that the very concept is incoherent. Consider the following passage from *Lectures on Ethics*:

Man cannot dispose over himself because he is not a thing: he is not his own property; to say that he is would be self-contradictory; for insofar as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.<sup>56</sup>

In the preceding excerpt, Kant is implying that, for ownership to make any sense, the subject owning and the object being owned must be metaphysically separable.

“Ownership”, in this sense, is an irreflexive relation. In other words, if one says that “*A* owns *B*”, it logically must follow that “ $A \neq B$ ”, according to Kant’s reasoning. Cohen finds Kant’s argument wanting, holding that all Kant has shown is that people cannot be things, not that only things can be owned (he accuses Kant of the fallacy of question-

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<sup>54</sup> *ASU*, 32.

<sup>55</sup> See *ASU*, Ch. 3, “Moral Constraints and the State,” for repeated invocations of the alleged “Kantian character” of Nozick’s moral system.

<sup>56</sup> Kant, 1997 printing.

begging).<sup>57</sup> Brenkert, in his response to Cohen, offers a more sympathetic interpretation of Kant:

To own oneself is to be in a position to treat one's powers and person simply as means to one's ends. But then to treat oneself as self-owned means that one treats oneself both as an end and, at the same time, purely as a means. That is, this requires that one treat oneself both as having various qualities of personhood, *qua* owner, and not to have those qualities, *qua* owned.<sup>58</sup>

The incoherence that Kant speaks of points directly to the first Categorical Imperative. It would be impossible to universalize the maxim that each person treat herself as both the master and slave of her person. The power differential between the master and the slave results in an unequal relationship. As a consequence, it makes no sense to assert that both master and slave are the same person; it is a conceptual contradiction. Furthermore, as Kant says in *Metaphysics of Morals*, if self-ownership implies the liberty “to dispose of oneself as one pleases,”<sup>59</sup> then it directly contradicts the second Categorical Imperative on its face. Self-ownership logically leads to all sorts of anti-Kantian actions (suicide, prostitution, etc.). It is for this reason that Kant expressly rejects it<sup>60</sup> and builds his moral system upon alternate humanitarian foundations. By appealing to Kant, Nozick may have handed his critics ammunition.

If one accepts Nozick's definition of slavery (ownership of one human being, in full or in part, by another human being), then that means that clauses 1 and 2 can be collapsed so as to avoid a tautology. The implication hiding between clauses 2 and 3,

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<sup>57</sup> Cohen 1995, 211-213.

<sup>58</sup> Brenkert 1998, 50.

<sup>59</sup> Kant (1797) 1996, 56.

<sup>60</sup> For an alternate (albeit conceptually shaky) Kantian defense of self-ownership, see Taylor (2004), who argues that Kantian conclusions about morality more or less line up with libertarian normativity. The implication is that Kant proved himself wrong about self-ownership.

however, is that individuals can either be owned by other people, or they can own themselves, not both *and not neither*. If one grants the second clause (which I am more than happy to do), it may be prudent to interject the following interrogative: is it possible to reject clause 3? Does it follow that one cannot *not* own oneself?

In examining the above problem one must first ascertain whether it is possible for some things to go unowned. On this question it is important to recall Exdell's important clarification that things can only be unheld if no one has *or has ever had* a exclusive moral right to them.<sup>61</sup> Take, for example, the external world in the state of nature. Locke<sup>62</sup> and Nozick seem to agree that the pre-human earth went unowned until the "property-acquiring animal" began to lay claim to its many fruits. So it does seem that things can go unowned in perpetuity (or at least until they are claimed). I ask: Why is the individual any different?<sup>63</sup> Is a person compelled to own himself by virtue of simply being born? It is implied by Nozick<sup>64</sup> that a person can, in a free system, legitimately sell

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<sup>61</sup> Exdell 1997. I use the terms "unowned" and "unheld" interchangeably here, although it is worthwhile to point out Exdell's distinction between the two terms. An unowned thing refers to something not currently possessed by an individual. An unheld object, Exdell says, is something that no person has a *moral right* to exclusively have. The problem here is that Nozickian property titles do not end with the owner's death, and therefore it can never be assumed (unless we are the first group of humans on the planet) that something that appears unpossessed is in fact unheld.

<sup>62</sup> "The earth and all inferior creatures be common to all men, but every man has a property in his own person," (Locke, Sec. 27). The use of the word "common" here has the potential to confuse, and indeed Locke seems to intend some sort of amalgam between collective property and non-ownership of the earth. I will not endeavor to reconcile what exactly he meant here and interpret him to indicate that the earth in the state of nature is unowned.

<sup>63</sup> I avoid the question of children, who are born without the "capacity for reflexive self-reference" and therefore do not qualify as selves according to Nozick's (1981) definition.

<sup>64</sup> *ASU*, 331. Nozick denies, however, that slavery can be inherited conditionally from antecedent generations ("But some things individuals may choose for themselves, no one may choose for another"). What, then, of the children of slaveholders? Do they inherit the moral right to arbitrarily rule over their parents' slaves?

himself into slavery. That is, he can alienate himself from his own self-property and transfer the title to another. The implication then is that it *is* possible to not own oneself. Then why isn't it possible (or preferable) for a person (or all persons) to be unowned (or, better still, unownable)?

If the libertarian wanted to avoid conceding that self-imposed slavery could be a legitimate outcome of self-ownership, he could counter in a number of ways. First, he could dispute that it is possible to not self-own, and in effect agree with Locke that life and liberty are inalienable from the individual. That is an astonishing concession; the libertarian was a Lockean all this time! He accepts partial self-ownership and, down the road, redistribution. A Nozickian he is no more. Second, the libertarian could assert that no *rational* person would enter into such a contract with another. The obvious rejoinder is to devise a scenario in which this very transaction could occur. G.A. Cohen provides one in his tale of two rational actors of equal talents and tastes, both of which want to own a slave more than they want to resist becoming one. They flip a coin to determine who will become subservient to the other and the transaction proceeds from there. A rational actor becomes a slave through a voluntarily consenting process that violates no one's rights.<sup>65</sup> Third, the libertarian could agree (and Kant, and Rousseau) that human beings are unowned and inherently unownable entities. Needless to say, he has given up the game by undermining the fundamental principle of entitlement theory.

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<sup>65</sup> Cohen 1995, 47. I shall assume that each participant promises to treat the other nicely as a potential master. The libertarian might retort that a form of "soft slavery" as such results from a contractual obligation and is therefore more permissible. Being subjected to the arbitrary will of another man, with no recourse to free oneself from said obligation, is slavery no matter how one slices it. The hypotheticals could go on.

The simple fact is that libertarians need the basic premise of self-property to be true in order to give moral weight to external property rights. As it is, Nozick's principle of self-ownership is "abstract and formal."<sup>66</sup> He infers self-ownership from the separateness of each person's existence. The human race, being divided more or less equally into single self-contained packages (individuals), is constituted by the sum of its parts, nothing more. What gives individuals value, he says in *Philosophical Explanations*,<sup>67</sup> is "being myself, a property no one else has, ...as it brings along with it the general characteristics of being an I which others have." But as they stand, Nozick's pronouncements about the inviolability of individuals, and the social costs that result, fail to paint a comprehensive picture of the moral status of individuals in society. A fundamental principle of full self-ownership, I believe, creates more problems than it solves in designing a moral system.

Perhaps it would serve as a fresh of breath air at this point to offer up an alternative grounding for the importance of the individual as a moral being. Returning to Immanuel Kant, consider the following passage that he offers when discussing his third Categorical Imperative, the "kingdom of ends":

In the kingdom of ends everything has either Value or Dignity. Whatever has a value can be replaced by something else which is equivalent; whatever, on the other hand, is above all value, and therefore admits of no equivalent, has a dignity.<sup>68</sup>

Kant is expressing the intuitive sense that a human being occupies a moral status superior to that of a bundle of goods worth whatever someone is willing to trade for a slave. A mother would never trade away her child for even the most ridiculous sum of money (or

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<sup>66</sup> Papaioannou 2008, 263.

<sup>67</sup> Nozick 1981, 454.

<sup>68</sup> Kant [1797] 2001, 192.



if she did she would face moral outrage). One cannot own oneself like one owns one's house or car. Those things can be replaced, but one's life never can. Life and liberty are the scarcest of resources to which each person is allotted one and only one share. Kant recognized the distinction between humanity and property, i.e. dignity.

While I believe that further invocation of Kant could clear the way for positive rights and defeat Mr. Nozick, I proceed away from the notion of self-ownership to an all too brief discussion of his entitlement theory.

### Entitlement Theory of Justice: Is “Equal Freedom” A Contradiction?

Setting aside the fact that self-ownership does not entail all the things for Locke that it clearly does for Nozick, there are many important distinctions to be made with respect to the two’s views on external property rights (what G.A. Cohen calls “world-ownership”).<sup>69</sup> In Locke’s state of nature, property rights exist as a pre-political natural right, originating from the foundational property that each man has in his own person. By mixing his labor with an unowned piece of the world, a man can acquire a title to said object through which he reserves the exclusive moral right to dispose of it as he pleases. This is known as Locke’s labor theory of value, and is among his greatest contributions to philosophy. This system of property rights in the state of nature is said to be “valid without consent”<sup>70</sup> and while Locke at first glance appears to endorse unlimited natural property rights, it is crucial to note that he believes that in the state of nature the primitive man will find it extremely difficult to acquire much more property than is necessary for “the conveniency of life”.<sup>71</sup> Locke believes that in the pre-political state of nature there is a natural limit to how much one man can acquire before waste sets in. Thus, in a time of abundance no one man acquires title to so much property that he crowds out his neighbor. It is the invention of money, a durable medium of exchange, that makes it easier for a producer to sell off his surplus and store his wealth in a manner such that it does not deteriorate over time. For Locke, this milestone marks not only the first social compact

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<sup>69</sup> Cohen 1997, Ch. 3.

<sup>70</sup> Scanlon 1976, 23. Steiner (1980) points out that since “it is an analytic truth that any property right, as a right against the world (right *in rem*), entails correlative obligations in all persons who are not the holders of that right,” any system of *legitimate* and enforceable property rights would require universal consent. Since Nozick does not adopt the labor theory of value it is not clear how he overcomes this objection.

<sup>71</sup> *Second Treatise*, Sec. 36.

among men, but also a point in history where the concept of property became in need of significant rethinking. The introduction of money into society and its implications also marks the first major departure between Nozick and Locke, the effect of which ripples forward.

Nozick takes issue with Locke on the question of whether or not it was necessary for a social compact to establish a fixed medium of exchange. Nozick invokes what he calls “invisible hand explanations”<sup>72</sup> to speculate about how a system of money could arise without an express social compact establishing it. Briefly, his assertion is that individual rational actors acting freely and chiefly for their own benefit will create market pressures leading to the establishment of a system of money. No social contract or collective consent is required.<sup>73</sup> Invisible hand explanations attempt to explain an emergent property of some phenomenon by showing how the prosaic properties of the phenomenon have the emergent property somehow implicit in them.<sup>74</sup> Nozick is trying to show here that conventions alone could establish a legitimate money system; he is very careful to avoid anything close to a social compact in a Lockean sense. The stark delineation becomes clear at this point: for entitlement theory to be valid, social contract theory must be rejected. Nozick cannot allow that a social contract can give legitimacy to a system of government because then the question of individual rights would be secondary. The Minimal State derives its legitimacy solely from the nonviolation of moral side constraints and the principle of compensation. As a result, the only Lockean

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<sup>72</sup> *ASU*, 18-22. Term is coined by Adam Smith. This invisible hand explanation, which reappears with a vengeance in Nozick’s quest to justify the minimal state, is the closest element to what one could call a methodology in *Anarchy, State, and Utopia*.

<sup>73</sup> Recall Nozick’s pithy aside that “tacit consent isn’t worth the paper it’s not written on” (*ASU*, 287).

<sup>74</sup> Gaus 2011, 122.

concept that he can import into his theory is natural property rights. But the two disagree early and often. Nozick is caught between a rock and a hard place by holding onto Lockean original property theory long after Locke has abandoned it, while simultaneously launching an incisive critique against the labor theory of value.<sup>75</sup>

Nozick's rejection of social contract theory indicates stark disagreement between he and Locke. The differences between the two men, however, become even more pronounced upon further inspection of the text. To begin, Locke's appeal to "natural reason" that each man has "a right to his preservation, and consequently meat and drink, and such other things that nature affords for his subsistence"<sup>76</sup> seems to be an early injection of positive rights talk into his discussion of property rights (in fact, this phrase appears before the labor theory of value is introduced). Indeed in the *First Treatise* Locke postulates a basic human right to essential resources in a fairly concrete way:

God, the Lord and Father of all, has given no one of his children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplus of his goods; so that it cannot justly be denied him, when his pressing wants call for it: and therefore no man could ever have a just power over the life of another by right of property in land or possessions; since it would always be a sin, in any man of estate, to let his brother perish for want of affording him relief out of his plenty. As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man *a title to so much out of another's plenty* as will keep him from extreme want, where he has no means to subsist otherwise.<sup>77</sup>

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<sup>75</sup> ASU 174-178 and 287-289. Nozick asks, but does not resolve, a number of questions relating to the inherent ambiguity in Locke's theory of original acquisition such as, "Why should one's entitlement extend to the whole object rather than just to the *added value* one's labor has produced?", and "Why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?" These questions only muddy the water further, but credit goes to Nozick for presenting them.

<sup>76</sup> *Second Treatise*, Sec. 25.

<sup>77</sup> Sec. 42. Emphasis mine.

Charity, it seems, is in some cases obligatory in Locke's state of nature.<sup>78</sup> But Nozick, while ostensibly adopting this foundation,<sup>79</sup> does not and cannot endorse such a call to action. No man may be forced to share his property with others without his consent, and to watch someone starve doesn't count as aggression in the Nozickian world.<sup>80</sup> If such callous neglect of another human being violated his rights, then the dominant protective agency could intervene to provide food and shelter for the indigent soul. Nozick's hands are tied; the starving man must appeal to luck.<sup>81</sup>

On balance, Locke's system of property rights is relatively strong and is, in the end, his reason for instituting civil government. Nozick adopts it (with the noted exceptions) for the sake of discussion. The primary concern of the second half of *Anarchy* is to design a system of justice that originates in property rights. Nozick begins with the principle of distributive justice, which says that "a distribution is just if everyone is entitled to the holdings they possess under the distribution."<sup>82</sup> This formulation isn't as airtight as Nozick needs it to be. Lawrence Davis identified a problem with the principle by asking what would happen if a man with no holdings stole some property from everyone on a South Sea island and then destroyed what he stole. Under the principle of

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<sup>78</sup> See Moulds (1965) for a detailed response to Strauss's (1953) neo-capitalist interpretation of Locke.

<sup>79</sup> "We shall begin with individuals in something sufficiently similar to Locke's state of nature so that many of the otherwise important differences may be ignored here." Presumably Nozick is aware of the previous passage from Locke (he cites it directly in Ch. 9 and calls it "an essential element of [Locke's] theory").

<sup>80</sup> Held 1976.

<sup>81</sup> To be clear, Nozick doesn't imply that inaction in this situation is of no moral consequence (no doubt he would recoil in horror at the blatant disregard for another's suffering). I will explore this subject further in the proceeding section.

<sup>82</sup> *ASU* 151. Nozick argues that one can derive a complete theory of justice from this principle, a view known as proprietarianism by which the only enforceable moral rights are property rights (Vallentyne 2011, 151).

distributive justice, all persons would be entitled to the holdings that they possess (the thief ending up the way he began, with nothing).<sup>83</sup> Nozick needs to specify better the procedures by which a just distribution can be arrived at. Introducing the notion of the transitivity of justice, he says that whatever arises from a just situation by just steps is itself just. The two principles of justice in holdings (justice in acquisition and justice in transfer) coupled with the principle of rectification serve that purpose and together form a sketch of entitlement theory.

Nozick declines to specify in detail any of the principles of his entitlement theory.<sup>84</sup> The first principle, justice in acquisition, is the most incomplete of the three. He must first show that property rights have a moral component to them; that is, property rights are enforceable as moral rights. How are property rights morally legitimate? Nozick doesn't fully adopt Locke's labor theory of value, a theory embraced by both Rousseau and Marx, on the grounds that mixing one's labor with an object seems an implausible way to gain permanent moral exclusivity rights to that object<sup>85</sup>. But property rights must be tied into self-ownership somehow. In his somewhat lengthy response to John Rawls, Nozick offers a series of counterarguments to the former's assertion that property rights do not have moral content because the process by which individuals acquire property is based on their natural endowments is "morally arbitrary"<sup>86</sup>. Whereas Rawls' central point is that "the concept of moral worth does not provide a first principle

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<sup>83</sup> Davis 1976, 838-840. I've modified the story slightly to avoid Vallentyne's (2011, 166fn) correct criticism of the counterexample.

<sup>84</sup> *ASU* 153.

<sup>85</sup> *ASU* 175. Nozick asks, "If I own a can of tomato juice and spill it in the sea so that its molecules mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"

<sup>86</sup> See Rawls 1971, Sec. 48 on "Legitimate Expectations and Moral Desert".

of distributive justice,” Nozick must account for distributive justice as a realization of the maxim that *people are entitled to what they deserve*. His final argument reads as follows:

1. People are entitled to their holdings.
2. If people are entitled to something, they are entitled to whatever flows from it (via specified types of processes).
3. People’s holdings flow from their natural assets. Therefore,
4. People are entitled to their holdings.
5. If people are entitled to something, then they ought to have it.<sup>87</sup>

Thus, Nozick has generated desert (the condition of being deserving). This argument is sort of an end-run around the labor theory of value and is effective in its critique that Rawls’ charge of moral arbitrariness could be used to dismiss the moral worth of any *whole individual*.<sup>88</sup> Schmidtz gives an alternative and inspiring account of desert, concluding that individuals deserve opportunities to which they can do or not do justice, but that justice consists of more than simple desert (and “Justice is not the whole of morality”).<sup>89</sup> He also highlights an important distinction that Nozick misses: specifically that “conceptions of desert respond to the fact that people are *active* agents... conceptions of entitlement respond to the fact that people are *separate* agents.” Thus arises a challenge to the third clause in the above argument.

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<sup>87</sup> ASU 225-226. In this formulation, “they ought to have it” is the same thing as desert. Nozick adds that “this overrides any presumption of equality there may be about holdings.”

<sup>88</sup> ASU 226fn. “If nothing of moral significance could flow from what was arbitrary, then no particular person’s existence could be of moral significance, since which of the many sperm cells succeeds in fertilizing the egg cell is arbitrary from a moral point of view.”

<sup>89</sup> Schmidtz 2002, 792.

To say that one's holdings flow from one's natural assets misses an intermediate step.<sup>90</sup> A person has to *do something* with his natural abilities to justify the moral desert to receive new holdings. If natural ability was the sole moral justification of full property right, then wouldn't Wilt Chamberlain be entitled to a lifetime of earnings as an NBA star based solely on some objective measure of his athletic ability? Natural ability requires development, which is conditional upon available resources, in order to become talent.<sup>91</sup> Moreover, a person of considerably limited natural athletic ability (for instance, this author) could spend many years developing his basketball skills to reach a level of athletic prowess superior to that of a person born with an ideal physicality for the sport. Holdings, therefore, do not flow only from natural abilities but also from actions.

Nozick agrees with Rawls that differences in natural abilities can result in inequality of holdings (the preceding argument is used to justify why that resultant inequality should not be eliminated or minimized), but he does not address the differences in the set of actions available to different individuals. As Hume said (in concert with Rousseau), "different parts of the earth produce different commodities; and not only so, but different men both are by nature fitted for different employments."<sup>92</sup> Depending on one's position on the earth at birth (which, like natural abilities, one has no control over), the set of actions available to one individual could conceivably be *very* distinct from that of another in a different position.

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<sup>90</sup> Nozick also fails to justify the assertion that one's natural abilities are exclusively the property of the same. There are significant challenges to the idea that one's ability to labor falls under the category of private property. See Andrew (1985), Papaioannou (2008), and Cohen (1995).

<sup>91</sup> See Papaioannou (2008) for a discussion of self-development as a process in the epistemological principle of self-realization.

<sup>92</sup> *Treatise on Human Nature*, Book III, Part II, Section IV.



*Pace* Nozick, it is no longer self evident that one is legitimately entitled to all of the holdings that flow from one's natural abilities, thus a distinction must be made that Nozick does not make: the distinction between the concepts of freedom and liberty. Liberty, the concept at the heart of the libertarian ideology, deals with the permissibility of types of actions.<sup>93</sup> This is the concept that Nozick is expressly concerned with for the entirety of *Anarchy*. Freedom, on the other hand, can be defined independently as the *possibility* of certain actions or types of actions.<sup>94</sup> To illustrate, a person may be at liberty to move to Alpha Centauri (barring immigration restrictions), but she is not free to do so. Conversely, she is free to strangle her loved one in his sleep, but she is not at liberty to do so. The important point is that liberty has two normatively-guided implications: it either compels one not to do certain things, or it empowers one to do certain things thanks to the forbearance shown by others towards one's assertions of liberty, as well as by the state itself.<sup>95</sup> Freedom of the individual is the absence of constraints (by other individuals or the laws of the universe) to do a particular action at a particular time or to perform a certain type of action generally. The freedom-liberty split is excellently summarized by Jonathan Wolff:

Hohfeld defines a 'liberty right' in the following way: I am at liberty to do x if I have a duty not to do x. Clearly if I have a duty not to do x, and this is properly enforced against me, then it will follow that I am *unfree*, by the

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<sup>93</sup> I devote the next section to discussing liberty vis-à-vis the moral side constraint system.

<sup>94</sup> Jonathan Wolff infers these definitions from the works of Wesley Hohfeld (1919) and Hillel Steiner (1994). See also Steiner (1974), "To ask whether an individual is free to do *A*, is not to ask a moral question. It is, rather, to ask a factual question the answer to which is logically prior to any moral question about his doing *A*."

<sup>95</sup> Or, as Cohen (1995, 61-62) suggests, liberty may consist in the set of actions it is *permissible* to do. For instance, he writes, "although a well-enforced law against rape restricts rapists' *freedom*, it nevertheless does not restrict their *liberty*, since there is no such thing as a liberty to rape."

previous definition, to do  $x$ . Yet on this account, freedom and liberty are by no means coextensive. I can have a duty not to do  $x$  – and therefore not do it – but still do it, and therefore be free to do it. Conversely, through illegitimate constraint I can be rendered unfree to do what I am at liberty to do. If *liberty* is defined in terms of absence of duty it becomes quite distinct from *freedom*, defined in terms of possibility.<sup>96</sup>

Thus, freedom is a descriptive, empirical concept with as many actual configurations as there are unique human beings alive on the planet. Liberty, by contrast, is a normative concept with one configuration superimposed upon every individual equally.<sup>97</sup>

It will be a worthwhile endeavor to explore this relationship between freedom and liberty further, but first one must operationalize the concepts. Imagine a single individual, named Wilt Chamberlain, sitting alone in his mansion in 1973. Now:

Let  $F$  represent the set of which are empirically *possible* for Wilt to do (Wilt is free to perform actions in  $F$ ). And,

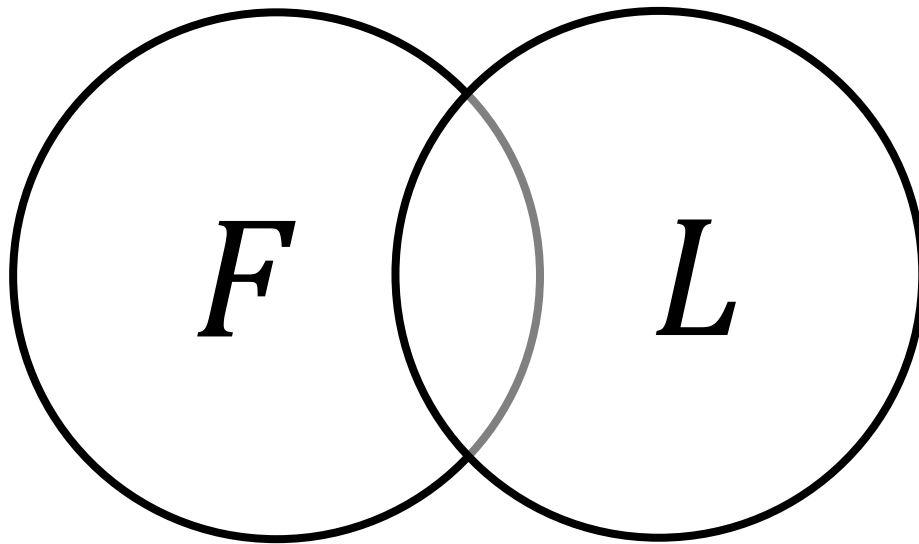
Let  $L$  represent the set of actions that it is theoretically *permissible*<sup>98</sup> for Wilt to do, whether or not it is possible for him to do them at the moment (Wilt is at liberty to perform actions in this set). Such that,

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<sup>96</sup> Wolff 1997, 349.

<sup>97</sup> Here I set aside special cases where, at least in the legalistic sense, some individuals such as children, criminals, and immigrants do not have identical liberty rights relative to the rest of the population.

<sup>98</sup> Assume any *ad hoc* moral or legal system of one's choosing and that all elements of  $L$  have positive or neutral normative value. The admittedly crude model I proceed to sketch is intended to be freedom- and liberty-flexible.



**Figure 1 - The Freedom-Liberty Model**

The above Venn diagram represents the totality of *logically coherent* actions in Wilt's universe at a point in time; both possible and impossible, as well as those both permissible and impermissible ( $F \cup L$ ). Note that what is *not* included in the either sets are actions which are neither empirically possible nor theoretically permissible. Elements outside both sets would include only hypothetically impossible actions (which result in a logical paradox), such as Wilt travelling back in time and killing himself, or, as I have argued, selling himself into slavery. Actions in  $F \setminus L$  are actions that Wilt is *free* to do, but he is not *at liberty* to do, and vice versa, etc.<sup>99</sup>

As stated before, set  $F$  consists of all possible actions available to Wilt in his universe at a given point in time. This set is constantly in flux. As he chooses an action  $x$  to take, Wilt eliminates a number of choices that he could have realized otherwise, but he also opens the door to new actions resultant from  $x$ . It makes intuitive sense, then, to say

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<sup>99</sup> If Wilt were the only human being on the planet,  $L \setminus F$  could very well be an empty set.

that Wilt's degree of freedom is very much a measure of the amount of choices that he has available to him at a given time. He is free in this moment to choose from a certain set of actions ( $F$ ) which then gives way to a new menu of choices ( $F'$ ). If  $F'$  results in a *net gain* of elements relative to  $F$ , then Wilt has gained freedom. If, on the other hand, he suffers a *net loss* of freedom based on a previous choice, can it be said that Wilt has acted wrongly? There is no way to know because  $F$  by itself has no normative content; it consists only of a set of empirical truths ( $x$  is available as an action,  $y$  is available, etc.). Any element of  $F$  may be good, bad, or neutral from the standpoint of normativity;  $F$  must be compared to  $L$  in order to import normative value to an element  $x \in F$ .

Therefore,

**All elements in subset  $F \cap L$  have positive or neutral normative**

**association. All elements of  $F \setminus L$  have negative normative association.**

The set of actions in  $F \cap L$  are the actions that Wilt has available to him, but *also* that are permitted of him to do. Hereafter I shall refer to this subset as "lawful freedom".

It should be clear now that what Nozick wants to maximize with his philosophy is not total freedom nor total liberty, but specifically lawful freedom. He could call for an increase in  $L$  (for instance, lessening moral restrictions and economic regulations) but that would be of no practical value unless the effect was to increase the choice of action that Wilt has available to him as well. A doctrine of liberty is of no use unless one is at liberty to do the things that one *can* do. The libertarian wants to be able to enjoy his liberty. In explaining why one should value extensive choice of action (freedom), Nozick says the following:

I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with

some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for a meaningful life.<sup>100</sup>

With no knowledge of one's natural abilities or situation in society (say, in the Original Position),<sup>101</sup> the rational actor might want to maximize the menu of choices that she has available to her that she is also permitted to do. This is how she shapes her life in a meaningful way.

We have defined freedom as the set of actions an individual has available to perform at a given time, and we have established that freedom (as defined) changes configuration over time. A decrease in overall freedom (that is,  $F$ ) is not inherently normatively bad, because we do not value  $F$ , only a certain subset of  $F$ ; we only value lawful freedom. It is the currency we use to translate our will into real world results. But every unique individual has a different  $F$  such that no two  $F$ 's are the same. Let us introduce a bit more complexity into our freedom-liberty model and imagine a society of three individuals (Wilt, Susie, and John) living together under some preordained moral and legal system. Now:

Let  $F^1$  represent the set of actions that it is empirically possible for Wilt to do. And,

Let  $F^2$  represent the set of actions that it is empirically possible for Susie to do. And,

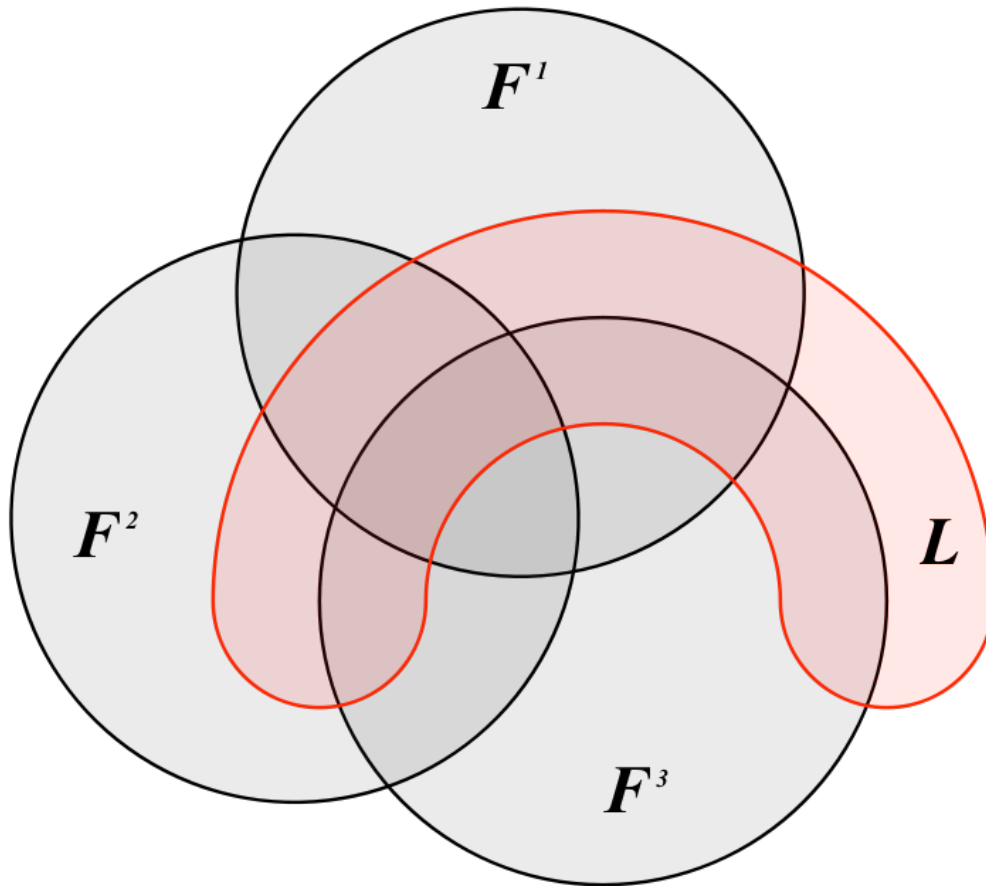
Let  $F^3$  represent the set of actions that it is empirically possible for John to do. And,

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<sup>100</sup> ASU 50.

<sup>101</sup> Rawls 1971.

Let  $L$  represent the set of actions that it is theoretically permissible for all to do. Such that,



**Figure 2 - The Multilateral Freedom-Liberty Model**

The above figure<sup>102</sup> reflects the separateness of individuals as well as the overlapping nature of extensive choice of action. Consider the subset  $[F^2 \cap L - (F^1 \cup F^3)]$  which denotes the set of actions that Susie is both free and permitted to take, but which Wilt and John are either not free or not permitted to take (or neither). This is Susie's *personal lawful freedom*; she may indeed become pregnant and carry a child to term, an action ostensibly permitted of Wilt and John but which they are nonetheless unfree to do.

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<sup>102</sup> This four-set construction originates from John Venn himself, notation mine.

Another subset of the model, Wilt's personal lawful freedom [ $F^1 \cap L - (F^2 \cup F^3)$ ], may include a panoply of actions unavailable to both Susie and John due to the amount of resources that Wilt has at his disposal (the option to buy a yacht, for instance).

A glance at the above model should reinforce the fact that not only is it natural for there to be inequalities in freedom (indeed freedom by its very nature is unequal), but that it is also very difficult to make a moral judgment about these inequalities. Wilt's relative natural advantage in playing basketball and subsequent riches is no more a moral outrage than Susie's relative natural advantage in terms of birthing children. This would seem to work in the libertarian's favor: how can one derive a moral judgment about a certain inequality when inequalities of freedom are natural and enduring? In this view, however, the libertarian must then explain why relative differences in personal lawful freedom deserve special moral protection against the state to the same degree that one is afforded moral protection, for example, against physical aggression. And since each person has a distinct total lawful freedom, some individuals will be in a better position vis-à-vis their menu of choices to pursue courses that could lead to a greater degree of self-development and, ultimately, more freedom<sup>103</sup> (Wilt having access to a basketball court, for example). There seems to be a conceptual basis for asserting that not all freedom is created equally.

There are, of course, some freedoms that are available to all and to which all are at liberty to enjoy. These freedoms are represented by the subset  $F^1 \cap F^2 \cap F^3 \cap L$ , the intersection of all sets of actions by all actors that are personal lawful freedoms. This subset, *universal lawful freedom*, are actions against which no one is constrained from

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<sup>103</sup> For an interesting exploration of freedom as one's relations to the external world, see Steiner's (1974) "Individual Liberty", in which he theorizes that "freedom is the personal possession of physical objects." I am not prepared to endorse this viewpoint in its entirety.

performing and which all are universally both directly permitted to do and forsworn from interfering in another's performing. In a three-person conception, this set might very well contain a wide range of diverse actions that Wilt, John, and Susie may have available to them. These freedoms vary in moral significance. For example, all three individuals have the freedom to breathe air, but in addition all three individuals may be standing under separate banana trees in the state of nature and have the option of picking one to enjoy. On the first example, if all three were constrained from breathing at once then there would soon be no need for lawful freedom, universal of otherwise. On the second example, it's not clear that constraint from acquiring bananas will lead to universal human suffering. But how would one go about determining what consists in universal lawful freedom as a fundamental *right* versus a coincidental possibility among individuals?

One way would be to increase the number of freedom-havers in the model from three to, for instance, ten. A Venn Diagram depicting eleven intersecting spheres of actions would be impractical to display on the page, but the taxonomy of freedoms outlined in the *MFLM* holds: there are some freedoms that some individuals or groups of individuals have that others simply do not have, but there are also some lawful freedoms that *all* have. Note, however, that as the number of  $F$ 's increase in the model, the amount of *coincidental* universal lawful freedoms decreases as those freedoms get moved over into other subsets, resulting in an overall decrease in  $F^1 \cap F^2 \cap F^3 \dots \cap L$ . Note finally that as the number of  $F$ 's increase into the thousands and millions that  $F^1 \cap F^2 \cap F^3 \dots \cap L$  stabilizes. I posit that there is *something different* about these freedoms that make them universal and stable, and will return to this model in the next section. It seems



appropriate to at least question Nozick's equation of property rights with individual rights of the Kantian persuasion.

Any entitlement theory, or system of property rights for that matter, must address the question of what limits there are on natural property rights. Locke's solution is to build in a proviso which limits one's ability to appropriate insofar as one does not worsen the situation of others and one avoids waste. While Nozick finds Locke's specific proviso lacking in its ability to handle difficulties brought about by an extensive property system with limited resources, he admits that "any adequate theory of justice in acquisition will contain a proviso similar to the weaker ones we have attributed to Locke."<sup>104</sup> Indeed, original acquisition in a world of finite resources and growing membership is a formidable problem for entitlement theory.<sup>105</sup> However, Nozick spends a much more significant amount of time in *Anarchy* discussing his theory of justice in transfer: "From each as they choose; to each as they are chosen."<sup>106</sup> It is here that Nozick illustrates how patterned distributions stand in opposition to liberty with the famous Wilt Chamberlain example.

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<sup>104</sup> ASU 178. Nozick's proviso would be limited to the monopolization of scarce goods necessary for life, but he believes that in the unimpeded operation of the free market the proviso would almost never need to take effect. If one person came to own all the drinkable water on an island and charge exorbitant prices for a gallon of water, this would leave others on the island worse off than they were in the State of Nature, and would in turn be a violation of the Lockean Proviso. However, Nozick notes that as a scarce good is appropriated, the price goes up, and therefore it will be difficult for any one person to appropriate all of it. The fact remains that the actions of one have driven up the price of a scarce good for all. Nozick needs this proviso because of the obvious possibility of one person's rights being violated by another person's appropriation of a particular material or resource. In effect though, this proviso weakens the concept of ownership since one is not always entitled to the full market value (the base value + whatever another person will pay him) of one's possession.

<sup>105</sup> See Steiner's (1978) "The Distribution Game" and (1977) "Justice and Entitlement" as well as Arneson (1991) and Papaioannou (2008).

<sup>106</sup> ASU 160.

The thought experiment begins with any patterned just distribution of the reader's choice in a given community, be it Marxist, egalitarian, utilitarian, etc; this initial distribution is coded D1. Legendary basketball player Wilt Chamberlain signs a contract with the local team whereupon the owners of the team have agreed to give Mr. Chamberlain \$0.25 for every ticket sold to every game this season. By the end of the season one million tickets have been sold to the games and Mr. Chamberlain has earned \$250,000. This extraordinary sum of money is much larger than the average income of the community and Wilt Chamberlain is now the richest man around. So many people have transferred their shares of the distribution to him that the final distribution (D2) is now unrecognizable from what came before. Is this distribution unjust?

Nozick argues that since individuals are free to transfer their justly acquired holdings under D1 as they see fit, and they voluntarily moved to D2 without harming a third party, then D2 must also be just. They could have used their money on any number of alternate leisure activities or even saved it for a rainy day as some no doubt chose to do, but enough people chose to transfer their holdings to Wilt Chamberlain to upset the patterned distribution. Thus, liberty upsets patterns. This allegory illustrates how “no end-state principle or distributional patterned principle of justice can be realized without continuous interference with people's lives.”<sup>107</sup> Nozick believes that these patterned systems necessitate some kind of redistribution of holdings at every stage in order to remain patterned accordingly, and therefore the state or whatever entity in charge of maintaining the pattern must constantly interfere with people's lives. Distributional patterned principles of justice, thus, are on some level fundamentally incompatible with

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<sup>107</sup> ASU 163.

individual liberty, and it is in keeping with his commitment to personal liberty that Nozick rejects them.

The elegance of Nozick's Wilt Chamberlain example lies in the fact that it can be applied to virtually any patterned distribution to show how the principle of personal liberty interferes with sustaining them. Many authors, however, have raised serious objections to this assertion. Milton Fisk charges that Nozick begs the question in assuming a market system under which the presupposed pattern operates, citing historical struggles between worker and capitalist classes as a challenge to property rights as a universally held maxim. Until he has justified the market as "the only or at least the best system", Fisk writes, Chamberlain has no rights to the wealth resulting in his endeavor.<sup>108</sup> Cheyney Ryan agrees that Nozick completely neglects alternative conceptions of justice that do not include extensive property rights and adds that the appeal to personal liberty made by Nozick here presupposes that holdings and personal property are interchangeable terms.<sup>109</sup> It may be said that one's employment within an organization is a holding, but does one have ownership over her job? Indeed, there are certain things that may not be done to one by one's employer without violating her rights, but she is certainly not free to do whatever she wishes with her job (say, swapping jobs at will with a co-worker).

At great issue with Nozick's conception of justice in transfer, as many authors have discussed, is whether Wilt Chamberlain is entitled to the full \$250,000 he received from playing basketball for that single season. The classical Lockean would answer yes insofar as Wilt Chamberlain's basketball playing does not do harm to others, but many

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<sup>108</sup> Fisk 1980, 104.

<sup>109</sup> Ryan 1977.

have argued that the question is not so simple. While Locke (and Nozick) argue that by working hard to perfect his talents and agreeing to display them before an audience to an agreed-upon price, Mr. Chamberlain is entitled to every penny he receives, Barbara Fried argues (and the Multilateral Freedom-Liberty Model reflects) that the resulting transaction is not based solely on his efforts but a confluence of factors also including societal values and dumb luck.<sup>110</sup> After all, astonishing basketball skills are only valuable because society has determined that they are. And Mr. Chamberlain was over seven feet tall, so don't genetic endowments also play a large role in deciding how much he gets paid? Or does his unrelenting focus and hard work give Mr. Chamberlain "an unencumbered moral entitlement to the value it creates?"<sup>111</sup> As Scanlon observes, "there is no strong intuitive ground for thinking that these (property) rights are absolute, and little ground for surprise at the suggestion that the pursuit of equality might call for their infringement."<sup>112</sup>

Karen Johnson raises another counterexample to demonstrate that Nozick's theory of justice could lead to a complete monopoly and therefore threaten liberty.<sup>113</sup> After all, it is a bit self-serving that Nozick assigns each of the one million basketball fans with the price of only \$0.25 to see Wilt Chamberlain play. What if people everywhere wanted to see Wilt play so badly that they gave up half, or even their entire wealth to him for the pleasure of watching him? Wouldn't he end up with everything? And if so, wouldn't that distribution be just under Nozick's criteria? Mr. Chamberlain owning absolutely everything would be a violation of the Lockean Proviso and therefore could be rectified,

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<sup>110</sup> Fried 1995, 240 and Perry 1997, 390-391.

<sup>111</sup> *Ibid*, 244.

<sup>112</sup> Scanlon 1976, 7. This theme will be explored further in the next section.

<sup>113</sup> Johnson 1976, 184.

but it is also true that all the individual transfers of wealth to him could be seen as a violation of the proviso in themselves. While this example is a bit flimsy, it illuminates one of the central deficiencies of Nozick's arguments: the atomistic conception of society.

In sum, it is implausible to base a theory of justice on protecting the freedoms that not only have the least consistent normative content, but which the author admits must be curtailed in favor of other principles. While entitlement theory certainly should have its place as a part of a more comprehensive theory of justice, and no doubt should property rights be respected generally, Nozick nonetheless fails to justify its place as the centerpiece. In the next section I explore the implications of side constraints, how redistribution doesn't affect liberty, and finally how to find positive rights in the libertarian worldview.

### **Moral Side Constraints: “First Do No Harm, Then Do No Help”**

John Stuart Mill, arguably the father of political liberalism, gave the philosophical world its most muscular defense of individuality with his essay *On Liberty*. As such, the Millian flavor of Nozick’s contribution should not be overlooked. First, recall the following passage from Chapter 3: “He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.”<sup>114</sup> Nozick echoes this sentiment throughout his work, most notably in the “meaningful life” discussion. Similarly, Mill expresses a general skepticism of government intervention, stating that “the strongest of all arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place.”<sup>115</sup> Nozick’s account is a modern twist on the same posture: “Is there really someone who, searching for a group of wise and sensitive persons to regulate him for his own good, would choose that group of people who constitute the membership of both houses of Congress?”<sup>116</sup> The principle of individualism, while taken to an extreme by the likes of Nozick, has a strong history of philosophical defense and as such will not receive strong challenge here. It is important, however, to examine a particular point of divergence between Nozick and Mill, and that divergence has to do with the moral theory which, at first glance, also appears strikingly similar.

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<sup>114</sup> Mill [1859] 1989, 59.

<sup>115</sup> *Ibid*, 83.

<sup>116</sup> *ASU* 14.

Nozick's moral theory, while underdetermined in the text, "sets the background for, and the boundaries of political philosophy," because, "what persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus."<sup>117</sup> The basic moral theory that he presents is a strict deontological side constraint construction in which the rules of morality are binding, absolute, and exceptionless.<sup>118</sup> These side constraints are a reflection of the "root idea" of the separateness of separate individuals separately living separate from each other. With this root idea in mind Nozick offers the first of an unspecified number of side constraints: a libertarian constraint preventing aggression between individuals. Compare this with the following passage from Mill:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.<sup>119</sup>

Mill's famous "Harm Principle" seems to comport fabulously with Nozick's notions of individual inviolability, anti-paternalism, non-intervention, pro-free market, and non-aggression. So why doesn't John Stuart Mill receive a single substantive mention in *Anarchy, State, and Utopia*? The answer is that Mill's arguments are not deontologically grounded; they are consequentialist. As such, Nozick must refrain from employing them, which is unfortunate for anyone wishing to launch a full-throated defense of individualism. Rather than appealing to utility or consequences as the grounding for moral judgments, as Mill does, Nozick must stake his territory on rights and the

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<sup>117</sup> *Ibid*, 6.

<sup>118</sup> Arneson 2011, 27-29.

<sup>119</sup> Mill [1859] 1989, 13.

nonviolation thereof. “In contrast to incorporating rights into the end-state to be achieved,” he writes, “one might place them as side constraints upon actions to be done: Don’t violate constraints *C*.”<sup>120</sup>

Nozick asks and does not answer the question of whether it is rational to accept the side constraint structure rather than simply minimizing the violation of *C*. He appeals to the Kantian principle of treating individuals as ends, but seems to ignore the Kantian imperative to also treat humanity as an end, presumably because incorporating this maxim would also entail consequentialist considerations. In defending the side constraint construction, Nozick appeals to the inviolability of individuals, arguing that human beings are deserving of such high respect as moral agents that to sacrifice one for the sake of others without his consent would be simply impermissible.<sup>121</sup> It is not enough, however, to justify side constraints on the grounds that human beings are distinct individuals. Any member of the animal kingdom is a distinct being with its own life to lead, but only humans are of a particular moral character that necessitates inviolability. Nozick’s answer is that there are traits that humans possess which are unique to the species, namely: rationality, free will, and moral agency (rational agent capacity). By employing these uniquely human faculties, Nozick says, a person can “regulate and guide its life in accordance with some overall conception it chooses to accept.”<sup>122</sup> And so, deontological constraints are grounded in the idea that only beings who can guide and regulate their lives can ultimately have meaningful lives.

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<sup>120</sup> *ASU* 29.

<sup>121</sup> Otsuka 2011, 46-47.

<sup>122</sup> *ASU* 48-49.



While the concept of the meaningful life is an attractive one to appeal to, it simply won't serve as the moral basis for a rights system of purely negative construction. Positive rights, the likes of which are incompatible with side constraints and deontological libertarianism in general, could equally be justified on the grounds of life-meaningfulness. Observe the following line of reasoning put forward by Samuel Scheffler, an early critic of Nozick: if the capacity for a meaningful life is the valuable characteristic which bestows *rights* on a being, then the function of these rights are to safeguard that being's ability to *develop* that characteristic; and it follows that certain rights (such as the right to assistance) might perform better instrumentally in safeguarding that valuable characteristic.<sup>123</sup> Notice that Nozick never says in *Anarchy* that an individual has a *right to pursue* a meaningful life. The only right-claim that he explicitly accepts is the *right against* aggression, which he believes is absolute and natural in virtue of the inviolability of individuals. The side constraint construction would disallow the claims on others that constitute positive rights, but the moral basis offered for constraints implies the very same.<sup>124</sup>

Implicit in the meaningful life argument is the considerably dogmatic view that only libertarian rights can give people the best opportunity to lead a meaningful life; positive duties to one another are oppressive obligations akin to enslavement. As Wolff identifies, Nozick omits an extremely important fundamental human characteristic: the

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<sup>123</sup> Scheffler 1976, 69-70.

<sup>124</sup> Wolff 1991, Papaioannou 2008, and Ostuka 2011. Another problem with asserting life-meaningfulness as a moral basis for a rights structure is that the ability to pursue a meaningful life is very much a matter of external factors including opportunity, resources, and knowledge. Planning one's life may take place at the intellectual level, but the process cannot be abstracted from temporal constraints.

connections that people have to others.<sup>125</sup> It's entirely possible that to many people a meaningful life is not complete without having been shared on a deep level with loved ones. But the notion of a meaningful life being one led *for* others never enters into the libertarian rights calculus. Indeed, "shaping one's life in accordance with some overall plan looks to be neither necessary nor sufficient for achieving a meaningful life."<sup>126</sup> Even granting that Nozick's conception of a meaningful life may be sufficient to justify his version of rights, it could nonetheless also serve to justify a different set of rights and as such must be set aside as incapable of justifying a single theory of rights.<sup>127</sup> Many commentators have concluded that the actual grounding of Nozickian libertarian moral theory is in fact self-ownership,<sup>128</sup> which in itself is highly problematic as observed in this paper.

Nozick believes that individual negative rights are not given their due respect in political philosophy, and so he employs deontological side constraints as a direct challenge to the utilitarian (consequentialist) rights theory. For Nozick, rights are absolute and unyielding; he is "committed to the view that it is never right to violate a

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<sup>125</sup> Wolff 1991, 29-33. Nozick does make several mentions of the importance of shared experiences in the final section of *Anarchy*, but the consideration is absent in the formulation of side constraints.

<sup>126</sup> Arneson 2011, 37en.

<sup>127</sup> Wolff 1991, 32. See also Otsuka 2011 a response to the grounding of natural rights in the inherent higher moral standing that humans possess ("inviolability vs. saveability"). Nozick is under no impression that he has comprehensively made his case, citing the same flaw in Locke's argument for natural rights (*ASU* 9), but Locke's natural rights have at the very least a theological grounding which Nozick ostensibly rejects. He also must avoid Locke's appeal to the preservation of mankind as the function of natural rights as that argument carries aggregative, and potentially consequentialist, content.

<sup>128</sup> Arneson 2011, Papaioannou 2008, Cohen 1995, and Weinberg 1997.

right.”<sup>129</sup> It would seem, then, that Nozickian rights are nonhierarchical in that one particular right cannot be prioritized over another. This seems problematic when the case arises that rights could potentially conflict with one another (say, some situation in which the right of free expression and the right of noninterference conflict), but Nozick rejects that rights are *prima facie*. Rights can never give way to any greater or equal moral claim in deontological libertarianism; they are the superlative moral concern in themselves. He also claims that rights can never conflict with other rights by emphasizing the “historical” nature of rights-gettings. This historical framework is specifically tuned to deal with property rights, but not much in the way of other kinds of rights (the kinds of civil liberties afforded by liberal democracy, for instance).<sup>130</sup>

A very common criticism launched against Nozick’s libertarianism (and much of the contemporary libertarian scholarship) is that its peculiar construction indicates an attempt to justify unregulated (or very minimally regulated) capitalism. To be clear, this is by no means an ignoble cause. Nozick is in good company defending the market system with the likes of Adam Smith, John Locke, John Stuart Mill, and Milton Friedman among many others. Friedman, for example, argued that private property is necessary to secure the hallmark features of a pluralistic society (civil liberties, rights, and political participation).<sup>131</sup> Mill saw economic competition as a process that does indeed cause harm to others, particularly the losers:

In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain, or loss to others, or intercepts a good which they had a reasonable hope of obtaining... But it is, by

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<sup>129</sup> Francis & Francis 1976, 635fn. Nozickian rights are also “strongly preclusive and strongly discretionary” in addition to being absolute.

<sup>130</sup> *Ibid*, 637.

<sup>131</sup> Ryan 1977, 140-141. See arguments in Friedman’s *Capitalism and Freedom* (1962).

common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences.<sup>132</sup>

Mill is arguing that economic competition should be allowed because, even though it does in fact cause harm, it does an overwhelming amount of good for the general interest of mankind. It follows that capitalism should be most preferred in the form that offers the optimal balance of harm minimization and benefit maximization. Some schedule of market regulations would no doubt do the trick, and it would be perfectly legitimate to impose them according to Mill (with restraint).<sup>133</sup> Nozick rejects this consequentialist reasoning, but it is not clear how he can claim that unfettered economic competition can produce harm without violating rights. He agrees that acts which produce harm cannot be allowed (“My property rights in my knife allow me to leave it where I will, but not in your chest”),<sup>134</sup> and it certainly seems well established that economic competition produces harm (or at least can hinder one’s ability to execute one’s rational life-plan). A major problem with deontological libertarianism is that it seeks to destroy the utilitarian monster with a monster of its own: the free market. As Jeffrey Friedman notes, “every *reductio* of utilitarianism can be converted into a *reductio* of philosophical libertarianism simply by changing the source of the terrible consequences envisioned from bands of hateful genocidists into the operation of impersonal market forces.”<sup>135</sup>

It would seem that Nozick has tied his own hands when it comes to defending free economic competition. He cannot appeal to Mill’s reasoning that economic competition, on balance, brings more good than harm to mankind generally. This is an empirical,

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<sup>132</sup> Mill [1859] 1989, 94-95.

<sup>133</sup> *Ibid.* “The principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine.”

<sup>134</sup> *ASU* 171.

<sup>135</sup> Friedman 1997, 461n5.

testable, and consequentialist claim to which deontological libertarians do not have access. Conversely, in order for pure capitalism to be permissible, Nozick would have to show analytically that it does not violate rights; that claim is *far* from substantiated. This is a perilous position to be in, philosophically speaking, for it seems that “those who (apparently) speak most in favor of the free market and free competition are, *prima facie*, in the worst possible position to defend it.”<sup>136</sup>

Perhaps the most damning philosophical objection to Nozick’s libertarianism is, in my view, the charge that Nozick smuggles consequentialist reasoning into his deontology. He begins by arguing that the minimal state is the only just form of the state because anything greater will violate peoples’ rights through redistribution without compensation.<sup>137</sup> He never demonstrates that pure capitalism doesn’t violate anyone’s rights, presumably because in Nozick’s world no one has the right to be protected from the harms brought upon participants through no fault of his own. And these harms are very real; they range from emotional distress brought about by failing in one’s entrepreneurship to actual starvation. Because, however, the harms are brought about by very capitalist structure that best fits with deontological libertarianism<sup>138</sup> there can be nothing done about preventing them. If, as entitlement theory suggests, private property rights are the foundation of justice above all other considerations, how is the deontologist

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<sup>136</sup> Wolff 2006, 1612.

<sup>137</sup> There is one exception case in which the more-than-minimal state could be justified, as in the case where past injustices are so great that the principle of rectification necessitates a more expanded state “in the short run” in order to get to a just distribution (*ASU* 231).

<sup>138</sup> Why does Nozick assume that the free market system fit the libertarian rights schema best? Why not, as Jonathan Wolff (2006) suggests, feudalism?

able to establish that point independent of experience? Friedman puts the question another way:

Most libertarians conclude that once we have decided that ‘liberty’ (inviolable private property) is the desideratum, we should eschew consequentialism because it is a less reliable way to achieve inviolable private property than is *a priori* philosophy. This is undoubtedly true, but how can we decide that inviolable private property *is* the desideratum without doing empirical research?<sup>139</sup>

Friedman calls this the libertarian dilemma. The deontologist and the consequentialist cannot escape one another. The former rests her premises on the evidence provided by the latter, and the latter needs the philosophical arguments of the former to avoid arbitrariness. And yet, Nozick explicitly rejects consequentialist reasoning precisely because he doesn’t want to allow what he calls “utilitarianism of rights”. By setting out to defend free market principles (which are synthesized from libertarian intuitions), but then refusing to let empirical evidence (and therefore counterevidence) into the equation, Nozick is guilty of doing philosophy backwards in the similar way that “creation scientists” do science backwards.

What would “utilitarianism of rights,” which essentially means the ordering of rights in terms of priority and the obligation to minimize violations thereof, imply for deontological libertarianism? Why can’t Nozick allow that some rights are simply more important than others? The answer is that in his conception of rights as side constraints, they must be inviolable, absolute, and exceptionless. To allow that a right can ever go unenforced and be violated (something that a consequentialist libertarian would allow) is

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<sup>139</sup> Friedman 1997, 443. Elsewhere the same question-begging insinuation is echoed by Wolff (2006, 1615): “How remarkable it is that a deontological libertarian should, through the exercise of pure reason, derive a set of rights that, in its approval of the free market, coincides with what his or her consequentialist colleagues can defend on the basis of actual arguments!”

to undermine the very foundation of philosophical libertarianism: self-ownership. As has been shown, full self-ownership in entitlement theory implies that no one has property in another person and therefore no one may force another to do anything against his will including crossing onto his territory (a metaphysical extension of himself) without his permission or just compensation. Nozick briefly discusses which kinds of boundary-crossings should be allowed to go ahead without prior permission (provided compensation is paid after the fact). He tentatively decides that such actions must 1) be unfeared by the victim, 2) carry a benefit that outweighs the transaction costs of obtaining prior permission, and 3) only take place if the boundary-crosser has sufficient means to compensate the victim fairly. He develops the principle of compensation as a modest alternative to the public harm principle, which “Nozick has no moral foundation upon which to erect” since it “justifies harming particular individuals who do not themselves constitute any clear and present threat of immediate harm.”<sup>140</sup> However, this principle of compensation may be procedurally unwieldy in cases where the victim of the crossing and the crosser disagree about the extent of after-the-fact compensation.<sup>141</sup> In addition, Mack identifies that this boundary-crossing example implies a shift in the conception of rights from “claims that are protected by property rules” to “claims that are protected by

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<sup>140</sup> Danley 1979, 422.

<sup>141</sup> Nozick says that the best method to establish a price for crossings in the posterior is to let the two parties negotiate and see what happens, but there is no reason to think that the two-party negotiations won't be laden with “involved bundles of subjunctives and counterfactuals” (*ASU* 65) as he admits third-party price setting procedures will be.

liability rules.” This shift threatens to undermine the “deeply proprietarian tone”<sup>142</sup> of *Anarchy*.

The principle of compensation plays a pivotal role in Nozick’s theory in that it justifies extending protection services to independents in the ultraminimal state. This is necessary because Nozick has ruled out redistribution of any kind. Indeed it seems that redistribution is the villain in this story:

There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits others. Nothing more... *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him.<sup>143</sup>

Obviously, Nozick’s injunction against redistribution is closely connected with his denial of positive rights. This is in keeping with the general principle of self ownership from which moral side constraints are abstracted, and which, as Arneson concludes, “entails the extreme denial that any genuine enforceable obligation to aid is ever generated even by the most favorable ratio of benefit to loss.”<sup>144</sup> As it stands, deontological libertarianism offers little in the way of *ought* and very much in the direction of *ought not*. I now offer a line of argument challenging Nozick’s assertion that all rights are absolute and of equal moral significance.

Returning to the Multilateral Freedom-Liberty Model (*MFLM*), recall that all the actions contained in the categories termed Lawful Freedom (individual, selective, and

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<sup>142</sup> Mack 2011, 108. See also Fried (2011, 241), who points out that Nozick’s condition that the benefits of an exchange be “great enough” (*ASU* 73) seems “vanishingly close to straight utilitarianism.”

<sup>143</sup> *ASU* 33. This passage follows Nozick’s denial of a society. Elsewhere (238) he restates this axiom from the other side of the transaction: “No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.”

<sup>144</sup> Arneson 1991, 54.



universal) are actions that individuals both are unconstrained from doing (by other individuals) and permitted to do by law (natural or positive). These are actions which individuals have the *right to do*. Rights come in different forms (property rights, political rights, legal rights, etc). Nozick's contention is that all rights are of an absolute and unyielding quality and he builds his entitlement theory (based on the principle of self-ownership) such that no conflicts between rights could occur since each individual owns himself completely. In order for this to be true there must be no set of rights which overrides other legitimate sets or that can be shown to be of greater moral significance from the standpoint of justice. It is my contention that the rights and freedoms contained within the subset called Universal Lawful Freedom (*ULF*) are exactly what contradict Nozick's theory.

Humans possess uniquely human traits that give them rational agent capacity. They are separate individuals with rationality, free will, and moral agency and as such, every person is free to pursue his moral goals. These goals are driven by their moral values, and it should be uncontroversial to say that individuals have varying moral values.<sup>145</sup> If a distribution of Lawful Freedom—a distribution of rights—was to give preferential treatment to an individual pursuing a particular set of moral goals, then all the other individuals who held a different set of moral values would have no obligation to respect those rights.<sup>146</sup> If, indeed, all humans are morally equal to one another, any just distribution of rights to pursue their moral goals must be neutral with respect to their

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<sup>145</sup> This may be considered an empirical claim, but if it is, it is as empirical as Nozick's claim that individuals are different from one another (*ASU* 33).

<sup>146</sup> Steiner 1974, 209-210. The denial of equal rights to pursue their moral goals to those individuals left out of the unequal distribution would be tantamount to a denial that they are moral agents in the same sense of the preferred individual.

moral values. As such, the only distribution of rights that *all* are obligated to respect is the distribution that everyone has equally. This is the very essence of *ULF*; it is the set of rights that all individuals have access to and that none may be constrained from enjoying. These rights have a special moral significance which sets them apart from other less important rights.

This brings forward the question of property rights. While the fundamental right to buy or sell property *is* a universal lawful freedom generally (assuming a market system), every object one owns also carries a distinct set of rights that are unique to that object's title relationship with the owner.<sup>147</sup> The property rights that each individual has over particular holdings are Personal Lawful Freedoms (*PLF*) and are *not* morally neutral; they assist in the particular moral agent's pursuit of his moral goals. The valuation of property rights as morally equal to human rights is, therefore, subject to challenge. It seems intuitive that it is in fact incorrect to automatically confer upon particular property rights the same moral significance that one would certainly afford the fundamental right to breathe air. This implausibility, and others, causes difficulty for Nozick's claim that redistributive taxation is on par with forced labor. First, Nozick is committing a category mistake. Taxing a person's holdings is an act against her property rights, which, when uncoupled from self-ownership (as it is appropriate to do), is quite a different proposition from acting against her bodily integrity by enslaving her. Second, redistribution does not affect "liberty" at all according to the definition put forward in the preceding pages. Nozick's definition of the term appears to be simply the right that one

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<sup>147</sup> Ryan 1977.

has to sell one's property.<sup>148</sup> That definition, however consistent with entitlement theory, is far from satisfactory as it only pertains to a certain set of rights that an individual has over one's property. Under the current working definition, however, redistributive taxation operates in a way that does not necessarily alter the moral rules of society (from which "liberty" is derived).

There is a strong precedence in the history of philosophy for separating kinds of rights categorically and in ordering them on the basis of indispensability. Aristotle spoke about the distinction between wants and needs in his discussions on virtue ethics. John Locke said that life and liberty were inalienable, and that the *preservation* of both individuals and mankind came first before wealth accumulation. If my argument is correct, then the universal freedoms that all people share are of a special sort that all people are unconstrained from performing, and which the laws of nature and society protect the performance thereof. At the risk of conceptual stretching, I simply speculate that if, as it seems plausible, that humans do have a fundamental right to assistance in certain matters, then some if not all of these matters are actions which pertain to the fundamental processes of life that all humans perform as a matter of necessity. These universal and necessary acts, which one may be entitled to assistance in performing (such as the procurement of an education, as Mill argued was an essential process for human development), would therefore most likely fall under the category of a *ULF*. As is no doubt obvious, I have described positive rights. And as a last point, taking into account that redistribution usually funds universal freedom at the expense of personal property, it is not entirely correct to say, as Nozick does, that redistributive taxation simply uses one

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<sup>148</sup> Ryan 1977, 140.

for the benefit of another, nothing more. When an individual gives up a share of his *PLF* which is then transferred into the domain of *ULF*, the taxpayer gets something for his money. He gets positive rights, the kind of which can *never* legitimately be taken away. Nozick would no doubt argue that this should not be done without the express voluntary consent of the individual, and most likely that the individual should be the one doing it. But building a system of positive rights over time is not something that any one individual can do. It takes a society to fight for it and some mechanism like the state to manage it.

## CONCLUSION

Robert Nozick was a thought experimenter of high order. The pages of *Anarchy, State, and Utopia* teem with fascinating arguments and counterexamples that warrant its place in the pantheon of modern political thought. Let not my challenge to Mr. Nozick diminish the fact that this work of political philosophy is absolutely one that cannot be ignored or dismissed. It should be read by any person with an interest in the doctrine that libertarianism offers.

I have presented arguments that full self-ownership is a problematic principle upon which to base a moral, and therefore political, theory. Personal property rights, which should be respected generally, cannot be definitively argued to be absolute and are a suboptimal foundation for a theory of justice. Moral side constraints are especially implausible when compared to an alternative conception of rights which can prioritize some over others when necessary. These three lines of attack, drawn from all over the secondary literature with a small contribution of my own, pose serious problems for deontological libertarianism, of which Nozick was a founding father.

There are a number of paths forward for the researcher. The most obvious future research endeavor would be to pose the same challenge to consequentialist libertarianism, which would entail a completely different (empirical) approach. Many consequentialists employ deontological arguments to round out their arguments (the hybrid approach), so some of my arguments here would apply there as well. In addition, since this paper has only scratched the surface of *Anarchy*, there is always more Nozickian thought to cover in future works. Finally, the Multilateral Freedom-Liberty Model has shown potential (with much refinement, no doubt) to be useful in delineating the conceptual or

instrumental distinctions between types of rights. As such, I hope to continue to pursue its development.

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