

NOZICK, LIBERTARIANISM, AND RIGHTS

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Libertarianism is distinguishable from other similar views primarily in terms of its emphasis on economic freedom and the protection of property rights; the libertarian is opposed to governmental regulation of economic activity, especially when such regulation involves involuntary redistribution of property, at least when the original holder of the property obtained it by legitimate means. Views other than libertarianism sometimes emphasize opposition to governmental intervention in people's lives, but the libertarian is unique in his emphasis on the denial of the legitimacy of governmental interference with economic freedom and property rights.¹ Libertarianism is sometimes based on an egoistic "morality,"² and when it is, the defense of libertarianism must involve not only defense of the uniquely libertarian thesis, but also defense of the egoist thesis. Given the general disregard in which egoism is held, it is unlikely that the egoist defense of libertarianism will win the latter view many new adherents.

Libertarianism is given a defense much more likely to have a broad appeal by Robert Nozick.³ Nozick takes as fundamental a morality which, at least on the surface, is not egoistic. Instead, human beings are held to have certain rights which are not to be violated even if violation would serve the interests of others. Nozick also claims that

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1. Thus, one can be a "civil libertarian" without being a "libertarian."

2. The writings of Ayn Rand illustrate this basis for libertarianism.

3. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). In suggesting that Nozick's view is likely to have appeal, I differ with Thomas Nagel's assessment of the appeal of Nozick's premises. "No one (except perhaps an anarchist) who did not already accept the conclusion would accept the premise," Nagel says of Nozick's argument. Nagel, Book Review, 85 *YALE L.J.* 136, 138 (1975). Surely the interest Nozick's work has attracted suggests the contrary.

these rights preclude interference with economic freedom. The state which would redistribute property, or prevent its acquisition, on grounds other than that the property was or would be acquired by illegitimate means, is an illegitimate state—one which violates moral rights.⁴ Thus, we have in Nozick a defense of libertarianism which is based on a moral view other than ethical egoism.

In this Article I want to examine Nozick's claim that recognition of moral rights precludes the legitimacy of any state more extensive than that tolerated by the libertarian. This is to examine a claim which is crucial to Nozick's position, for, on his view, the nature of rights largely determines the extent of legitimate interference with individual liberty. I shall advance the thesis that rights do not have the libertarian implications Nozick attributes to them and that the libertarian view cannot be defended on the basis of rights. By so doing, I hope not only to undermine Nozick's defense of libertarianism, but also to defend rights against the rather bad reputation they have begun to acquire because of their association with libertarianism. That is, for those who find libertarianism impossible to tolerate, and who accept Nozick's claims about the relationship between rights and libertarianism, a plausible solution would be the rejection of rights along with libertarianism.⁵ By denying the connection between rights and libertarianism, I hope to undercut both uses of the claim that the connection exists.

There are various ways in which one could undertake an examination of the sort I have in mind. One line of attack would be to establish the existence of rights more extensive than those recognized by Nozick—rights which would directly require redistribution. While I would be sympathetic to such an approach, I shall not adopt it here. Instead, I shall argue that the rights Nozick *does* recognize themselves entail that the state can justifiably exercise powers with respect to property and economic activity which are more extensive than a libertarian can allow. To establish this thesis, I shall initially set out some of the more distinctively libertarian aspects of the position Nozick adopts. Then I shall offer two largely independent arguments designed to show that this libertarian position cannot be defended in the way Nozick attempts to do so: First, I shall argue that mere understanding of what

4. Some features of the criteria for making such judgments are elaborated in what follows. The term "redistribution" is used here and throughout this essay in its ordinary sense, meaning roughly "intentional change in the distribution of something." Thus I do not use this term in the technical sense mentioned by Nozick. See R. Nozick, *supra* note 3, at 27. For purposes of this Article, nothing of substance turns on this difference.

5. For example, after discussing Nozick, David Lyons suggests that concern for humanity may require concern for something other than and incompatible with rights. Lyons, *Rights Against Humanity*, 85 *PHILOSOPHICAL REV.* 208, 215 (1976).

having a right entitles one to protect against can establish the legitimacy of the more than minimal state; second, an examination of the relationship between rights and distributive justice yields a case for an even more extensive state.

NOZICK'S LIBERTARIANISM

It seems best to allow Nozick to describe his libertarian position in his own terms. A relatively comprehensive statement of his position is contained in the following passage of *Anarchy, State, and Utopia*:

Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.⁶

Thus, for Nozick the legitimate state exists solely for the purpose of protecting rights against violation; forcing some to aid others is a violation of the rights of those so forced, and thus is not a justifiable function of the state.

Nozick recognizes, of course, that some claims that persons should be required to aid others are themselves based on rights; indeed, it is just such claims that Nozick is concerned to deny. Nozick's position on such rights claims is well illustrated in the following two quotations:

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

There are particular rights over particular things held by particular persons No rights exist in conflict with this substructure of particular rights. Since no neatly contoured right to achieve a goal will avoid incompatibility with this substructure, no such rights exist. The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition.⁷

6. R. NOZICK, *supra* note 3, at ix (emphasis in original).

7. *Id.* at 238 (footnote omitted) (emphasis in original).

. . . [A] right to life is not a right to whatever one needs to live; other people may have rights over these other things At most, a right to life would be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else's rights. With regard to material things, the question is whether having it does violate any right of others.⁸

The trouble, therefore, with the state which would require some to aid others is that such a state would violate the property rights and rights to economic freedom of those who would be required to supply the aid. Among the familiar practices of existing states which would have to be abandoned in order to satisfy Nozick's demands would be welfare economics⁹ and taxation.¹⁰ The sole ground on which interference with property distribution is justifiable, according to Nozick, is to *rectify* past violations of principles of justice governing acquisition and transfer of property.¹¹ No other ground for state interference with economic transactions is permitted.

HAVING A RIGHT

The rights Nozick is willing to grant to human beings are roughly the rights said by Locke to be conferred by the law of nature.¹² Explicit mention is made by Nozick of the Lockean rights to life, health, liberty, and possessions.¹³ These rights make it permissible to protect the holder of the rights against (at least) violence, theft, fraud, and the violation of contracts.¹⁴ Nozick, however, thinks that these rights do not make it permissible for the state to force anyone to give up property held by one person in order to benefit others; indeed, it is these very rights which prohibit such redistribution.

What is it that having these rights entitles one to do? Nozick, again with Locke, allows that having a right entitles one to protect that right against transgressions and to punish those who transgress it.¹⁵ This much is implied in the suggestion that rights entitle a person to protect against violence, theft, fraud, and so on, and is not a point of contention between Nozick and the defender of the more extensive

8. *Id.* at 179 n.

9. *Id.* at 154.

10. *Id.* at 169.

11. *Id.* at 152-53.

12. See J. LOCKE, TWO TREATISES OF GOVERNMENT 309-18 (P. Laslett ed. 1967) (*Second Treatise*).

13. R. NOZICK, *supra* note 3, at 10. Locke claims that the law of nature requires that "no one ought to harm another in his Life, Health, Liberty, or Possessions." J. LOCKE, *supra* note 12, at 311. Thus, in speaking of a right to health, for example, I mean to indicate only the claim that one ought not to be *harmed* in one's health. The much stronger connotations which sometimes attach to the expression "a right to health" thus should not be read into this expression.

14. R. NOZICK, *supra* note 3, at 26.

15. *Id.* at 10.

state.¹⁶ Transgressions such as theft and fraud, and perhaps violence as well, are actions which are commonly understood as involving elements of intention in their definitions. "Theft," for instance, may be defined as "the trespassory taking of another's personal property with intent to steal it."¹⁷ Examples of transgressions such as these call to mind the class of actions against which persons are perhaps most concerned to protect themselves: intentional violations of rights.

Intentional violations of rights are not, however, exhaustive of the kinds of actions which may be harmful to one's rights. Take the aforementioned rights to life and health, for instance. The placing of a poisonous substance in a person's drinking water would be equally harmful to that person's life or health whether or not the poison was placed there intentionally; intention has nothing to do with measuring the degree of harm which results from an action, but instead seems relevant only to determining what response is appropriate in dealing with a person who contributed to the occurrence of harm. One can be deprived of things to which one has a right without anyone intending that the deprivation occur.

What do rights entitle a person to do with regard to unintended harm? Punishment of the person who causes the harm does not seem to be entailed, for such punishment would constitute punishment of the morally innocent—at least in cases in which the harm resulted from nonnegligent acts. But action taken to *protect against* unintended harm clearly seems permissible. Given a right to life and health, if Jones is about to do something which will harm Smith's life or health (assume Jones thinks he is butchering a dead animal, but it is really live Smith), Smith is surely entitled to stop Jones. Or given a right to property, if Jones is about to walk off with Smith's umbrella, then Smith is entitled to protect his property and take steps to retrieve the umbrella, even if Jones sincerely but wrongly believes it to be his. No doubt there are limits on what protective measures such rights entitle one to take (Smith is not entitled to kill Jones in order to protect his umbrella), but it seems undeniable that limited protective measures are permissible, even if the harm is unintended. Otherwise, we would be left with the peculiar view that rights entitle one to interfere with the informed, responsible actions of others, but not with actions done, for instance, in ignorance or under compulsion.¹⁸

16. It is a point of contention, however, between Nozick and the anarchist. For a discussion of Nozick's success, or lack of it, in that dispute, see Lyons, *supra* note 5, at 208-11.

17. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 85 (1972).

18. Evidence that Nozick would accept this point can be found in his brief discussion of innocent threats and innocent shields. See R. NOZICK, *supra* note 3, at 34-

This feature of having a right—the fact that having a right entitles one to protect against unintended as well as intended harm—is sufficient in itself to generate serious problems for Nozick's claim that the state cannot be justified in interfering with economic activity except when done to compensate for previous unjust acquisition or transfer of property. There is no guarantee that the unfettered exercise of economic freedom will not result in a distribution of property which is harmful to some persons' abilities to maintain their lives or health. We need only to recognize that some distributions of property could leave some persons without the means to maintain life and health. This could be the result even if no individual intends to harm anyone through acquisition or transfer of property, and even if no individual action of acquiring or transferring property causes any measurable harm to anyone. Since rights entitle one to protect against unintended harm, all that is necessary to justify protective measures on the part of those whose rights are threatened is that the *cumulative effect* of the many past acts of acquisition and transfer be harmful to persons' rights.

This has two important effects on Nozick's position. First, state regulation may be necessary to ensure that economic transactions do not have this unacceptable effect on persons' rights, and, second, this regulation cannot always be accommodated in Nozick's theory as rectification for past injustice, since we cannot be sure that undesirable effects will always be traceable to acquisitions or transfers independently identifiable as unjust.¹⁹ The invisible hand, if you will, does not always lead us in desirable directions.

The *extent* of state regulation made possible by this feature of having a right depends on how other aspects of having a right are defined. The foregoing considerations ensure that the state may intervene on behalf of someone who is denied access to the means necessary to maintain life and health by a series of innocent economic transactions. However, these considerations seem to provide a case for protection only for those whose *existing* status with respect to life and health is threatened by the economic activities of others, since such

35. Nagel is thus incorrect in interpreting Nozick as being concerned with rights which yield claims "only against someone who contemplates deliberately violating them." Nagel, *supra* note 3, at 143.

19. Nozick may be able to accommodate this into *one* part of his theory by appeal to the Lockean proviso. See text & notes 23-33 *infra*. The point here, however, is not that Nozick cannot accommodate this into his moral theory, but that a state more extensive than the *libertarian* state can be justified. A state faced with the problem of harm resulting from the cumulative effect of individually innocent and harmless economic acts could justifiably exercise extensive control over economic activity, so much so that there might be no need for a defender of welfare rights to ask for a more extensive state.

cases provide the clearest examples in which something covered by the rights in question might be threatened by the activities of others. Nevertheless, if we consider the question of how to define that to which one has a right, we will be able to see the rather great extent to which state intervention in economic activity could be required by Lockean rights.

If one has a right to *R*, in what does a violation of a right to *R* consist? One way of understanding the notion of violation of rights is by reference to a *baseline situation*. On this understanding, one's right to *R* is violated when the actions of others render one's position with respect to *R* worse than one's baseline situation with respect to *R*. Nozick makes use of this approach to the idea of having a right. In the context of a discussion of what it is to be made worse off by another's appropriation, he suggests two possible requirements which might define the baseline against which one's position is to be compared: "Someone may be made worse off by another's appropriation in two ways: first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could."²⁰ Generalizing from these remarks, one possible baseline is that defined by one's presently available opportunities; according to this standard, one's rights are violated if one's opportunities for improvement are reduced. A second possible baseline is defined by what one actually has at a given time; one's rights are violated if what one actually has is taken away.

Without argument, Nozick proposes to interpret the baseline for rights violations in the second way.²¹ I propose to argue that a higher baseline must be adopted if the notion of rights involved here is to be at all plausible. Nozick's baseline promises absurd results—one's rights with respect to *R* are violated only if one's position with respect to *R* is made worse off than it previously was; one's rights are violated only if one is deprived of what one has had. But to restrict rights violations to these types of situations is incredible. Compare the following two situations. In one situation Jones attacks Smith, who is an adult, and chops off his arms and legs with an axe. In a second situation, Jones administers a drug to the infant Smith which prevents any further development of the latter's arms and legs. In the first situation, Nozick's baseline tells us that Smith's rights have been violated, for Smith has been made worse off with respect to the use of his arms and

20. R. NOZICK, *supra* note 3, at 176.

21. *Id.* at 178.

legs than he previously was. In the second situation, however, Nozick's baseline does not permit us to say that Smith's rights have been violated, for Smith is deprived of nothing which he had at the time of the administration of the drug!

Avoiding this result requires a baseline which includes some allowance for the fulfillment of potentialities. The infant Smith in our example would have had use of mature arms and legs had it not been for the intervention of Jones; he has thus been deprived of the fulfillment of his potential. This notion of "fulfillment of one's potential" is extremely difficult to state with precision. Nozick would no doubt object if this notion were defined so as to result in a baseline which required some to make sacrifices so that others could fulfill all their potentialities. Nonetheless, avoidance of the above result does require a baseline which permits the possibility of demanding such sacrifices.

The above example is an instance of an action which prevents a child from attaining mature and healthy growth. A baseline which will allow for prohibition of that action will also allow for the general prohibition of actions which have such effects on children. This includes the prohibition of otherwise innocent economic transactions which have the unforeseen consequence of denying to children the means necessary to attain maturity. The child-welfare rights implications should be clear. If the distribution of property which results from a series of economic transactions makes it impossible to provide for children to a degree sufficient to enable them to attain healthy maturity, then the rights of those children not to have their lives or health harmed by others' activities make state intervention to correct the distribution justifiable.

These considerations mean that state regulation of economic activity may be required by rights Nozick himself allows and that this regulation may be considerably more extensive than the libertarian can allow. State intervention may be necessary to prevent or correct distributions which are harmful to the lives or health of anyone; it may also be necessary to prevent or correct distributions which are harmful to the healthy development of children. This second category entails that some may be expected to forego advantages so that children may attain certain of their potentialities.

Lockean natural rights thus yield three results inconsistent with Nozick's libertarianism. First, the state which does more than merely protect persons against violence, theft, fraud, and the violation of contracts, is clearly justifiable, since prevention and correction of harmful distributions is also permitted. Second, state alteration of distributional patterns can be justified for reasons other than to rectify some morally

culpable action, since harmful distributions need not be due to any culpable action. Third, some persons may indeed be required to sacrifice in order that others may benefit, the clearest case being that of children who require assistance in order to attain mature and healthy growth.

In this section, then, I have argued that Lockean natural rights permit extensive state regulation of economic activity when such regulation is necessary to prevent the harmful effects of economic activity. This in itself is sufficient to break the connection between rights and libertarianism. However, the foregoing establishes only that rights entitle one to interfere in others' activities when *those activities* intentionally or unintentionally cause harm to that in which one has rights; it does not establish that others may be required to assist someone who is threatened with harm because of *natural events* rather than the actions of other human beings. In the next section, I shall argue that Nozick's Lockean natural rights allow that even this can be justified under some circumstances.

RIGHTS AND DISTRIBUTIVE JUSTICE

Nozick proposes an historical entitlement theory of distributive justice.²² According to this theory, any distribution is just, provided it accords with the principles of justice in acquisition, transfer, and rectification. These principles deal respectively with the acquisition of holdings, the transfer of holdings, and the rectification of injustice in holdings. Possible sources of injustice in holdings are completely exhausted by violations of the principles of justice in acquisition and transfer; consequently, any distribution of holdings is just provided only that it did not result from violations of the principles of justice governing the original acquisition of unheld property or the transfer of property previously held by someone. Observation of a pattern of distribution alone can never be sufficient ground to conclude that the distribution is unjust; the *history* of the distribution must be examined before such a conclusion could possibly be justified.

Nozick's adoption of this historical entitlement theory of distributive justice and his commitment to libertarianism are conjoined with the rejection of patterned and end-state principles of justice. Patterned principles are those which would allocate holdings by reference to some "natural dimension" of persons. As for end-state principles, Nozick is somewhat less clear about them, but he seems to mean that any nonhistorical principle is an end-state principle; that is, an end-state principle

22. *Id.* at 150-53.

is any principle which does not evaluate the justice of a distribution on facts about the historical origin of the distribution, and thus bases evaluation solely on the nature of the distribution. A patterned distribution is any distribution resulting from the application of two or more patterned or end-state principles.²³

The essential problem with all of this is that the rights Nozick recognizes commit him to more than the entitlement theory of justice. We have seen that, in general, a right to *R* entitles a person to protect himself against being left with less than his baseline situation with respect to *R*. We have also seen that among the rights Nozick recognizes are rights to life and health. It takes no more than this to derive *patterned, end-state principles of justice*. A crucial step in this derivation is the recognition of the fact that a right to *R* entitles a person to his baseline with respect to *R* even if his being below the baseline is due to natural disasters not the fault of anyone. This is conceded by Nozick in his discussion of the Lockean proviso, where he discusses the following example: Suppose a natural disaster destroys the entire supply of something necessary for life, such as water, with the exception of the supply owned by some individual, Jones.²⁴ Suppose also that Jones' supply is sufficient to provide water for everyone. In such a situation, persons have a right to the use of Jones' water supply; they have this right regardless of the fact that Jones' original acquisition of the water supply may not have violated anyone's rights and regardless of the fact that the destruction of the remaining water was not Jones' fault.²⁵

The problem for Nozick is that these considerations show that the possession of rights such as those to life and health entails *end-state* principles of distribution and a *pattern* of distribution resulting from the application of the end-state principle. The restricted water supply example shows that having a right to something *R* entails having access to what is necessary to *R* even if what is necessary to *R* is held by someone else. The right to *R* entitles one not to be left below the baseline with respect to *R*. Given that one has a right to life and health, and that the maintenance of these requires food, water, and so on, then one has a right to the minimum quantity of these material goods necessary

23. *Id.* at 155-56.

24. *Id.* at 174-82. This example and the discussion of this section both presuppose that the case is one in which sufficient water exists to satisfy everyone's needs; the shortage in question is due to monopoly control over the water supply.

25. The relevant passage from Nozick runs as follows:

Nor may [an owner] charge what he will if he possesses [a water hole], and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights.

Id. at 180.

to the maintenance of life and health. But this means that rights may demand that a certain end-state be achieved and maintained; rights to life and health demand that the distribution of holdings be patterned so that everyone has the capability of maintaining life and health. Rights thus can require patterns.²⁶

In general, the recognition of rights entails *both* principles of justice in acquisition and transfer, *and* end-state principles of justice. The former are entailed because rights constrain all activity, including economic activity. The latter will be entailed provided only that the rights possessed include rights over particular things which require some material holdings for their attainment and maintenance. Rights to life and health are such rights, for they are rights to the life and health of a particular living thing—oneself—and that living thing does require other material goods for its maintenance. Thus, any plausible set of rights will be capable of serving as the basis for derivation of *both* kinds of principles of justice.

Nozick makes it appear that these two kinds of principles of justice are incompatible. End-state principles tell us that "all that needs to be looked at, in judging the justice of the distribution, is who ends up with what."²⁷ According to Nozick's favored historical entitlement theory, however, the only thing that needs to be looked at is the history of the distribution, that is, whether it is the result of violations of the principles of justice in acquisition and transfer. Each denies the relevance of what the other holds to be the whole question. But principles of justice in distribution which are grounded on rights involve, I have argued, both kinds of principles.

Rights such as those to life and health do entail end-state principles, for, given such rights, it is possible to conclude that a pattern of distribution is unjust merely by examining the pattern independently of its history: If anyone is denied what is necessary to life and health, the pattern of distribution is unjust. If everyone has what is necessary

26. Nozick claims that the Lockean proviso is not an end-state principle, arguing that "it focuses on a particular way that appropriative actions affect others, and not on the structure of the situation that results." *Id.* at 181. To support this claim, he cites the case of a medical researcher who synthesizes a new substance capable of curing a disease. He claims that even if this substance becomes necessary for others to stay alive, that "does not entail that [the researcher's] appropriation of anything left some people (immediately or later) in a situation worse than the baseline one." *Id.* The point here seems to be that the researcher's appropriation did not violate the Lockean proviso. But it does not follow from this that the Lockean proviso is not an end-state principle. For it is also true in the water hole example that the *appropriations* of the water hole owner need not have violated the proviso; natural forces destroyed the supply held by others. Yet Nozick himself says that the proviso is operative in this case. The proviso can therefore come into operation even if no act of appropriation violates it, and it does not focus exclusively on the way appropriations affect others.

27. *Id.* at 154.

to maintain life and health, it does not necessarily follow that the pattern is just, for it may be the case that the pattern is the result of violations of rights occurring in its history. Since rights require both historical and end-state principles of justice, a distribution cannot be judged just merely by applying one kind of principle. A distribution is unjust if it violates either kind of principle, and just only if it violates neither.

The fact that rights require the application of both kinds of distributive justice principles, while the two kinds are sometimes made to appear incompatible by Nozick, suggests the need for an additional distinction in the classification of principles of distributive justice. On the one hand, we have principles which specify the distribution of the *total* supply of holdings; everything capable of being distributed is allocated to someone by such a principle. On the other hand, we have principles which specify the distribution of only *part* of the total supply of holdings; such principles require that a portion of the total supply be distributed in a particular way, but impose no requirement with respect to the remainder of the total supply. The first kind of principle imposes a *total pattern*, the second a *partial pattern*.

Most of what Nozick says about end-state principles applies to such principles only when they impose *total* patterns. Evaluating the justice of a distribution will necessarily exclude historical considerations only when the total supply of holdings is distributed according to non-historical principles, leaving nothing to be distributed according to historical ones. Rights to life and health, however, require only *partial* patterns. The distribution of holdings necessary for all to attain and maintain life and health will involve only a small portion of the total supply, except in circumstances of extreme scarcity. That being the case, the distribution of the remaining supply can take place in any number of ways compatible with the partial pattern, further constrained only by principles of justice in acquisition and transfer.

This distinction between total and partial patterns undermines the force of one of Nozick's major arguments against patterned and end-state principles. Nozick suggests that if the distribution required by such principles were achieved, it would be rapidly overturned by the voluntary actions of persons transferring their holdings. He gives an example in which Wilt Chamberlain receives a pattern-upsetting transfer of funds from the many who are willing to pay to watch him play basketball, and one in which a man in a socialist society starts a factory with the materials others voluntarily give him in exchange for being allowed to hear his lectures. Nozick continues:

The general point illustrated by the Wilt Chamberlain exam-

ple and the example of the entrepreneur in a socialist society is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them.²⁸

Thus, end-state or patterned principles are objectionable because they would require continuous interference with people's liberty.

The argument that the principles would *continuously* be upset by voluntary actions and thus would require *continuous* interference for their maintenance applies *only* to principles which specify a *total* pattern. A partial pattern leaves room for exchanges of holdings which occur within the limits set by the partial pattern, and so the pattern would be upset, and interference required, only when voluntary exchanges altered the distribution so much that the partial pattern no longer obtained.²⁹ Partial patterns are not subject to the charge that they would require *continuous* interference. Even apart from this, is it clear that the actions which would upset even a total pattern (unbalanced exchanges of holdings), once achieved, would be so much more common than the actions (fraud and theft, for example) which would upset the distribution required by the entitlement theory? Besides, even Nozick is willing to permit interferences with liberty to correct violations of *his* conception of justice, and so if one of the patterned or end-state conceptions of justice *is* correct, how can Nozick complain about its interference with liberty? If interference with liberty to correct injustice is permissible, the fact that a conception of justice would permit interference with liberty cannot be used against it. We must first know the correct conception of justice before we can evaluate the morality of particular kinds of interference with liberty.

Nozick's views on the water hole example thus present serious difficulties for him. However, Nozick could avoid much of the trouble I have been trying to give him by giving up his original intuition about

28. *Id.* at 163.

29. It *may* be that Nozick recognizes this in his remark that "perhaps some *very* weak patterns are not so thwarted," *id.* at 164, but it is not clear what he means by "very weak" patterns.

the water hole example. If he were to say that the water hole owner could deny others use of it even when all other supply has been wiped out, he could avoid the difficulties created by the Lockean proviso, and would at least be able to hold the entitlement theory without also being committed to end-state principles.

But can Nozick give up his original intuition about the water hole example? To avoid the problems arising from this example, Nozick must say that property rights constrain the right to life even in circumstances of scarcity due to monopoly. That is a claim which I think most are going to find hard to swallow; to say that someone faced with certain death must respect the property rights of someone who would lose nothing but a bit of property (placing the maintenance of property above the maintenance of life) seems an outrageous inversion of values. I must confess that such a view, to which one strain of Nozick's thought commits him, seems to me to richly deserve the ridicule that has already been directed toward it.³⁰ Fortunately, however, there are also some nonemotive considerations which point away from this distinctly unattractive result.

Nozick is willing to allow that *acquisition* of property may be constrained by other rights. That is one point of the Lockean proviso, and as long as the proviso is not extended to cases in which the scarcity of an essential thing is not due to anyone's *acquiring* of property, the problems for Nozick can be avoided. The acquisition of property is constrained by the right to life: If someone's acquisition of property leaves others without any possible means to maintain their lives, that acquisition is unacceptable. Given that view, why should the relationship of these rights be reversed once a particular piece of property has been acquired by someone? Why should the scarcity of a vital material good be grounds for prohibiting someone from acquiring the total supply of it, but not for redistribution when natural forces create a situation which *leaves* someone with the total supply? In each case, the potential owner of the total supply may be innocent of any culpable wrongdoing, and in each case the point of the interference is that the particular supply in question is the only available supply of a good necessary for life. It can be said that there is a difference in that the owner, but not the person who has not yet acquired a piece of property, has a greater right than others to the property in question. This unequal right, if it exists, however, can be accommodated without allowing property rights to constrain the right to life. The owner's greater right may entitle him to compensation for water used by others, or perhaps

30. See Barry, Book Review, 3 *POLITICAL THEORY* 331 (1975).

a greater say in control over the water, but there is no reason to conclude that it must entitle him to total control over the water at the expense of others' lives. If protection of life is important enough to constrain acquisition of control over property, then there is no reason why it is not also important enough to constrain the extent of control once acquired. Certainly nothing about Lockean natural rights provides any reason for a shift. So Nozick's commitment to the Lockean proviso commits him to his intuition about the water hole example.³¹

In order, then, to avoid the problems raised by the water hole example, Nozick must abandon the Lockean proviso altogether, thus avoiding the unjustified shift with respect to which right constrains which. But there are good reasons for the proviso, reasons in addition to its ability to yield the intuitively correct result in cases of extreme scarcity due to monopoly. For the right to control a particular piece of property is an acquired right, one the possession of which requires, at some point in time, that the right-holder *do* something to acquire it, or that someone else *do* something to confer it on the right-holder. On the other hand, our Lockean natural rights³² are unacquired rights. As such, they exist prior to the acquisition of rights over particular things, and thus constrain the actions involved in such acquisition. Thus, the right to life constrains the acquisition of rights over particular things and we have, roughly, the Lockean proviso. Abandonment of the proviso therefore would be tantamount to abandonment of Lockean natural rights—the basis of Nozick's whole enterprise.

CONCLUSION

Nozick's commitment to Lockean natural rights entails commitment to the Lockean proviso and to its applicability to the water hole example, which shows that end-state principles can be deduced. With the deduction of end-state principles, we have the result that property rights can sometimes be interfered with to protect persons against natural contingencies. A further result is that a more than minimal state may be justified as necessary to achieve or maintain an end state.³³

31. I would like to thank Mark Overvold for comments which helped me to improve my expression of the argument of this paragraph.

32. For purposes of this Article, Lockean natural rights are assumed to exist.

33. It might be objected that this understanding of rights violates Nozick's demand that rights be viewed as side constraints, not goals to be pursued. See R. Nozick, *supra* note 3, at 28-30. This objection would not be to the point, however, for rights *have* been used as side constraints in this discussion. Nor is the adoption of end-state principles of justice incompatible with viewing rights as side constraints. Rights fail to function as side constraints only when states of affairs involving fewer rights violations may be pursued, even if rights are violated in the pursuit. Nozick's equivocal remarks notwithstanding, end-state principles per se do not require pursuit of the end state at all costs; they merely entail that a state may sometimes be judged unjust merely

Libertarian property rights thus cannot be defended on the basis of Lockean natural rights.

by examining the state itself. Change through violations of rights is not required, and, for most such principles, would be prohibited. Moreover, the difference between Nozick's position and that defended in this Article lies in the question of which right constrains which when conflicts occur; both positions take rights as side constraints.