

Online Chapter

Further Philosophical Roads to Libertarianism

Introduction

Philosophical criticism of libertarianism in recent decades has been directed almost entirely against Nozick's *Anarchy, State, and Utopia* (ASU), with occasional shots aimed at Hayek. This contributes to the mistaken impression that no important philosophical work on behalf of libertarian conclusions has appeared since the 1970s. A major purpose of this chapter is to dispel this impression by providing brief accounts of the work of other philosophical defenders of libertarianism. A related purpose is to further convey the character of the themes and contentions that comprise libertarian theorizing by seeing them at work in different forms or configurations than we have seen in Nozick or in Hayek. I will discuss the work of Hillel Steiner, centering on his *An Essay on Rights* (hereafter *ER*) (Steiner 1994), Loren Lomasky, centering on his *Persons, Rights, and the Moral Community* (hereafter *PRMC*) (Lomasky 1987), Douglas Rasmussen and Douglas Den Uyl, centering on their *Norms of Liberty* (hereafter *NL*) (Rasmussen and Den Uyl 2005), and David Schmidtz, centering on his *Elements of Justice* (hereafter *EJ*) (Schmidtz 2006).¹ I concentrate on foundational arguments and implications for property rights and economic justice. Since all these theorists are highly sophisticated thinkers, I can here convey only the barest essentials of their doctrines.

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In the chapter on Philosophical Antecedents and the two chapters on Nozick and Hayek, we repeatedly encounter the idea that individuals have their own lives to lead – their own happiness or purposes to pursue² – and that reasonable social norms do not demand that persons “rise above” this partiality to their own ends. The search for reasonable social or political principles is not the search for some common substantive end (or hierarchy of ends) that all must make their own and serve. Rather, it is a search for norms that duly take account of our equal status as agents with (often intertwining) ends of our own. A search of the latter sort characteristically leads libertarian-inclined theorists to norms that explicitly require respect for the liberty of individuals to pursue their own happiness or projects or to norms – like the Humean–Hayekian principles of justice – respect for which is constitutive of our liberty. Moreover, according to liberty-leaning theorists, a regime of rightful or just liberty requires the identification of moral boundaries that mark off spheres of discretionary choice – morally sovereign domains within which individuals may do as they respectively see fit singly or in voluntary cooperation with others. Despite the very significant differences among the philosophical schemes examined in this chapter, this deep pattern persists.

Steiner’s Left-Libertarian Principles of Justice

Left-libertarianism is a doctrine that is “libertarian” in virtue of its endorsement of the rights of self-ownership and (or some would say “but”) is “left” due to its endorsement of an egalitarian distributionist principle with respect to the division of natural resources.³ One can view such a left-libertarianism as an attempt to reconcile the demands of liberty and the demands of equality by ascribing to each individual a right of self-ownership and an equal right to natural resources. (We have already encountered such a left-libertarianism in Chapter 2’s discussion of Herbert Spencer’s *Social Statics*.) Through his writings from the mid-1970s to his *An Essay on Rights* and beyond, Hillel Steiner has revived, extended, and defended an elegant version of left-libertarianism.⁴ According

to Steiner, the two key components of his doctrine – the self-ownership of all persons and the equal rights of all persons to raw natural objects – each derive from the right to equal liberty. Steiner's doctrine is of great intrinsic interest and also serves as a crucial test for the possibility of successfully combining self-ownership with some egalitarian distributionist perspective.⁵

Steiner's rights-oriented doctrine shares a number of key features with Nozick's position – including an insistence on the strongly deontic character of moral rights.⁶ Steiner takes the function of rights (or claims of justice) to be the resolution of disputes about which of two (or more) incompatible actions is morally permissible without having to establish which of the contending actions is more valuable or morally preferable (1994: 215). Rights are taken to be strongly deontic precisely because they *need* to be if they are to resolve such disputes without determining which contending action is more choice-worthy. Ben favors the use of the thumb that is part of his left hand to press the space bar on his laptop; but Jen favors the use of that thumb to season the stew that she is preparing for the Druid Day Festival. Like Nozick and Hayek, Steiner denies that we can resolve the dispute about which of these actions should or may be performed by engaging in a moral balancing act, i.e., by weighing the commensurable value or moral importance of these actions or their consequences against one another. In order to settle disputes about which of two incompatible actions may be performed, we have to turn away from considerations about the value or merit of those actions and focus on a different dimension of morality, the dimension of justice or rights. We can resolve the dispute between Ben and Jen only by identifying who has a right to that thumb and, thus, who has a right to decided what will be done with that thumb.

If Ben and Jen *both* have rights over the thumb in question so that each party's exercise of his or her right violates the other party's rights, no appeal to their rights will resolve their dispute. Dispute resolution by way of determining who owns the physical component the use of which is in dispute will be systematically available only if all rights over human bodies and extra-personal objects are compossible, i.e., no one's exercise of his rights over objects precludes anyone else's exercise of her rights over objects.

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Any rights rule worthy of the name has to be one that ... ensures that one and only one party to any deadlock is holding a trump card. ... The inviolability of each right doesn't rest precariously on some contestable weighting or ranking, nor therefore is it contingent upon the varying calculational outcomes of what has aptly been called a "utilitarianism of rights". (1994: 202)

This requires that each person's (or association's) rights with respect to any object that may be deployed in action must be exclusive; a set of compossible rights will be a set of exclusive rights.

Suppose that the dispute is resolved by recognizing that Ben has a right to the thumb in question. The thumb is within the domain over which Ben has moral authority and whatever he chooses to do with it – other than sticking it in Jen's eye – is morally permissible. Jen can acknowledge Ben's right over the thumb as a reason for her desisting from using that thumb to season her stew without reversing her stance on which deployment of the thumb would be best or most valuable. Recall Locke's claim in *LCT* that the way to resolve a dispute between *A*, who favors sacrificing a calf to please God, and *B*, who disfavors the sacrifice because *B* thinks it will displease God, is to circumvent the apparent need to determine whether the sacrifice of the calf will or will not please God. For Locke's resolution turns on who *owns* the calf. Thus, to use Steiner's language, the party who has to "stand down" because the other party has a right to the calf does not have to "reverse" her judgment. If *A* is the owner of the calf, *B* has reason to allow *A* to sacrifice the calf that does not at all require that *B* affirm the greater value or wisdom of this action. Rather, *B* has reason to be "tolerant" (1994: 194, 195) of *A*'s conduct while continuing to condemn it as displeasing to God. Such rights-based resolutions of disputes make *peaceful* pluralist society possible.

For Steiner, liberty is a matter of being in position to deploy mental and physical components of action as one chooses. The *extent* of one's liberty is a matter of the *extent* of the components of action one can deploy as one chooses. *Rightful* liberty – which must be *equal* liberty – will obtain among us if and only if there is *equality* among

the components of action that each of us is in a position to deploy as we respectively see fit. There are two subsets of the components of action that need to be divided equally in order for equal liberty to obtain. There are parts (or aspects) of persons and there are raw extra-personal objects, e.g., raw land, raw chunks of ore, raw fruits of nature and so on. (We shall see shortly why, at least to begin with, only *raw* extra-personal material is subject to equal division.)

One would expect Steiner to say that, for the principle of equal liberty to be satisfied, each individual must have rights over a total bundle of personal *and* raw extra-personal components of action that is equal to the total bundle ascribed to each other individual. There is a single pie made up of personal *and* raw extra-personal components of action and each person has a right to an equal slice – although some slices may have more crust and others more filling. Instead, Steiner envisions two separate equal divisions – one division of personal components and another division of raw extra-personal components. The principle of equal liberty requires an equal division of each sort of component of action. However, Steiner also maintains that the equal division of *personal* components of action consists in each person having title over *all* the personal components that constitute his or her person, i.e., in each person being a full self-owner. This, however, seems to fly in the face of the unequal natural endowments of people. Jen may have larger and more toned muscles, a larger and more acute brain, and more physical and mental energy than Ben. If that is the case, then the ascription to each of them of full ownership over their respective natural endowments is an ascription to them of unequal shares of personal components of action. And, if the extent of anyone's liberty is the extent of the components of action under her control, Steiner's ascription of full self-ownership to Jen and Ben amounts to an ascription to them of unequal liberty. The distributionist tilt within the right to *equal* liberty clashes with universal self-ownership among individuals whose personal resources are unequal.

In *ER*, Steiner provides a somewhat different argument for universal self-ownership. It turns on the ideas that self-ownership is the polar opposite of slavery and that slavery is paradigmatic of inequality of freedom. To fully reject slavery,

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we have to affirm that “our respective bundles of original property rights must include at least ourselves” (1994: 231). However, there is no reason to think that, when we arrive at universal self-ownership, we have arrived at equality in the division of personal components of action and, therefore, have arrived at the division of personal components that is required by Steiner’s understanding of the right to equal liberty. Indeed, equality in the division of personal components for action may well obtain when some of the personal resources of strong, acute, and energetic Jen are within the domain of weak, dull, and slothful Ben. If our rights with respect to personal resources are supposed to be rights to equal shares of those resources, some of us should be part owners of others. The lessons for libertarianism are that the wrongness of slavery is *not* a matter of the enslaver having control over a more extensive domain of personal resources than the enslaved, and universal self-ownership is *not* a matter of persons enjoying equally extensive domains of personal resources.⁷

I have argued that, on Steiner’s understanding of liberty, equal liberty among individuals requires that those individuals have discretionary control over *equal* resources. However, given the inequality among people’s original natural endowments, universal original self-ownership entails an *inequality* among the personal resources over which individuals have rightful discretionary control. Hence, Steiner cannot derive original self-ownership from his principle of equal liberty. One response to this criticism would be for Steiner to contend that original self-ownership *does* involve each individual *beginning her life as a self-owner* with rightful discretionary control over personal resources that are *equal* to the personal resources with which all other individuals rightfully *begin their lives as self-owners*. I understand Steiner to be advancing this contention by means of his “genes argument.” For, according to Steiner, this argument “implies that when minors cross the threshold into moral agency (and hence, self-ownership), their respective personal resources will be approximately equal.”⁸

This approximate equality of personal resources is to be engendered by redress payments that are made from the parents of genetically better endowed children to the

parents of genetically less well-endowed children (1994: 277). Parents who make these payments will invest less in the development of their children's personal resources than they otherwise would, while parents who receive these payments will invest more in the development of their children's personal resources than they otherwise would – to the point of (approximately) equalizing the personal resources of all children when they cross the threshold to self-ownership (1994: 280). On Steiner's view, this demand for redress is not based upon child *A* being better naturally endowed than child *B*. Rather, it is based on the parents of child *A* making use of more than an equal share of a certain natural resource in the production of *A*, while the parents of *B* make use of less than an equal share of that natural resource (1994: 277). That natural resource is the germ-line genetic information that these parents employ in their respective procreative endeavors. Since all persons have equal rights to natural resources, each may permissibly make use of up to an equal share of germ-line information without any need to make redress to other persons. But anyone who makes use of more than an equal share must make rectification payments for his or her overstepping.

Steiner speaks of these payments going to “under-appropriators,” i.e., parents who use less than equal germ-line information. He says that the upshot of his genes argument is “to redistribute wealth, via the global fund, from those adults who own children with superior genetic endowments to those who don't” (1994: 277). However, this seems to be a misstep. For, within Steiner's system, the redress payments should go into a “global fund” (1994: 270); and the administrators of that fund should cut checks to all people who have used less than an equal share of this global information. Indeed, those who have not at all used this resource – those who simply don't have children – would seem to have a more extensive claim to compensation from the “over-appropriators” than the “under-appropriators,” who make use of germ-line information that is, say, 80 percent as good as the average germ-line information (1994: 268). If a significant percentage of people do not procreate and yet have valid claims to redress payments from the “over-appropriators,” little funds may be left for the “under-appropriators” to use

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to enhance the personal resources of their children. On the other hand, if couples whose procreation involves inferior germ-line genetic information procreate markedly more times than those whose procreation utilizes superior germ-line information, who counts as the “over-appropriators” of this natural resource? Who then owes redress to whom?

Here is one other and deeper difficulty with the genes argument. If germ-line genetic information is considered a natural resource to which each has an equal claim, it seems that one should count all genetic information that is embodied in persons as natural resources to which each person has an equal claim. This would include, of course, the genetic information that contributes to certain individuals being economically more productive than others and, within systems that reward productivity, having higher earnings than others. If parents should make redress payments for their use of superior germ-line information in their production of their children, naturally talented individuals should make redress payments for their use of their more than equal genetic endowment. Most obviously, those naturally talented people should make redress payments for the higher earnings that are due to their superior genetic endowments. While not all of high earners’ talents need be due to their superior genetic resources (1994: 277), everyone has a right to an equal share of those genetic resources and, hence, a right to an equal share of *all the talent that is due to those natural resources*. So, although Steiner’s claim that genetic information is a natural resource need not support full-fledged “talent pooling” (1994: 277), it does support *partial* talent pooling and, hence, seems to institute some people’s partial ownership of others in contravention of universal self-ownership.

Let’s turn to Steiner’s other primary contention: Persons have natural rights to equal shares of raw extra-personal stuff. At least to begin with, Steiner limits the equal division of extra-personal material to raw natural stuff because he endorses Nozick’s argument against pattern theories in “How Liberty Upsets Patterns.” Indeed, he provides a superb one-line summation of that argument. Pattern theories “create rights to interfere with the exercise of the rights they create” (1976: 43). However, Steiner points out that this argument only shows that the *ongoing* application of a

avored distributional formula comes into conflict with that formula's initial application. It does not rule out there being a sound distributional formula, e.g., equality in holdings, which tells us what the starting-point distribution of raw extra-personal material should be. Nor does advocacy of an initial, equal distribution of raw bits of nature collide with Nozick's manna from heaven argument that extra-personal objects are themselves the products of the labor, talent, time, and energy of particular individuals (1974: 159–60, 219). For, raw bits of nature *are* manna from heaven. Thus, Nozick's telling arguments against pattern *doctrines* do not rule out there being a distributional *principle* that is limited to specifying the just *initial* distribution of raw extra-personal material.

Nevertheless, the burden is on Steiner to produce a positive argument for his view that individuals have natural rights to equal shares of nature rather than raw material simply being unowned. The key premise of Steiner's positive argument is that no action is permissible unless the agent of that action *already* has title to all the physical components of the action. Thus, no initial appropriations can be permissible unless the agent already has title to the appropriated material. Since some initial appropriations are permissible, there must be natural titles to raw stuff; and, since we are moral equals, those must be titles to equal shares. Unfortunately, Steiner's key premise is highly problematic. The *permissibility* of an action requires only that the components of the action are not already owned by others. Everything else being equal, an initial acquisition of raw material will be permissible as long as that material is unowned.

For Steiner, once individuals are accorded their "original property rights," i.e., their natural self-ownership rights *and* their natural equal shares of raw material, the game of voluntary, rights-respecting, chosen actions and interactions is on; and *whatever* array of holdings arises among the players will be just. For "... justice requires only the former [our original property rights] but not the latter [our non-original property rights] be equal" (1994: 229). Still, whether Steiner's largely historical conception of justice in holdings gets off the ground depends upon his providing a satisfactory account of the crucial original equal right to nature. In the course of his

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extensive writings, Steiner construes the right to equal shares of raw material in two distinct ways. According to the joint-ownership (JO) construal, the original ownership of raw material is joint-ownership. For Steiner, this joint-ownership is global; each individual on the earth is an equal joint shareholder of all global raw material and is to receive an equal share of the revenue from leases of that material. According to Steiner's early version of the equal division (ED) construal, each individual has title to a specific equal share of global raw material. It follows that each may appropriate only the specific share to which he has antecedent title. Steiner's later version of ED is designed to avoid this implication. According to this version, "... no specific person originally holds a title to any specific [raw materials]. Nevertheless, each is entitled to an equal portion of them" (1994: 268).

ED is the alternative that best fits the spirit of Steiner's enterprise, viz., to specify original *individual domains* within which each individual may do as she sees fit without being subject to the will of others. One obvious problem with ED is that it requires an account of what makes one batch of raw material equal to another. For instance, what would make A's batch of iron ore equal to B's patch of raw fertile land? The best answer seems to be that a batch is equal to a patch if they have the same market value. But what happens when relative market values change? Suppose B invents a much more efficient way of raising crops on the sort of raw land to which he has title and this doubles the market value of that raw land. Must we re-establish equality in market value among shares of raw land by requiring B to transfer one fourth of his acreage to C whose raw land has not increased in value? Isn't that uncomfortably like the *ongoing* enforcement of a pattern that Steiner joins Nozick in rejecting?

One obvious problem with JO – which we have already seen in Spencer's doctrine – is that it vests enormous monopoly power in *society*. Under JO, there needs to be a global authority that has jurisdiction over all of the earth. Such a global monopolistic owner would be in a position to extract enormous economic *and* non-economic concessions from anyone who seeks to lease any portion of the earth. It might be said that such onerous concessions will not be demanded because the global owner of the earth may

only act in ways to which *all* the joint-shareholders agree. However, if unanimous consent is necessary for any decision by global society, no one will ever get a lease – or permission to do anything with or on the earth – because there will never be unanimous agreement on anything. (Recall Locke’s argument against the original joint-ownership of the earth.) In response to these difficulties, Steiner moves to the view that each individual may utilize up to an equal share of raw material without the consent of others and without making redress to others. But any use of more than an equal share of natural material that has not been consented to requires a redress payment into a global fund that compensates those who make use of less than equal shares.

Two facts about human existence greatly complicate Steiner’s program. The first fact is that human beings do not merely lease or have titles to portions of raw extra-personal stuff; people *consume* raw stuff – often in the process of creating nifty, life-enhancing goods or services. Human ingenuity is continually converting noisome natural *material* into useful natural *resources*. Human progress involves an increasing percentage of wealth existing in the form of made objects. The second fact is that human beings are always dying and other human beings are always graduating to personhood. And – because of material progress – more persons are graduating than are dying. If natural materials are becoming increasingly scarce and the number of claimants to equal shares is pretty consistently growing, then size of equal shares of raw stuff will be constantly diminishing.⁹ Thus, on Steiner’s view, members of later generations will correctly claim that earlier generations have cheated them out of their just shares of natural stuff – or their just shares of the revenue from leases that allow the consumption of leased raw material.

Steiner offers a solution to this difficulty. It is to count the entire estate that any individual justly possesses as abandoned by that person at death. This includes both raw *and made* extra-personal objects. Since, according to Steiner, dead people have no rights, they have no rights to property or to having their wills honored. Furthermore, “the [former] property of the dead thereby joins raw natural resources in the category of initially unowned things: things to an equal

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portion of which, as we have seen, each [living] person has an original right” (1994: 258). To be clear, when Steiner says that the deceased’s “property” becomes “unowned,” he only means that it does not remain or become the property of any specific living person. Nevertheless, the deceased’s property does become part of the pie of extra-personal objects to which all living persons are equally entitled. Thus, through the death of property owners, the pie that is morally destined for equal division or for generating rental income that is to be equally divided is replenished. Even the individual’s corpse goes into the pie that must be equally sliced or rented out (1994: 273).

Will this solution to the increasing per capita scarcity of raw material withstand scrutiny? Is an individual allowed while she is still alive to transfer all of her just holdings to another party immediately with the condition that she retains the right to use those holdings as she pleases for the rest of her life? If any such contract is allowed, persons can easily contract around Steiner’s nullification of wills and thereby defeat Steiner’s scheme for replenishment of the social pot. Can Steiner disallow such contracts? To disallow such contracts seems to deny people the innocuous use of what Steiner’s doctrine has assigned to them as a matter of justice for the sake of ongoing adherence to an enshrined distributional principle. If Steiner’s principles disallow such contracts, those principles “... create rights to interfere with the exercise of the rights they create” (1977: 43).

Lomasky’s Rational Norms for Personal Project Pursuers

In his *PRMC*, Loren Lomasky sets out to provide a fuller account than Nozick offers in *ASU* of the moral background for the ascription of basic rights to individuals and of the way in which basic rights arise from that background. As in Locke and Nozick,¹⁰ a crucial feature of that moral background is the rationality of individuals being partial to the attainment of their personal well-being. And, according to Lomasky, each person’s well-being consists fundamentally

in her pursuit and fulfillment of her life-constituting *projects*. An appreciation of the *personal* value for each individual of her pursuit and achievement of her life-defining projects and the *personal* reason that each individual has for advancing those projects reveals why it is a mistake to think that correct principles of social choice identify a common, impersonal end – or hierarchy of ends – that each individual should be required to serve.

According to Lomasky, basic human rights are predominantly persons' negative rights against interference with their non-interfering engagements in their own projects. These are Nozickian moral side constraints that are not to be violated even if their violation would prevent a larger number of such violations. However, Lomasky maintains that if we follow the correct route to basic rights, we also arrive at modest positive rights to the assistance that individuals may need to engage in their own indispensable project pursuit. Persons' moral rights against being subject to interference do not include rights against those *minimal and exceptional* interferences that may be necessary to accord to others their modest rights to assistance. Lomasky insists, however, that to endorse such positive rights to assistance is not to endorse any formula for the overall distribution of well-being or opportunity or income across society. Moreover, Lomasky takes the route to moral rights to lead to the affirmation of robust rights of private property. Rights to do as one sees fit with one's person *and* with one's property are grounded in the same way in the value for each agent of the fulfillment of her life-projects.

Lomasky's argument begins with the same sort of rejection of utilitarian-type argumentation as we find at the beginning of both Rawls' argument in *TJ* and Nozick's in *ASU*. Prudential rationality is the most basic and non-controversial form of practical rationality. "[P]rudence is the maximization of one person's good. ... Each person has reason to make trade-offs within his own life of less valued states of affairs for more highly valued ones" (1987: 21). Before Friday's arrival, Robinson Crusoe only needs to concern himself with prudential rationality. "But in a world with many persons, each of whom can act in ways that affect the well-being of others, more than one person's good has to be considered" (1987: 22). According to many moral theorists,

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Prudence here invites its own extension. If it is rational to maximize good over the course of a lifetime, irrespective of *when* particular satisfactions occur, then is it not similarly rational to maximize satisfaction over all persons, irrespective of *to whom* particular satisfactions accrue? ... What is the moral analogue to the prudent man's temporal indifference? It is indifference or, better, impartiality concerning whose ends are being advanced. (1987: 22, 23)

To resist this extension, Lomasky must reinforce the case for the individual having reason to reject impartiality and embrace partiality. This reinforcement of the rationality of partiality is intended to establish that due consideration of other persons at large must take a different form than impartiality between their good and one's own.

Lomasky's reinforcement of the rationality of partiality turns on the centrality for human life of *projects*. Projects

persist throughout large stretches of an individual's life and continue to elicit actions that establish a pattern coherent in virtue of the ends subserved. Those which reach indefinitely into the future play a central role within the ongoing endeavors of the individual, and provide a significant degree of structural stability to an individual's life. ... When we wish to understand or describe a person, to explicate what fundamentally characterizes him as being just the particular purpose being that he is, we will focus on his projects rather than on his more transitory ends. ... Projects explain more than an action; they help to explain a life.¹¹ (1987: 26)

A person's projects provide him with particularly important personal reasons for their advancement. An agent's "central and enduring ends provide him reasons for action that are recognized as his own in the sense that no one who is uncommitted to those specific ends will share the reason for action that he possesses. Practical reason is essentially differentiated among project pursuers" (1987: 28). An agent has reasons to advance *his* projects, not merely because his name is somehow attached to them but, rather, because his life is deeply a matter of his commitment to and advancement of those projects. The like projects of others similarly provide those others with personal reasons to advance the projects

that constitute their lives. We can each appreciate this fact about the personal projects of others without their projects having for us the value that they have for them.¹²

In an essay that clearly influenced *PRMC*, Bernard Williams offers this account of decision-making by the impartialist:

His own substantial projects and commitments come into it, but only as one lot among others – they potentially provide one set of satisfactions among those which he may be able to assist from where he happens to be. He is the agent of the satisfaction system who happens to be at a particular point at a particular time. ... His own decisions as a utilitarian agent are a function of all the satisfactions which he can affect from where he is: and this means that the projects of others, to an indeterminately great extent determine his decision. (1973: 115)

While to dissociate oneself from a whim or passing fancy may well be reasonable in light of one's more fundamental goals, to dissociate oneself from a life-defining project is to dissociate oneself from one's self. This is why Williams holds utilitarianism to be a threat to *integrity*. To adopt an impartial regard for everyone's ends is to surrender one's *self-direction*.

In addition, to be prepared to sacrifice one's projects whenever doing so will maximize project satisfaction across society is to dissociate oneself from the tenacious commitment that one needs to possess life-defining projects. Were we all to commit to the second-order project of impartially advancing everyone's substantive first-order projects, we would find ourselves and others bereft of first-order projects to advance (1973: 110). To have a well-ordered personal life is to have a life as a project pursuer. Since the acceptance of the impartialist extension of prudence threatens one's success as, and even one's existence as, a project pursuer, that acceptance threatens one's success as, and even one's existence as, a being with a well-ordered life. Lomasky, therefore, denies that

morality enrolls us all as partners in the human enterprise to which all our efforts must be devoted. There is no such thing; there are only the various personal enterprises in which individuals enroll themselves and which provide them with irreducibly personal ends that they strive to realize.¹³ (1987: 35)

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Lomasky takes his defense of partiality to underwrite the liberal commitment to the “unique and irreplaceable value” of each individual and to move us toward a liberal doctrine of rights because “rights provide the most morally stringent protection of the worth that each individual exemplifies” (1987: 52).

We should note, however, that Lomasky’s defense of the value for each individual of his own life-constituting projects seems to turn on the idea that each individual’s projects have value for him in virtue of his choice of or commitment to those projects. For each project pursuer, value “springs from his ability to generate value through his personal commitments” (1987: 50).

[E]ach project pursuer is constructing a life that has unique value because he *gives* it that value through his commitment to some ends as directive for him. Value emerges from commitment ... The value that emerges is conceptually posterior to commitment, not prior to and thus conditioning choice. (1987: 54)

However, we shall see that Lomasky’s stance on value and value-based reasons for action is not as thoroughly subjectivist (i.e., choice-based or commitment-based) as it seems to be.

According to Lomasky, for *B* to have a right that *A* accord some deference to *B* (in the form of non-interference with or assistance to *B*), *A* must have (sufficient) reason to accord that deference to *B*. Moreover, for *A* to have reason to accord *B* that deference, that deference must be an end of *A*.¹⁴ Now *A* may have all sorts of reasons to be deferential to *B* based upon special features of *B* or of *A*’s relationship with *B*. Here, however, we are concerned with general rights, i.e., rights that each individual has against each other individual (absent those rights being waived or forfeited). So, we want to know what (sufficient) reason *A* has to be deferential toward *B* which each individual has to be deferential to all other individuals. Or, if some persons cannot be brought within the moral community of right-holders, we at least want to find a (sufficient) reason or set of reasons that almost all individuals have to be deferential in certain ways to almost all other individuals.¹⁵

Within his “tripartite derivation of rights,” Lomasky offers three considerations on behalf of each *A* – or nearly each *A* – having rational motivation to be deferential in some way toward each *B* – or nearly each *B*.¹⁶ The first consideration is the tendency among us “to be moved by the needs of others, especially the needs of kin” – a tendency that has a sociobiological explanation (1987: 62). Recognition of this motivation helps to explain how deferential behavior is possible. It displaces a purely egotistic view of human psychology (1987: 63). The second and somewhat surprising consideration is that we each have *impersonal* reason to promote or at least not undermine the projects of others or the capacity of others to act as project pursuers. The underlying basis for Lomasky’s contention that each *A* has some such impersonal reason with respect to each *B* is that:

- 1) Each *B* has personal reason to advance her own projects.
- 2) No one can really have even personal reason to promote some end if that end lacks impersonal value – value that does not depend upon commitment to that end.
- 3) If an end has impersonal value, then everyone – hence, *A* – has some impersonal reason to advance (or not to hinder) that end (1987: 64).
- 4) Hence, *A* has some impersonal reason to advance *B*’s projects.

The crucial premise 2 tells us that the existence of impersonal value is a precondition of the existence of personal value. Personal value emerges only from commitment to ends that have impersonal value – value that resides in that end prior to and independent of any commitment to that end. In terms that Lomasky does not utilize, only if an end has objective value can an individual create subjective value in that end and personal reason for her attainment of that end by way of committing herself to it. Subjective (personal) value must piggyback on objective (impersonal) value.¹⁷ However, the impersonal reason that *A* has to be deferential toward *B* in virtue of the impersonal value of *B*’s projects may be “vanishingly small.” “Even if *A* has some [impersonal] reason to accord *B* the status of a rights holder, it could be the case that this reason is routinely engulfed and outweighed by

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the far stronger reasons A has to pursue his projects at the expense of B” (1987: 65). Hence, the second consideration within Lomasky’s tripartite derivation of rights, and the controversial philosophical claims that stand behind this consideration, can play only a subsidiary role in that derivation.

The third and central consideration within Lomasky’s derivation turns on two connected facts. The first is that each project pursuer “has [personal] reason to act to bring about circumstances in which he will be able to lead a coherent life responsive to his own conception of the good” (1987: 65). The second is that, since each individual knows that (almost) all other individuals also have reason to bring about circumstances conducive to their long-term and coherent promotion of their good, each knows that he can induce (almost) all others to be deferential toward him by offering his like deference toward them. Cooperative mutual deference will emerge among rational individuals especially as increasing deference builds trust which, in turn, motivates further deference (1987: 70–5). Indeed, rather than a confusing and costly multitude of bilateral structures of reciprocal deference, what will emerge among rational individuals will be a general structure of deference to which all (or nearly all) individuals will subscribe (1987: 75–9). However, any such story about emerging cooperation to mutual advantage must confront the prospect of individuals defecting from cooperative interaction when their gains from doing so (or their losses from being cooperative suckers) outweigh the gains from maintaining cooperation. This is where the biological motivation and impersonal reason considerations come to the rescue.

Our biologically grounded empathetic disposition to assist others provides us with some additional *personal* reason to abide by a scheme of mutual deference. And the impersonal value of others’ project fulfillment provides us with some add-on *impersonal* reason to do the same. However, the personal, empathetic reason that an individual will have to be deferential toward persons who are outside his circle of friends and clansmen will be minimal. And, as Hume points out, empathy towards one’s friends and clansmen may be a stronger motivation for betraying strangers than empathy

for strangers is for reciprocal compliance. Nor, it seems, will the impersonal value of the fulfillment of others' projects add much to that individual's all-things-considered reason to comply with those terms of deference. For, as Lomasky has told us, the rational motivation provided by another's impersonal good may be "vanishingly small." Moreover, once impersonal reasons are introduced on behalf of an agent's deference toward the beneficiaries of this deference, impersonal value that will be served by that agent's defection – e.g., the value of the choiceworthy projects of that agent and his compatriots – also have to be counted. Thus, it is far from clear that these add-on considerations will move people toward strict compliance with a norm of reciprocal deference.

An alternative move that Lomasky could – and does make – is a more Kantian appeal to respect for persons as pursuers of valuable projects – respect that calls for each person to eschew treating any other individual as a tool for the ends of others.

[T]o require A to renounce his own cherished end E_1 , and to enroll him as B's partner in the pursuit of B's end E_2 , is to make A an adjunct to B's projects, an instrument for B to use toward B's ends. That is how I construe the locution of treating someone merely as a means and not as an end in himself. ... A regards himself as a member of a Kingdom of Ends when he both respects the unique individuality that is his own and recognizes that all other project pursuers are themselves unique individuals with his own life to live. (1987: 54)

Similarly, the "demand for liberty as a right" is responsive to "the separateness of persons and their projects."

[B]ecause persons are separate beings individuated in part by virtue of the particular projects to which they commit themselves, they are rationally entitled to insist that they be let alone to pursue their own designs and not be enlisted as adjuncts to the projects of others.¹⁸ (1987: 99)

Here one's reason for circumspection in one's conduct toward others is neither that this is a way of eliciting like circumspection from others, nor is it that one values – empathetically or

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impersonally – others receiving deference. “Noninterference ... involves the recognition of other persons as distinct individuals committed to their distinct projects, but assumes no sympathy with person or project” (1987: 99). Here, one’s reason to be circumspect toward others is that their existence as project pursuers gives them a moral status – as ends in themselves.

Despite this Kantian strand within Lomasky’s exposition, the core consideration that he relies upon on behalf of *A*’s deference to others is that such deference elicits from others the deference that *A* needs from them. Since noninterference is what everyone needs from everyone else and, for the most part, it is not costly to supply noninterference to others, as a first approximation, rational individuals will gravitate toward mutual noninterference. “[I]t is initially plausible to insist that basic rights be understood as negative or liberty rights that forbid coercive encroachment” (1987: 85). Moreover, Lomasky sees private property rights as significantly *constitutive* of such liberty rights. The ends of a project pursuer and the pursuit of her ends are rarely confined to the moral space defined by her skin. We seek achievements in the world by means of our purposeful use of worldly means. “Purposeful action and command over things are virtually inseparable” (1987: 120). Thus, “to posit basic rights to property is neither more nor less warranted than is the positing of basic rights simpliciter. *If* there are basic rights, then there are basic rights to property” (1987: 121).

A system of private property requires known and impartial rules that specify how individuals may acquire, transform, and transfer raw or modified extra-personal objects, i.e., how individuals can expand or re-contour the moral space within which they are protected in the pursuit of their chosen ends. “The basic liberty right to acquire and use property is made concrete through the social recognition of conventions that define which actions constitute appropriation and transfer of property” (1987: 123). This endorsement of private property rights rules out all general distributional formulas. “There will be no such thing as ‘having more than one’s fair share’ if there is no socially imposed standard for allocating shares” (1987: 125).

Still, one can reject all distributional principles while still ascribing to individuals positive rights to some degree of

assistance. Indeed, Lomasky affirms a positive right to “that which is necessary for [one’s] ability to live as a project pursuer” (1987: 126) as part of the deference that members of the moral community have reason to offer one another. The reason for the inclusion of this deference is *not* that Kantian respect for persons as project pursuers requires assistance to those in dire need. Rather, Lomasky justifies this inclusion as part of the terms that individuals need to offer others in order to induce others’ reciprocal deference. Some individuals will prefer terms of deference that are limited to mutual noninterference. But others, more concerned about the prospect of needing assistance to maintain their project pursuit, will prefer relatively robust rights of assistance. The (not explicitly negotiated) bargain that will give almost everyone a sufficient stake in the emerging moral community includes a broad right to liberty combined with a modest right to assistance if one is unable to secure by oneself (or through the voluntary assistance of others) conditions needed to live as a project pursuer. Rational individuals will tend to converge on these terms largely because of the personal value for each individual of minimizing the number of people who have no rational stake in the governing normative structure and, therefore, cannot be taken to be obligated to respect the rights that others claim under that structure (1987: 125–7).

Rasmussen and Den Uyl’s Meta-Norms for Flourishing Individuals

Philosophical defenders of libertarianism vary greatly from one to another about how robust the metaphysical and/or moral premises are on which their respective defenses depend. The advantage of modest premises is that they are less contentious. One does not have to start out with premises that may be more difficult to defend than the conclusions one hopes to reach by relying upon them. On the other hand, modest premises may lack the heft to support pleasingly robust conclusions. Of the philosophical defenders of libertarianism discussed in this book, Douglas Rasmussen and Douglas Den Uyl have taken most seriously the need to

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provide hefty philosophical underpinnings for libertarianism and have most boldly sought to defend these underpinnings.

Rasmussen and Den Uyl (hereafter, R&DU) take very seriously a range of criticisms that both leftists and conservatives have directed at liberalism at large. According to these criticisms, liberalism relies upon and reinforces a “very narrow, instrumental, and minimalistic understanding of values and ethical life.” Liberal toleration is often defended on the relativist basis that, since no beliefs are objectively correct, no one’s beliefs can ever justify the suppression of the views or activities of others. But, of course, if no beliefs are objectively correct, it is not objectively correct that the suppression of another’s views or activities justifies the other party’s complaint or resistance.¹⁹ Liberals have often defended liberty on the ground that it maximizes the satisfaction of desires, whatever those desires happen to be; and this non-judgmental basis for liberty is threatened as soon as one begins to distinguish between worthy and unworthy or proper and improper desires. Liberals represent principles of justice as merely terms of convenience that minimize friction and collision among creatures bent on doing and attaining whatever they have been conditioned to want to do or attain.

R&DU’s first goal is to recapture the richer conception of the good human life that they find in the Aristotelian tradition – a tradition that they take to be individualist at least in the sense that its primary teaching concerns how an individual can live a flourishing life, a life of human well-being.

[C]lassical ethics ... takes the central problem of ethics to be what to make of one’s own life and is thus “self-perfectionist” in its orientation. ... [T]he enterprise of ethics is fundamentally directed toward perfecting the self, with social management being derived from (or not in conflict with) the principles thought necessary for self-perfection. (2005: 115)

Their second goal is to show how a liberal political order is the appropriate accompaniment to that “self-perfectionist” ethical order. “We do not need to minimize the moral universe to support liberalism, nor do we need to ground morality in sentiment or contracts, as much as traditional liberalism has done, to generate a liberal politics” (2005: 15). Indeed, they

seek to show that a *libertarian* order that centers on a natural right to liberty is the appropriate political concomitant to the neo-Aristotelian understanding of human values and purposes that they develop and defend.

While we cannot here do justice to the ethical vision that R&DU expound, we can touch on five of its crucial characteristics. The first is an insistence on the objective value of the conditions or activities that are constitutive of human flourishing. Such conditions as knowledge, health, friendship, and creative achievement – as they are *attained* within the particular lives of persons – make the lives in which they are attained valuable. This value explains why one should desire and commit oneself to the attainment of these states rather than these conditions being valuable because they are desired or the objects of commitment. “[F]lourishing is an object of desire because it is desirable and choice-worthy, not simply because it is desired or chosen” (2005: 127). The second is the contention that friendship – or, more generally, sociality – is prominent among the conditions that make for human flourishing. This is the core basis for R&DU’s rejection of the charge that liberalism manifests and is committed to an atomistic view of human beings and social existence [R&DU 2006].²⁰ The third is R&DU’s philosophical *explanation* for the value of the conditions and activities that comprise human well-being. As Aristotelians, R&DU maintain that these conditions and activities are valuable because they are fulfillments of our natural potentialities. Flourishing for any sort of living thing consists in its realization or actualization of its nature. For human beings, flourishing consists in the realization or actualization of the potentialities that constitute human nature. “[T]he meaning and purpose of morality are to be found in terms of a human being’s ‘self-perfection’ or ‘self-actualization’ or ‘human flourishing’” (2005: 124). This third feature is the most metaphysically ambitious and controversial component of R&DU’s stance.²¹

The fourth key feature of R&DU’s position is the individualization of human flourishing and its value (2005: 132). The abstract specification of fundamental human goods – such as knowledge, health, friendship, and creative achievement – is merely an indication of *types* of ways in which individuals at large flourish. However, the flourishing of any individual

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human being will be the realization by that individual – *through her choices and efforts* – of her particular potentialities for knowledge, health, friendship, creative achievement, and so on, in the actual particular psychological and material circumstances of her life. This individual's flourishing is this concrete, self-realizing self-actualization. “[I]ndividuals should not be regarded as metaphysical pincushions in which these generic goods are ‘stuck.’ ... It is only through an individual's practical choices that these generic goods become determinate, real, and valuable” (2005: 81). Both flourishing and the value of flourishing are radically individuated. The realization of *her* core human potentialities in the psychological and material circumstances of *her* life is the valuable end *for that individual*. It is the end that she has reason to achieve. The individuation of human flourishing rather than mere differences in subjective tastes or commitments explains – to echo Rawls – “the plurality of distinct persons” on which “the correct regulative principle” for human society depends (1971: 29).

The fifth key feature of R&DU's account of human flourishing is the contention that self-direction is an essential aspect of each basic component of an individual's well-being. A state of friendship or creative achievement or knowledge must arise from one's choices, attention, or efforts. Constituents of personal well-being cannot be *delivered* to one. In their later *The Perfectionist Turn*, R&DU say, “Ontologically considered, *human* flourishing is an activity, an actuality, and an end that is realized (or a function that is performed) through the self-directed exercise of an individual's rational capacity”²² (2016: 45).

Let us turn then to R&DU's account of how a natural right to liberty can be derived – or extracted – from their ethics of human flourishing. R&DU maintain that, while any fundamental political principle must take due account of the separate value of each individual's flourishing, that principle needs to have a very different character from the norms that define and guide individual human flourishing. Most clearly, that principle cannot enshrine the flourishing or any aspect of the flourishing of any specific individual or group as an end for all individuals or associations. Such a principle must not “... structurally prejudice the political/legal order of

society more toward some forms of human flourishing than others” (2005: 83–4). Rather, it must focus on some aspect of human action that “is central to any and every form of human flourishing.” And it must reconcile “[t]he propriety of individualism and the need for sociality,” i.e., our “shared need to act in a peaceful and orderly social/political context” (2005: 91). To emphasize the difference between the principles that form such a normative framework and the norms that guide individuals toward self-realization, R&DU refer to the former as “meta-normative” principles. Such principles are not moral norms “... in the sense of guiding us toward the achievement of moral excellence or human flourishing” (2005: 91).

In thinking about what the key, neutral, meta-normative principle could be, R&DU take their cue from their claim that self-directedness is – in terminology that I am supplying – the *form*, but not the *substance*, of personal flourishing. Thus, a rule that protects each individual’s self-direction hones in on a feature present in all human flourishing, takes like cognizance of the propriety of each individual’s pursuit of personal well-being, and is responsive to the need for a neutral framework supportive of peace and beneficial interaction. R&DU then move rather quickly from a rejection of “encroachment upon self-direction” to an affirmation of a right to liberty as the most basic natural right and then on to construing liberty as a matter of rightful possession of compossible spheres of action.

[S]ince the initiation of physical force is the single most threatening encroachment upon self-direction, as well as the most basic, the aim of the individual right to liberty is to ban legally such activity in all its forms. The individual right to liberty allows each person a sphere of freedom – a “moral space” or “moral territory” – whereby self-directed activities can be exercised without being invaded by others. This translates socially into a principle of compossible *and* equal freedom for all. (2005: 89–90)

It seems that the right to liberty is not a right against all impingements on self-direction;²³ the former provides moral protection only against initiated physical impingements. If

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so, we need an explanation for why our fundamental natural right does not protect us against all encroachments on self-direction. R&DU do say that the initiation of force – and, presumably, also the threat of force – are the “most threatening” and “most basic” encroachments on liberty. Still, it is not clear how this points to a right against infringements on liberty rather than a broader right against infringements on self-direction. However, R&DU are clear that the fundamental meta-normative right to liberty is to be understood as a side constraint on permissible action rather than as a goal for action. Violations of liberty are to be eschewed rather than minimized.²⁴ Through their distinction between ordinary ethical norms and meta-normative side constraints, R&DU retain the fully teleological character of their *ethical* doctrine while, in effect, introducing *political* principles that are deontic in character.

R&DU’s emphasis on people’s natural right to liberty *of action* has important implications for their view about property rights and the natural right to property.

Self-directedness pertains to actions in the world, actions employing or involving material things at some place and some time. For such actions by individuals to be self-directed, they need to have the use and control of what they have created and produced protected from being used without their consent. ... A human being needs to have property rights to things that are the result of his or her own judgments and productive efforts. A person’s choices and judgments cannot be said to have been respected if the material expression of those judgments is divested from that individual. (2005: 98)

This is not an argument directly on behalf of any specific property rights for particular individuals. Rather, it is an argument for including within the “meta-normative” structure rules that specify how individuals can in non-conflictual ways make extra-personal objects their own and, thereby, alter or enhance their prospects for protected self-directed action.²⁵

A system of rules that is neutrally and duly responsive to the importance of human self-direction will include rules concerning initial acquisitions, transfers, and the recovery of illicitly acquired resources. That system of rules will have to have certain features in order to fulfill its function; e.g., the

rights that arise through following the rules must be compossible.²⁶ Still, R&DU deny that philosophical reasoning can identify some best set of rules. Their view is that there is a considerable range of eligible sets of rules any one of which would satisfy the telos of property rights (2005: 103). Presumably, any particular array of holdings that arises through the chosen actions of individuals that accord with an established and acceptable set of the rules of acquisition will be just. Thus R&DU endorse Nozickian historical entitlement doctrine – albeit they agree with Hayek and Lomasky that the specific details of any actual acceptable set of entitlement rules will depend heavily on historical contingency and convention. In contrast to Nozick, R&DU reject any Lockean proviso on the grounds that no acquisition in accordance with these entitlement rules can deprive another party of any resource that the other has already acquired in accordance with those rules (2005: 101). A defender of a Nozick-like proviso will reply that *C*'s decisions about her disposition of what she has justly acquired might so straiten *D*'s opportunities to bring his self-owned powers to bear on the world that *D* would have a just complaint against *C* even if *C* does not deprive *D* of any of his just holdings.²⁷

R&DU do not appeal to the notion of self-ownership. However, in an interesting discussion of others' invocation of this notion, they investigate whether advocates of the contention of self-ownership take that thesis to be morally axiomatic or seek a deeper ground for it. They point to how common it is for the Kantian-sounding proposition that persons are moral ends-in-themselves to be invoked in support of self-ownership. Although they decline themselves to make this philosophical move, they contend that the best explication of persons as moral ends-in-themselves is to be found in their own individualist moral perfectionism.

Schmidtz's Pluralist and Indirect Consequentialist Theory of Justice

David Schmidtz's freedom- and property-friendly work in political philosophy²⁸ differs in character in a number of striking

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ways from the work of Steiner, Lomasky, and Rasmussen and Den Uyl. These other authors emphasize the contrasting value judgments that individuals make or the contrast between the ends that different individuals have reason to pursue. Yet they each think that reflection upon this pluralism leads to a doctrine of individual rights, which then is the most salient source of further political philosophical conclusions.

In his *Elements of Justice*, Schmidtz offers a theory of justice according to which there are (at least) four distinct, non-reducible elements of justice – desert, reciprocity, equality, and need (2006: 4). Each of these elements is the source of certain of the demands of justice. Moreover, a demand that devolves from one of these elements may conflict with a demand that devolves from another. Furthermore, any demand of justice that devolves from any of these elements does so with the assistance of empirical information about human psychology and the conditions for social, economic, and political progression or regression. Due to the important role that this information plays in determining the demands of the various elements of justice – and not just in determining how already established decrees of justice ought to be applied – Schmidtz sees himself as a practitioner of non-ideal theory. Non-ideal theory contrasts with ideal theory which, at least in its extreme form, seeks to derive principles of justice or doctrines of human rights or ends that all rational creatures should promote through purely abstract reasoning (Schmidtz 2011).²⁹

Schmidtz sees his theory as less driven by a single, dominant normative theme than ideal theories are. Since there are more apparently independent, moving parts within Schmidtz's system, he sees that system as less of a conceptually tightly knit *doctrine* than those offered by, e.g., Nozick, Steiner, Lomasky, and R&DU (and myself). In addition, by including the elements of equality and need within his overall account of justice, Schmidtz offers a more ecumenical vision than theorists who more readily accept the “libertarian” label than he does. (However, he does not *reject* the label.) Nevertheless, I believe that the account of Schmidtz's overall stance that I shall be providing knits its elements together more tightly than may seem to be the case, shows the continuity of his stance with crucial strands within the libertarian position,

and indicates that the elements of equality and need play a lesser role than Schmidtz's language may lead one to expect.

According to Schmidtz, the concept of justice calls for giving people their due (2006: 7). This concept will allow us to say that punishment of the innocent is unjust because punishment can never be due to the innocent. However, most of the questions that we have about justice – e.g., whether people are due an equal income – cannot be determined by means of some finer explication of the concept of justice. According to Schmidtz, to arrive at answers to most of our questions about justice, we need an external standard. We cannot turn to the foundation of justice (whatever this may be) or the essence of justice. Rather, we must consult the function of justice, i.e., that for which justice is the foundation. Since questions about justice usually confront us at a more substantive level as questions about desert, reciprocity, equality, or need, most of our questions about justice have to be answered by determining what *conceptions* of desert, reciprocity, equality, and need best serve the external standard – that which justice is to foster.

What, then, is the good which is the end or function of, if not the essence of, justice? Schmidtz's consistent answer is: cooperation to mutual benefit. We want to arrive at conceptions of the elements of justice that will lead society "to become and remain a cooperative venture for mutual advantage" (2006: 79). Schmidtz also speaks of this end as our living well together. And it is clear that, for Schmidtz, living well itself involves many factors – such as giving and receiving earned respect. We want to arrive at conceptions of just desert, just reciprocity, just equality, and just need that enable "people to live together in mutually respectful peace"³⁰ (2006: 79). An important feature of Schmidtz's position here is his pragmatic understanding of what makes for a good articulation of an element of justice – say, desert. A good articulation is not so much an articulation that *accurately describes* desert as an articulation, the expression, practice, or institutionalization of which fosters the end of desert, viz., cooperation to mutual advantage. A conception of an element of justice will pass muster to the extent that "institutionalizing, endorsing, acting on it" will be conducive to our living well (2006: 9–10).³¹

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A great deal of *EJ* is devoted to highly nuanced discussions of the plausibility and consequences of adopting diverse conceptions of desert, reciprocity, equality, and need. Many of these discussions have no partisan political import. One example is Schmidtz's discussion of "transitive reciprocity," which calls upon recipients of favors to pass on similar favors to third parties who subsequently are in need of such favors. Think of a teacher who, as a student, received a particular type of attentive advice from a teacher and now passes on the favor by providing similar advice to one of her students. Still, most of Schmidtz's explorations of different conceptions of desert, reciprocity, equality, and need do have political import; and, on one level or another, the import of these explorations is always libertarian friendly.

In the very first chapter of *EJ*, Schmidtz points to the general problem that people disagree about what actions should be performed and what ends should be promoted. However,

If we are to live in peace, we need a high level of consensus on a long and mostly inarticulate list of "dos" and "don'ts" that constitute the ordinary sense of justice with which we navigate in our social world. (2006: 6)

And we quite quickly arrive at the common libertarian theme that the solution is not to overcome our substantive disagreements but, rather, to devolve decision-making authority.

In effect, there are two ways to agree: We agree on what is correct, or on who has jurisdiction – who gets to decide. ... Isn't it odd that our greatest successes in learning how to live together stem not from agreeing on what is correct but from agreeing to let people decide for themselves? (2006: 6)

The first topic that Schmidtz takes up with respect to desert is whether one should accept Rawls' apparently general skepticism about desert. This skepticism relieves people who may be deliberating about what distributional norms ought to be adopted from worrying about whether those norms clash with independent claims of individual desert. Rawls' skepticism turns on the view that someone deserves to gain from her productive activity only if: (1) she deserves the

features of herself – e.g., her talents, energy, insight, perseverance – that issue in that productivity; and (2) no one does deserve such features because anyone’s possession of such features is a matter of her good luck in the natural and social lotteries. Schmitz’s response is to deny (1).

We distinguish outcomes that owe something to a person’s character from outcomes that do not. Desert makers, if there are any, are relations between outcomes and internal features of person. We need not (and normally do not) assume anything about what caused those features. (2006: 36)

[W]hen a person’s internal features support desert claims, the support comes from appreciating what those features are, not from evidence that they are uncaused. ... [It is an option] to say we deserve credit for working hard not because we deserve to have been destined to work hard, but simply because we did, after all, work hard.³² (2006: 37)

We are not, according to Schmitz, compelled to adopt these claims rather than (1). However, if we adopt these claims, we will be more respectful of people and we will be more likely to have the kind of life we prefer. We will have “a theory that lets the concept of desert be what it needs to be in human affairs” – “a theory that acknowledges the existence of persons: beings who make choices and who are accountable for the choices they make” (2006: 38).

Of course, sometimes an individual will be merely lucky. Some benefit will come to her independent of any desert-making features she has at the time that the benefit arrives. However, even in these cases, this individual can make herself deserving of the benefit on the basis of what she does afterwards. “[W]hat once was morally arbitrary need not remain so. The most valuable things we are given in life are opportunities, and the main thing we do to deserve them is to do justice to them after the fact” (2006: 53). Why should we favor a conception of desert that gives people credit for taking advantage of even their undeserved opportunities? “One justification for giving people credit for using their opportunities well is that doing so empowers people to use their opportunities well, thereby helping them to live well together” (2006: 55).

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Schmidtz begins his discussion of the equality element of justice with Bruce Ackerman's tale about your arriving immediately before him at a garden containing two yummy apples which you quickly consume with one gulp (Ackerman 1983). Schmidtz accepts Ackerman's condemnation of your behavior but argues that this involves no general presumption on behalf of equal shares. Rather, what is morally offensive about your conduct is its unequal treatment of Ackerman and, more fundamentally, its lack of equal respect for him. Indeed, equality of treatment and equal respect will yield *unequal* outcomes when there is some relevant inequality among recipients – e.g., inequality in contribution. The judgment that you should have left that second apple for Ackerman results from the application of equality of treatment to an extraordinarily artificial scenario (2006: 109–13).³³ When persons do not arrive simultaneously, Schmidtz endorses the initial acquisition of unowned material on the basis of first possession. First possession gets the ball of human productivity and innovation rolling – in part because it allows early arrivers to invest their time and effort without fear of having to redistribute their products or their increasingly valuable land to later arrivers. Nor are later arrivers disadvantaged by the entitlements of the first possessors because the prospect of those entitlements is crucial to getting the ball of productivity and innovation rolling. “First appropriators pay the price of converting resources to productive use. Latecomers reap the benefits” (2006: 156). First possession also gets rolling the ball of secure possession that enables individuals – singly or jointly – to pursue their ends as they choose. “We cannot live together without rules that secure our possessions, thereby enabling us to plan our separate lives” (2006: 157). Furthermore, just as one should not mistake a demand for equal treatment with a demand for equal shares, one should not mistake a demand that no one (without fault) be badly off – which Schmidtz dubs “humanitarianism” – with a demand that everyone be equally well (or badly) off (2006: 114–19).

Schmidtz says, “I think need-claims are among justice's irreducible primary elements” (2006: 161). However, Schmidtz worries about people focusing too much on momentary and static needs when they think about distribution according to need.

Need-based distribution can fail the test of self-inspection [i.e., does expressing or institutionalizing the demand for need-based distribution foster the meeting of those needs?] because alternative principles frequently are more conducive to people meeting their needs.

In many contexts, distributing according to need does not result in people getting what they need. It induces people to do what manifests need rather than what meets need.

In the long-run, large scale need-based distribution has never been the key to making people in general less needy. Even if meeting needs were all that mattered, we still would not want to detach the awarding of paychecks, for example, from what actually meets needs, namely productivity. We still would want resources substantially to be distributed according to productivity. (2006: 167)

Schmidtz believes that a social world of cooperation to mutual benefit requires committed compliance to rules that are protective of individual liberty, property, and contract. In his focus on mutual benefit and on the crucial role that expectations of such compliance play in creating and maintaining such cooperation to mutual advantage, Schmitz is heir to the classical liberalism of Hume and Hayek. Like Hume and Hayek, he recognizes the very broad sense in which his position is consequentialist. In addition, he recognizes that compliance may be undermined by defending it on consequentialist grounds. For, if the ground for compliance with certain rules is our living better with one another, shouldn't one violate those rules if doing so would yield better or more extensive living together?

Schmitz addresses such questions in his chapter, "Beyond the Numbers," which begins with the TROLLEY case and the HOSPITAL case. In TROLLEY,

A trolley is rolling down the tracks on its way to killing five people. If you switch the trolley to another track on which there is only one person, you will save the five and kill one. (2006: 170)

In HOSPITAL,

Five patients are dying for lack of suitable organ donors. A UPS delivery person walks into the hospital. You know she is

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a suitable donor for all five patients. If you kidnap her and harvest her organs, you save five and kill one. (2006: 170)

Many people will assert the permissibility of your turning the trolley toward the one and deny the permissibility of turning the scalpel toward the delivery person; and these people will seek to identify a morally significant difference between the cases. In contrast, Schmitz concentrates on explaining the impermissibility of turning the scalpel and, *perhaps*, also takes that explanation to show the impermissibility of turning the trolley.

According to Schmitz,

A broadly consequentialist theory needs to treat some topics as beyond the reach of utilitarian calculation. ... Why? Because, from a consequentialist perspective, consequences matter and because, as an empirical matter there is enormous utility in being able to treat certain parameters as settled, as not even permitting case by case utilitarian reasoning. (2006: 171)

To get good results in the real world ... we need to be surrounded not by unconstrained maximizers but by people who respect rights, thereby enabling us to have a system of expectations and trust, which allows us together to transform our world into a world with greater *potential*. ... When we cannot count on others to treat us as rights-bearers with separate lives, we are living in a world of lesser potential. (2006: 171)

If other people can count on us not to murder them, new possibilities open up – opportunities people would not otherwise have. In contrast, if people cannot rely on us not to murder them, then our murderous act may be as good as possible under the circumstances – it may hit the utility ceiling, but the ceiling itself will be lower than it would have been had murder been ruled out. (2006: 172)

When doctors embrace a prohibition against harvesting organs of healthy patients [or delivery persons] without consent, doctors give up opportunities to optimize – to hit the ceiling – but patients gain opportunities to visit doctors safely. They gain a world with a higher ceiling. Such utility comes from doctors refusing even to ask whether murdering a patient would be optimal. (2006: 173)

Schmidtz distinguishes between: (1) actions that hit local utility ceilings by departing from constraints that enable us to have a system of expectations and trust; and (2) actions that conform to such constraints and, thereby, make or maintain the prospect of hitting a higher systemic ceiling. And his claim here seems to be the Humean and Hayekian *indirect* consequentialist claim that strict compliance is to be favored because in the long run it raises us (or is likely to raise us) to that higher ceiling.

Nevertheless, there are hints of two alternative stances. The first of these is that strict compliance is better than case-by-case pursuit of best consequences because the *potential* upshot of strict compliance is better than the *actual* upshot of case-by-case decision-making; it is better to have a higher ceiling (which *may* be hit) than a lower ceiling that will be hit. The objection here, of course, is that actually hitting a lower utility ceiling can easily be better than possibly hitting a higher ceiling. The second of the alternative stances is the *rule* consequentialist claim that morality is about acting in accordance with the set of rules that has better (expected) consequences than acting in accordance with any competing set of rules. Such a *rule* consequentialist need not argue that eviscerating the delivery person will have worse consequences than abiding by a rule against unprovoked killing. For the *rule* utilitarian already maintains that rightness in action is a matter of complying with the best set of rules.

Schmidtz seems to be leaning toward the *rule* consequentialist claim when he aligns himself with “‘rule of practice’ utilitarians [who] decline even to ask about the utility of particular actions in particular cases” (2006: 173). However, if Schmidtz was advancing the *rule* consequentialist claim, he would condemn a *secret* evisceration in HOSPITAL simply because this act contravenes one of the rules within the best set of rules. However, Schmidtz instead offers the standard *indirect* consequentialist suggestion that the evisceration will not remain secret. Surely “UPS Inc. [will] wonder what is happening to all the delivery personnel they keep sending to our hospital” (2006: 173–4). Hence, the evisceration is to be condemned because of that act’s negative expected consequences. The difficulty for the indirect consequentialist strategy is that it is tied to our *hope* that violation of the rules that we favor will – sooner or later – have bad consequences.

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Schmidtz provides a moving report about his discussion of TROLLEY and HOSPITAL cases with post-Soviet professors who refuse to concede the need to sacrifice the one to save the five. The professors say to him,

We have heard this before. All our lives we were told that the few must be sacrificed for the sake of many. We were told there is no other way. But what we were told was a lie. There is always another way. (2006: 176)

And Schmidtz writes that he more and more sees the wisdom of this response. For, “The real world does not stipulate that there is no other way” (2006: 176). However, I think Schmidtz needs to and can do better than this. For one thing, he could point to the fact that his consequentialism is a consequentialism of mutual advantage. Therefore, it precludes greatly benefiting the five by greatly harming the one – even if there is no other way to save the five. For another thing, Schmidtz could appeal to the concept of justice with which he began, viz., justice calls for giving people their due. Schmidtz tells us that, on the basis of this concept, we can conclude that not being punished is due to the innocent. Isn’t it equally plausible that not being killed is due to the innocent while being saved through the killing of an innocent is not due to the innocent? Indeed, in his penultimate sentence on the topic, Schmidtz aligns himself with the Rawlsian–Nozickian contention that “justice is about respecting the separateness of persons” (2006: 176). However, the justice invoked here does not merely require that one search for another way, but also that one refuse to sacrifice the one if no other way to save the five is found.

Consequentialist Approaches and Strict Enough Compliance

Hume, Mill, Spencer, Hayek, and Schmidtz can all be classified as consequentialists. Each of these theorists takes some overall social outcome – greatest social happiness or bountiful mutual benefit (through cooperative interaction)

– as the ultimate societal measure. Yet what especially unites all these classical liberal or libertarian figures is the indirectness of their consequentialism. Each holds that the societal good must be promoted obliquely through people's steady compliance with rules that facilitate and sustain peaceful co-existence and voluntary cooperation, e.g., rules against theft, against welching on agreements, and (more generally) against invasions of security or liberty. In addition, advocates of each approach recognize that general compliance with these norms depends upon agents having sufficient mutual assurance of one another's compliance with them. I want to raise here a problem that all these forms of indirect consequentialism face and which Hayek seems most to recognize.

Stout friends of mutual advantage will often encounter situations in which it appears that their defection from the rules will enhance their own interests without injuring others and stout friends of aggregate advantage will often encounter situations in which it appears that their defection from the rules will enhance aggregate advantage. On these occasions, and for the sake of greater yet mutual or aggregate advantage, these individuals may be led to violate the norms that, as indirect consequentialists, they proclaim. Moreover, others' suspicion that such defections may be in store will undermine their own reasons to comply with the relevant norms; and yet others' recognition of this in turn makes them more likely to defect from these norms. As the prospects of general compliance with the norms and, hence, the prospect of the desired outcome of that compliance recedes, individuals have less and less reason to act in accordance with the rules favored by the indirect consequentialist. After all, indirect consequentialists disavow rule worship, i.e., compliance with rules for their own sake independent of the contribution that compliant action makes toward some ultimate desired outcome.

I conjecture that sufficient mutual assurance of reciprocal compliance will exist only if agents do see each other as agents who are disposed (and have reason to be disposed) to abide by those norms *for their own sake*. In order for the favored consequences of general compliance with these norms to arise, people must at least to some extent take

these norms to have a moral force that itself provides us with reason to abide by them. Such a belief *in* the norms is a necessary *non-consequentialist* catalyst for compliance with those norms being strict enough to yield the benefits on the basis of which indirect consequentialists seek to justify those norms. Steadfast respect for freedom, Hayek argues, is the policy that most facilitates cooperation to mutual advantage; but our respect for freedom will only be steadfast enough “if it is treated as a supreme principle” (1973: 57). General compliance with the rules of just conduct – through which each person’s freedom is constituted – is the multi-purpose means that facilitates each individual’s pursuit of her ends. But, Hayek maintains, this multi-purpose means will obtain and serve those ends “only if [those rules of just conduct] are treated not as means but as ultimate values, indeed as the only values common to all and distinct from the particular ends of the individuals” (1976: 17).

Another Route to a Safety Net

This may be a good place to mention another route to a safety net – one that is not based upon a claim like one finds in Lomasky that individuals have a basic *right* to some minimal level of assistance. Libertarian rights theory begins with the morally pluralist premise that each person’s well-being or flourishing is an end of ultimate value – an end which that individual properly seeks to promote. Regard for the rights of others rests on: (i) one’s recognition of others as beings each of whom has rational ends of her own; and (ii) the recognition of those rights taking the form of constraints against treating others as though they do not have ultimate ends of their own but, rather, exist as means to one’s own ends. However, the background affirmation of the value, for each individual, of her life and well-being precludes ascribing to each individual a natural obligation simply to die or suffer severe hardship rather than engage in what would in other circumstances be a minor violation of another’s rights. Those who (without significant fault) are in dire straits and who need to use or consume some resource to

avoid death or severe hardship – the use or consumption of which would otherwise violate another’s property right – are not obligated to forego that use or consumption. If *A* needs to snatch the apple pie that is cooling on *B*’s window sill to avoid starvation and is not significantly at fault for being in such dire straits, *A* is morally at liberty to do so. This is a more modest claim than that those in dire straits have a *right* to use or consume what they need to in order to avoid death or severe hardship. For it does not follow from *A* being morally at liberty to snatch the apple pie that is cooling on *B*’s window sill to avoid starvation that *B* is obligated to supply the pie to *A*.

However, the existence of this moral liberty threatens lives and projects and a social order that is built substantially on well-established and secure property rights. It poses the risk of unpredictable conflict between those at liberty to seize what is otherwise the property of others and the holders of those resources who are at liberty to resist those seizures. The social conditions for peaceful and cooperative interaction are endangered. The most natural solution to this threat is for those who can readily afford to do so to contribute to a “dire straits fund” that makes needed resources available to those in dire circumstances (not substantially of their own making). Putting aside isolated emergency cases – e.g., the hiker who needs to break into a wilderness cabin to escape a sudden blizzard – the existence of such an institution sustains people’s full, non-attenuated rights to all the holdings that they do not contribute to that fund. Given the fund, no one in dire straits can claim a moral liberty to seize goods that have not been contributed to the fund. Hence, it would seem to be in the moral and practical interest of all those whose holdings may permissibly be seized by individuals in dire straits to contribute to this fund. However, there may be problems motivating voluntary contributions to the “dire straits fund” because individuals may withhold their contributions in the hope of free-riding on others’ contributions. This raises questions about the possible need for the coercive funding of public goods – a topic taken up toward the end of the first section of Chapter 5.

Notes

- 1 In recent years, important philosophical contributions to libertarian thought have come from Ralf Bader, Jason Brennan, Jessica Flanigan, Chris Freiman, Michael Huemer, Jacob Levy, Roderick Long, Mark Pennington, Daniel Russell, Horacio Spector, Fernando Teson, Kevin Vallier, Bas van der Vossen, and Matt Zwolinski among others. See Powell and Babcock (2017).
- 2 Again, each person's well-being is almost certainly deeply intertwined with and enriched by the well-being of loved ones, friends, and others with whom she shares enjoyments, values, and commitments.
- 3 The "left-libertarian" label is also adopted by theorists who reject distributionist principles yet hold that a society that is true to libertarian principles will have vastly less social and economic inequality than theorists like Nozick and Hayek find acceptable. See Chartier (2013).
- 4 For a short synoptic statement, see Steiner (2009).
- 5 For a detailed critical account of Steiner's views, see Mack (2009).
- 6 See, however, Steiner (2006).
- 7 I am saying that, if *freedom is a matter of the extent of one's rightful domain* (as Steiner maintains), then universal self-ownership involves inequality of freedom.
- 8 Private email communication, September 24, 2017.
- 9 Any attempt to set aside a significant portion of prospectively valuable raw material for later generations will encounter profound knowledge problems and economic costs.
- 10 And, as we shall see, in Rasmussen and Den Uyl.
- 11 Project pursuit is not reserved for the self-consciously autonomous few. "A person's commitments may be unarticulated and not at all the product of conscious deliberation culminating in a moment of supreme decision" (1987: 42).
- 12 Lomasky adds, "That the ends are personal does not, of course, preclude their being directed toward the welfare of other persons" (1987: 35).
- 13 Recall "there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives" (Nozick 1974: 32–3).
- 14 "One acts in order to attain some end that one values. ... [A]ll action is to secure some end or other" (1987: 20).
- 15 We ignore here the rights that some beings, e.g., infants, may

- have because of their relationships with other beings who have rights (1987: 39–41).
- 16 Some individuals cannot be brought within the community of rights-holders because they demand more deference from others than the others are prepared to supply, or offer less deference to others than others are prepared to accept (1987: 79–83).
 - 17 For his arguments for the objective value of certain of our ends, see Lomasky (1987: 229–37). For similar arguments, see Mack (1989).
 - 18 See also Lomasky (1987: 99–100, 113).
 - 19 Skepticism is often appropriate in the face of ill-informed intolerance. After witnessing the burning of some witches, Montaigne remarked “It is rating our convictions highly to roast people alive for them” (Trevor-Roper 1967: 143).
 - 20 Schmidtz remarks that “The liberal ideal is free association, not atomic isolation” (2006: 151).
 - 21 R&DU’s perfectionism is further developed in Rasmussen and Den Uyl (2016).
 - 22 Cf., Lomasky’s claim that “Self-direction as an essential component of human good is one postulate of an ethic with an individualistic core” (1987: 16).
 - 23 But see “The individual, basic, negative right to liberty prohibits all forms of nonconsensual use or direction of persons” (2005: 280).
 - 24 Recall Nozick’s distinction between moral side constraints and moral goals.
 - 25 See the last paragraphs of my discussion of Murphy and Nagel in chapter 5.
 - 26 See Mack (2010: 62–4) for features that any eligible set of rules for a property system must possess.
 - 27 See Mack (1995) and Russell (2010).
 - 28 Aside from Schmidtz (2006), see Schmidtz (1994, 1995, 1998).
 - 29 Also see Gaus (2016).
 - 30 Also see Schmidtz (2006: 11, 55, 58, 59, 86, 150, 153, and 205).
 - 31 Does this mean that a good theory of justice can consist of useful fictions rather than truths? I am uncomfortable with the possibility that Schmidtz’s answer is “What is the difference?” (2006: 206).
 - 32 Recall the Hayekian “Desert as Contribution Proposal” discussed in chapter 3.
 - 33 The contrast between equality of treatment and equality of outcome is a recurrent theme in Hayek’s writings.