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LIBERTARIANISM AND THE STATE*

By Peter Vallentyne

I. Introduction

Liberalism comes in two broad forms. Classical liberalism emphasizes the importance of individual liberty, and contemporary (or welfare) liberalism tends to emphasize some kind of material equality. The best-known form of libertarianism—right-libertarianism—is a version of classical liberalism, but there is also a form of libertarianism—left-libertarianism—that combines classical liberalism's concern for individual liberty with contemporary liberalism's robust concern for material equality. In this essay, I shall assess whether libertarianism in general, and left-libertarianism in particular, can judge a state to be just without the universal consent of those it governs.

Although Robert Nozick has argued, in *Anarchy, State, and Utopia,*[1] that libertarianism is compatible with the justice of a minimal state—even if it does not arise from universal consent—few have been persuaded.[2] Libertarianism holds that individuals have very strong rights of noninterference, and all nonpacifist versions of the theory also hold that individuals have strong enforcement rights. Given that these rights are typically understood as protecting choices, it is very difficult to see how a nonconsensual state could be just. Those who have not consented to the state's powers retain their enforcement rights, and the state violates their rights when it uses force against them to stop them from correctly and reliably enforcing their rights.

I shall outline a different way of establishing that a nonconsensual libertarian state can be just. I shall show that a state can, with a few important qualifications, justly enforce the rights of citizens and extract payments from wrongdoers to cover the costs of such enforcement. Moreover, certain versions of left-libertarianism, unlike right-libertarianism, can justify the redistribution of resources to the poor and investment in infrastructure to overcome market failures.

I should emphasize that my goal is rather modest. I shall merely sketch a possible libertarian position that recognizes the justice of significant

* For very helpful comments, I am indebted to Dani Attas, Ellen Frankel Paul, Robert Johnson, Brian Kierland, Mike Otsuka, Eric Roark, and the other contributors to this volume.

[1] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

[2] See, for example, the criticisms raised in Murray Rothbard, *The Ethics of Liberty* (Atlantic Highland, NJ: Humanities Press, 1982), chap. 29.

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state activity. Although I believe that this version is indeed plausible, I shall not attempt here to defend its plausibility.

II. Justice and the State

The term "justice" is used in several different ways. Sometimes it designates the moral permissibility of political structures (such as legal systems). Sometimes it designates moral fairness (as opposed to efficiency or other considerations that are relevant to moral permissibility). Sometimes it designates legitimacy in the sense of it not being morally permissible for others to interfere forcibly. Finally, sometimes it designates what we owe each other in the sense of respecting everyone's rights. This final concept is the concept of justice to which I shall appeal. It can be understood broadly to include duties we owe ourselves (if there are any) or narrowly to exclude such duties. In the present context, this distinction does not matter, since agents of the state will not normally violate their own rights in their official capacity.[3] For simplicity, I will therefore understand justice broadly. The justness of the state is thus a matter of the extent to which it operates without violating anyone's rights.

I shall focus on a threshold conception of justice according to which a state is just if and only if it violates rights as rarely as can be reasonably expected of humans in general. Justice in this sense is compatible with occasional violation of rights. I focus on the threshold concept because states are run by humans and humans are fallible. It is thus inevitable that states will sometimes (e.g., inadvertently) violate someone's rights. Justice in the threshold sense only requires that such activities be sufficiently rare relative to what is reasonably feasible for humans.

It is important to note that the justness of a state does not conceptually guarantee that it has any *political authority* over citizens in the sense that citizens in its territory typically have at least a pro tanto *moral obligation to obey* its dictates. Ideally, a state should have political authority, but it is not conceptually necessary for justice. Just as an individual citizen can behave justly without having any political authority over others, so too can the state (or agents thereof). Consequently, we shall not be concerned here with the important issue of political authority.[4]

[3] This is not to say that the issue of whether individuals have rights against themselves is irrelevant to justice—broadly or narrowly construed. If an individual violates his own rights (e.g., by mistreating his body) and others are permitted to enforce those rights even against his will, then it will be just, broadly and narrowly, to do so. Of course, almost all libertarians deny that we have rights against ourselves, and those who accept such rights deny that they may be enforceable against a person's will.

[4] For insightful discussion of political authority in the context of libertarian theory and John Locke's quasi-libertarian theory, see A. John Simmons, "Consent Theory for Libertarians," *Social Philosophy and Policy* 22, no. 1 (2005): 330–56; and A. John Simmons, *On the Edge of Anarchy* (Princeton, NJ: Princeton University Press, 1993).

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A state, then, is just, in our sense, if and only if, at least typically, it violates no one's rights. But what is a state? Defining statehood is no easy matter, and there is no uncontroversial comprehensive definition. Something like the following, however, seems at least roughly right for our purposes: A *state* is a rule-of-law-based coercive organization that, for a given territory, effectively rules all individuals in it and claims a monopoly on the use of force. This can be unpacked as follows: An organization is *coercive* just in case it prohibits at least some activities, threatens to use force against individuals who do not comply with its dictates, and generally implements its threats. A coercive organization is *rule-of-law-based* just in case (roughly) it uses force only in a reasonably impartial and reliable manner in response to the violation of dictates that are reasonably knowable in advance (e.g., public, clear, and stable dictates), where violation is reasonably avoidable (e.g., because the dictates are not retroactive and compliance is not unreasonably difficult). An organization *effectively rules* the individuals of a given territory just in case those individuals generally conform to its dictates (in the sense of obeying them in part because the organization issued the dictates). An organization *claims a monopoly on the use of force* just in case it prohibits the use of force (or credible threat thereof) without its permission.[5]

I shall show that, on this view of justice, almost all forms of libertarianism can recognize certain kinds of states as just. Following that, I shall show that a certain form of left-libertarianism can view reasonably robust states as just. First, however, we need to clarify the nature of libertarianism.

III. Libertarianism

Libertarianism can be advocated as a full theory of moral permissibility or merely as a theory of justice (i.e., a theory of what rights individuals have). The difference concerns impersonal duties (duties owed to no one).[6] Impersonal duties are duties that are not the correlates of any right. Because libertarianism is a purely rights-based theory (i.e., considers only those duties that correspond to someone's rights), it does not specify any impersonal duties. Thus, if there are impersonal duties, libertarianism is mistaken as a full theory of morality. Although I would argue that there are no impersonal duties, I shall not consider that issue here. Instead, I shall simply take libertarianism—as effectively all libertarians do—to be a theory of justice. So understood, libertarianism is only concerned with

[5] Note that, to be a state, an organization need neither have, nor claim to have, a de jure (i.e., rightful) monopoly on the use of force. It just has to prohibit the use of force without its permission (i.e., it has to claim a de facto monopoly).

[6] Recall that I understand justice broadly to include duties to oneself. If justice were understood narrowly to exclude duties to oneself, then such duties would be a second difference.

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interpersonal duties and is silent on whether there are any impersonal duties.

Libertarianism is sometimes advocated as a derivative set of rules (e.g., on the basis of rule utilitarianism or contractarianism). Here, however, I reserve the term for the natural rights doctrine that agents initially *fully own themselves.* Agents are full self-owners just in case they own themselves in just the same way that they can fully own inanimate objects. Stated slightly differently, full self-owners own themselves in the same way that a full chattel-slave-owner owns a slave. Throughout, we are concerned with moral ownership and not legal ownership.

Full self-ownership consists of full private ownership of one's person (e.g., one's body). Full private ownership of an object consists of a full set of the following ownership rights: (1) *control rights* over the use of the object (liberty-rights to use it and claim-rights against others' using it); (2) *rights to transfer* these rights to others (by sale, rental, gift, or loan); and (3) *immunity to nonconsensual loss of any of these rights* as long as one has not violated anyone else's rights. Full private ownership also includes some bundle of: (4) *rights to compensation* if someone uses the object without one's permission; (5) *enforcement rights* (rights to use force to prevent the violation of these rights or to extract compensation owed for past violation); and (6) *immunities to nonconsensual loss when one has violated the rights of others* (i.e., limits on what rights are lost as the result of a right-violation). Because these last three elements are in tension with each other, the concept of full ownership is indeterminate with respect to what mix of these last three elements is required. At one extreme is the view that full owners have an absolute immunity to the nonconsensual loss of their rights (even if they violate the rights of others). This view entails that full owners do not have any rights of compensation or enforcement (since those rights require that those who violate their rights lose some of their control rights and thus do not have an absolute immunity). At the other extreme is the view that individuals have some kind of absolute rights to compensation and enforcement (e.g., you may kill a person to stop her from touching your car). This view entails that full owners have very minimal immunities to loss when they violate the rights of others.[7]

One possible version of libertarianism, then, is radical pacifist libertarianism, which holds that individuals have absolute immunities to losing any of their self-ownership claim-rights against others' using their person. As a result, radical pacifist libertarians hold that it is never permissible to use force against another individual without her permission.

[7] For more on the indeterminacy of full self-ownership with respect to compensation rights, enforcement rights, and immunities to loss, see Peter Vallentyne, Hillel Steiner, and Michael Otsuka, "Why Left-Libertarianism Isn't Incoherent, Indeterminate, or Irrelevant: A Reply to Fried," *Philosophy and Public Affairs* 33 (2005): 201–15.

Because all states use, or threaten to use, force, radical pacifist libertarians deny that any state can be just.[8]

Another possible, but implausible, version of libertarianism holds that individuals have certain rights of enforcement, but no individual, or group of individuals, has any right to enforce *someone else's* rights. I may use force to stop you from assaulting me or to recover compensation from you after you have assaulted me, but this does not justify anyone else's use of force against you for this purpose. To do so would violate your rights, on this view. On this view, individuals do not have the moral power to authorize the use of force by others against their aggressors. Like radical pacifism, this version of libertarianism precludes the justness of a state. All versions of libertarianism hold that it is unjust to use force to stop activities that violate no one's libertarian rights. The view under consideration also holds that it is unjust to use force to stop activities that *do violate* someone else's libertarian rights. This leaves no room for just state activity.

In what follows, I shall set aside these two positions and focus solely on nonpacifist versions of libertarianism that permit third parties to enforce the rights of individuals with the consent of those individuals. I shall attempt to show that such versions of libertarianism can judge certain kinds of states to be just.

All forms of libertarianism endorse full self-ownership. They differ with respect to the moral powers that individuals have to acquire ownership of external things. The best-known versions of libertarianism are right-libertarian theories, which hold that agents have a very strong moral power to acquire full private property rights in external things. Left-libertarians, by contrast, hold that natural resources (e.g., space, land, minerals, air, and water) belong to everyone in some egalitarian manner and thus cannot be appropriated without the consent of, or significant payment to, the members of society.

In what follows, I shall restrict my attention to unilateralist versions of libertarianism, which are those versions that allow agents, under certain conditions, to use and appropriate unowned resources without the collective approval of others. All versions of right-libertarianism are unilateralist—as are almost all versions of left-libertarianism (because they allow appropriation without approval as long as an appropriate payment is made, as I discuss below). The only articulated form of libertarianism that this rules out is joint-ownership left-libertarianism, which holds that natural resources belong to everyone collectively and thus that appropriation—and perhaps (much more radically) even use—

[8] Radical pacifists do not deny that individuals have a duty not to violate rights and a duty to pay compensation for past violations. They merely deny that anyone may use force against violators to make them fulfill their duties. Radical pacifists may even allow for a person's property to be confiscated in order to compensate victims—when this can be done without using force against a person.

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requires collective consent of some sort (e.g., majority or unanimous consent). This form of libertarianism makes it relatively easy to justify state activity—since all will consent to allowing some kind of state-protected private property rights—but it is not very plausible. Any minimally plausible version of libertarianism will allow some appropriation without the consent of others, and I shall therefore focus solely on unilateralist versions.

IV. General Libertarian Limits on the State

I shall argue below that (given our background assumptions) libertarianism in general, and a certain version of left-libertarianism in particular, leaves some significant room for just state activity. First, however, let us briefly identify the kinds of state activities that all forms of (unilateralist) libertarianism condemn as unjust—except, of course, where the activities are carried out in accordance with a consensual agreement or in response to the violation of someone's rights (which qualifications I leave implicit in what follows). Because different versions of libertarianism can take different positions on the ownership of external resources (i.e., resources other than the bodies and minds of agents), it is difficult to generalize about the libertarian limits on state restrictions on the use of such resources. All versions of libertarianism, however, endorse full self-ownership, and I shall therefore focus on the limits that this places on just state activity.

First, all libertarians judge it unjust for the state to use force to make individuals promote (by personal service) a merely impersonal good. Merely impersonal goods are features of the world that are morally desirable, but not in virtue of being good for any individual (e.g., perhaps the preservation of cultural artifacts when this benefits no one). Because libertarians, like most people, hold that failing to promote merely impersonal goods violates no one's rights, they hold that the state violates rights of self-ownership if it uses force to make someone promote such goods. All libertarians thus condemn as unjust the state's use of force for this purpose.

Second, effectively all libertarians condemn as unjust the use of force against a person for her own benefit but against her will (i.e., strong paternalism). Here we must distinguish between two ways that rights in general, and those of self-ownership in particular, can be understood. Rights can be understood in choice-protecting terms or in interest-protecting terms. Almost all libertarians endorse self-ownership understood in choice-protecting terms. So understood, only valid consent can waive a right of self-ownership (e.g., make it permissible for you to touch me) or transfer a right from me to you (e.g., as in the case of a binding contract to perform personal services for you). It is possible, however, to endorse self-ownership in interest-protecting terms. So understood, using force against a person without her consent need not violate her self-

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ownership, if it is not against her interests. Thus, for example, it may not violate a person's self-ownership to forcibly prevent her from smoking, when this use of force is genuinely in her self-interest. Like most libertarians, I believe that the interest-protecting conception of rights licenses far too much paternalism.[9]

Unlike many libertarians, however, I believe that the choice-protecting conception is too restrictive. It is incompatible with young children having any rights, and, without some fancy footwork, it judges that a person's self-ownership is violated when I push her to the ground without her permission to prevent her from being hit by a car. A more promising account, I believe, is a hybrid account according to which rights protect both interests and choices—with the protection of choices being lexically prior. More specifically, I would defend the following conception: A person has a claim-right against others that they not perform action X if and only if it is wrong for others to perform X when (1) she has validly *dissented* from their X-ing (i.e., communicated her opposition to their X-ing), or (2) she has *not validly consented* to their X-ing and their X-ing is *against her interests* (on some appropriate conception of interest). If self-ownership is so understood, then the use of force to benefit a person without her consent sometimes may not violate her rights: namely, when it is not against her interests and she has not dissented (e.g., pushing someone to the ground to prevent her from being hit by a car).[10]

In what follows, I shall assume that the rights of self-ownership protect choices in this hybrid sense. This is a controversial assumption and does some important work below. One immediate implication is that it is unjust to use force against a person for her own benefit *but against her will* (although it may sometimes be permissible to use such force without her consent).[11]

Third, all libertarians condemn as unjust the state's use of force to make a person provide personal services for the benefit of others—assuming, as we are, that the individual has not violated anyone's rights. Most people agree that it is unjust for the state to force people to clean the houses of the needy, but libertarianism's claim is much more radical. It holds that it

[9] There are, of course, many different interest-protecting conceptions of rights, and here I assume a particular fairly direct form. For insightful discussion of the debate between choice-protecting and interest-protecting conceptions of rights, see Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998).

[10] Note that the hybrid account holds that an action does not violate a person's rights when she does not validly dissent and the action is not against her interest. The account does not require that the action be in her interest (she might be unaffected). I would argue against altering the account to require that the action must be in her interest, on the ground that this would sometimes make it impermissible to provide an enormous benefit for others with no adverse effect on the right-holder.

[11] Admittedly, it is most natural to think of property rights as choice-protecting rather than as interest-protecting. Those bothered by an interested-protecting conception of property rights can take them to be quasi-property rights.

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is unjust for the state to force individuals to serve in the military, to serve on juries, or even to testify in court cases. Of course, there may be ways to soften this implication. Perhaps it is not unjust for the state to provide incentives (e.g., tax breaks or extra governmental services) to individuals who commit to so serving. Nonetheless, libertarians have fairly radical views on this topic.

Fourth and finally, all libertarians judge it unjust for the state to use force to prevent individuals from exercising their enforcement rights (e.g., using suitable force to prevent someone from violating one of their rights). As I have noted, libertarianism is compatible with different views about what enforcement rights individuals have, but all forms (even radical pacifist libertarianism) agree that, whatever rights these are, it is unjust for the state (or others) to interfere forcibly with their proper exercise. Moreover, this applies even when the enforcement rights are applied against agents of the state. Assuming (as we are) that individuals have at least some enforcement rights, an otherwise innocent agent violates no rights when she properly applies those rights (e.g., uses the minimal force necessary to prevent her rights from being violated) against agents of the state who are (1) attempting to falsely arrest her, or (2) attempting forcibly to prevent her from correctly exercising her enforcement rights against others. It is a violation of her self-ownership, and hence unjust, for the state to intervene forcibly in such cases.

Given our background assumptions, no state is just according to libertarianism if it engages in the foregoing kinds of activities. Can a state nonetheless be deemed just by some versions of libertarianism if it carefully avoids such activities? I shall argue that it can.

Libertarianism holds that individuals have—in virtue of their self-ownership and property rights in external things—various liberty-rights, claim-rights of noninterference, and powers to transfer these rights to others. If everyone consensually transfers some of these rights to each other so as to create a state, and the state fulfills all the obligations generated by these transfers, then the state is just, no matter what it is like. Even a highly communistic state could be just in principle. Thus, universal mutual consent is one uncontroversial, uninteresting, and very unlikely way that a state can be just according to libertarianism.

Even if no one transfers enforcement powers to the state, a state can be just according to (a given version of) libertarianism, if its dictates have the right content and the state is sufficiently reliable in enforcing its dictates. Call a state "a libertarian private-law state" just in case (1) it prohibits (and enforces its prohibitions against) only those activities (a) that violate someone's libertarian rights, (b) for which the victim has a libertarian right to enforce those rights, and (c) for which the state has a libertarian liberty to enforce (e.g., because the victim has consented to enforcement on her behalf); and (2) it respects the libertarian rights of all (including any derivative contractual obligations that it may owe). Although such a

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state claims a monopoly on the use of force, it is very restrictive in what it prohibits. As a result, if it enforces its prohibitions reliably, such a state will only rarely violate anyone's libertarian rights and will be, according to libertarianism, a (sufficiently) just state.

A libertarian private-law state is much less extensive than any modern state. Indeed, it is much weaker than the "night-watchman" state that some libertarians (e.g., Nozick) are willing to defend. Here we can briefly note some of its key features. One is that it may not involve any *public criminal law.* First, the state prohibits only activities that violate someone's libertarian rights, and it does not enforce anyone's rights against her will. If all those who have had their rights violated by a given action waive their enforcement rights, the state does not pursue the matter. Second, unless one holds—implausibly, in my view—that libertarianism recognizes certain "crimes against society" (e.g., murder, assault, theft), the members of society in general have no enforcement rights with respect to some specific rights violations, except as authorized by specific individual victims. Thus, for example, if the person assaulted waives her enforcement rights, the state does not pursue the matter.[12] (Of course, murder, where the victim no longer exists, requires some special treatment, but I shall not attempt to discuss the matter here.)

Note also that, under a libertarian private-law state, individuals maintain the right to enforce their rights on their own, without any role for the state. That is, a libertarian private-law state does not require that individuals use its enforcement procedures. It merely requires that individuals use enforcement procedures that it has *authorized* (and thus, indeed, claims a monopoly on the use of force). Because it authorizes all libertarian self-enforcement procedures, the libertarian private-law state violates no one's libertarian rights in imposing such a requirement.

A libertarian private-law state can exist and be just without anyone irrevocably consensually transferring any enforcement rights to the state. Its justness thus does not require anyone's consent in this sense. Nonetheless, on a standard choice-protecting conception of rights (to be addressed in the next section), the justice of any particular use of force by a libertarian private-law state against a particular person requires (something like) either (1) her consent or (2) where she has violated someone

[12] In *Anarchy, State, and Utopia,* pp. 133–42, Robert Nozick seems to suggest that, for certain kinds of right-violations, others—either individually or collectively—have the right to punish the violator even against the will of the victim. I would argue that a plausible version of libertarianism will limit enforcement to *prevention* of right-violations (including failures to compensate for past violations) and will not include any right to punish as such (to inflict harm on the violator for its own sake). Moreover, even if there is a right to punish, I would argue that it is a right possessed only by the (primary) victim of the right-violation (although she may authorize others to exercise it on her behalf). For more on the rejection of the right to punish, see Randy Barnett, "Victim's Rights: Restitution or Vengeance," *Ethics* 87 (1977): 279–301; Randy Barnett, "The Justice of Restitution," *American Journal of Jurisprudence* 25 (1980): 117–32; and Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998), chaps. 10–11.

else's rights, the consent of that victim (given the latter's enforcement rights). There is thus a weak sense in which the justice of a libertarian private-law state depends on the consent of at least some of those governed. Below, I shall identify a hybrid conception of enforcement rights that will sever this dependency.

We have not yet dealt with the issue of how a libertarian private-law state is financed. We know that it respects libertarian property rights, but, on this issue, the various versions of libertarianism disagree on what kind of taxation, if any, is allowed. I shall now argue that a libertarian private-law state can be financed by forcibly extracting the costs of enforcement from those who violate rights. Following that, I shall argue that, according to a certain form of left-libertarianism, a libertarian private-law state can also involve significant taxation for the purpose of promoting equality of opportunity and financing certain goods and services that the market fails to provide.

V. Enforcement Rights

As we have seen, libertarianism is compatible with a wide range of views concerning enforcement rights. We have set aside two possible views: (1) radical pacifist libertarianism, which denies that individuals have any enforcement rights, and (2) pure self-enforcement versions of libertarianism, which hold that third parties have no rights to enforce an individual's rights, even with her consent. We shall now examine more carefully the conditions under which third parties in general, and the state in particular, may enforce the rights of individuals.

On a narrow choice-protecting conception of enforcement rights, others are permitted to enforce a person's rights only when she grants them permission. I shall now identify how the hybrid conception of rights (sketched in Section IV) can make it permissible for others to enforce a person's rights under a broader range of conditions. Suppose that you steal my wallet and knock me temporarily unconscious. Alternatively, suppose that you steal my wallet and I haven't realized it yet. Alternatively, suppose that I realize it, but haven't yet decided whom, if anyone, I want to authorize to enforce my rights to recover the wallet. The narrow choice-protecting view of enforcement rights under consideration here says that a third party who witnesses the theft, and who can easily stop the thief, is not permitted to do so because I have not given my permission. This is very implausible. Perhaps there is a broader choice-protecting conception of enforcement rights that avoids this implausible result, but I shall not purse this possibility. Instead, I shall show that a hybrid conception of enforcement rights can judge third-party enforcement to be just in these cases.

On the hybrid conception of rights (with choice-protection lexically prior to interest-protection), others are permitted to enforce my rights

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when and only when (1) I have validly consented, or (2) I have not validly dissented (i.e., expressed my opposition) and enforcement is not against my interests. For these purposes, let us stipulate that enforcing a right (in a particular context in a particular way) is not against the right-holder's interest if and only if the expected well-being of the right-holder is at least as great with this particular enforcement as it is without it. (Other accounts are, of course, possible, but I will assume this one for the sake of illustration.)[13] Note that the baseline is not nonenforcement generally, but rather nonenforcement by this particular person in this particular situation in this particular manner. Thus, for example, the expected well-being accompanying such nonenforcement takes into account the probabilities that the right will be enforced by others (who may do it more effectively). One is not permitted to enforce someone else's rights without consent when someone else is sufficiently more likely to do a better job.

Assuming that enforcement in the foregoing cases is not against my interests, the hybrid conception holds that others are permitted to enforce my rights in the above kinds of cases. Although I believe that this is a more plausible account than the narrow choice-protecting account, I shall not argue that here. The crucial point is that, if the hybrid conception of rights is accepted, then a third party, and hence the state, may enforce rights under reasonably broad conditions. The right-holder can, of course, renounce the enforcement claim against the right-violator, in which case no one may enforce the right. The right-holder can also dissent from certain others enforcing the right, in which case they are not permitted to enforce the right. In the absence of these two conditions, however, third parties, and the state in particular, may enforce the rights of a right-holder when she consents or when, given the absence of dissent, it is not against her interests.

I shall now discuss a second relevant aspect of enforcement rights. Suppose that you violate my rights and owe me $100 compensation. Suppose further that the only way to get you to pay me this amount is for someone to track you down and force you to pay up. Suppose that the cheapest way of so enforcing my rights costs $50. (For example, perhaps the cheapest way is for me to enforce my rights myself and I would pay up to $50 to avoid doing it myself. Alternatively, perhaps someone else is a more efficient enforcer in this case and she would do so for no less than $50.) I suggest that the right-violator has an enforceable duty to pay for these enforcement costs. Of course, if she immediately and voluntarily pays the $100 compensation, then there are no enforcement costs. If, however, someone has to spend resources on getting her to pay, then the violator is liable for the cheapest (reasonable) way of getting her to pay. Again, this is a controversial issue that requires a defense. Although I

[13] I believe that an objective account of the expected consequences is the relevant one, but, of course, several views are possible.

would defend something in the spirit of this position, here I am simply flagging it to explore its implications for the justness of a libertarian private-law state. In what follows, I shall assume that violators have a duty to cover enforcement costs in addition to a duty to compensate their victims.

Right-violators, of course, are not always caught, and when they are caught, it is not always possible to extract full compensation. Here I shall briefly comment on how these issues might be dealt with. I suggest that the payments that may be extracted from apprehended right-violators include payments to cover (when possible) the expected value of the unrecovered payments from them. There are many ways of fleshing out this idea, but here is one. Suppose (1) that a violator imposes a harm worth $100 and enforcement costs of $20, and (2) that there is (a) an 80 percent chance that the violator will be caught and will fully compensate the victim and (b) a 20 percent chance that he will not be caught and will provide no compensation. Given that there is only an 80 percent chance of recovering compensation and enforcement costs, in order for the violator to cover the full expected costs of his right-violation, we must recover $125 ($100/.8) compensation for the victim and $25 ($20/.8) for the enforcer (so that their expected values are $100 and $20 respectively). This ensures that, where possible, the violator covers the full expected costs that she imposes on the victim and the enforcer.[14] Of course, it is sometimes not possible for violators to fully compensate their victims (e.g., because the victim is dead, has suffered an uncompensable harm, or has suffered a finite harm that is greater than it is possible for the violator to compensate). In such cases, I suggest that the recoverable enforcement payment is the efficient cost of maximizing compensation to the victim. Obviously, these and many further related issues need a thorough development.[15] Here I am merely identifying them to explore their implications for the justness of the state.

The core idea is that violators have an enforceable duty to compensate their victims as much as possible and to cover the efficient costs of any enforcement procedures that are needed to ensure that they do compensate their victims as much as possible. If this view is accepted, then we have a financing mechanism for the state. The state may enforce the rights of citizens with their consent or when it is in their interests and they do not dissent. Moreover, the state may forcibly extract efficient enforcement costs from right-violators when the state enforces the rights of citizens. Of

[14] Note that, on this proposal, the relevant probabilities of nonpayment are those for the specific violator for the specific violation. Thus, individuals do not foot the bill for other individuals.

[15] Extracting compensation from violators may involve forcing them to labor in their most productive capacity and having compensation and enforcement payments deducted from their paychecks. If the individuals are reasonably reliable, they need not be imprisoned. If they are sufficiently unreliable, they may need to be imprisoned in a labor camp. For more on this view, see Barnett, *The Structure of Liberty,* chap. 14.

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course, the enforcement costs that it may extract are limited to something like the cheapest feasible cost. Thus, if the state is inefficient in its enforcement procedures, it will not be able to recover the full costs of enforcement. Unless inefficient states receive voluntary contributions from individuals, they will not be able to sustain their operations without violating the rights of individuals. Efficient states, however, will be able to extract the costs of enforcing rights from right-violators.

A libertarian private-law state, then, can provide enforcement services and forcibly extract financing for those services from the right-violators. I shall now argue that such a state can also (1) redistribute resources to individuals who are disadvantaged through no fault of their own, (2) help provide goods and services that the market does not provide adequately, and (3) forcibly extract financing for those activities.

VI. Redistribution

The modern state often redistributes resources from those who have a lot to those who have little. Can a libertarian private-law state do this? Clearly, it cannot (normally) redistribute resources from all rich people to all poor people, since at least some of the rich may have a libertarian right to those resources. Any redistribution will have to be from those who have resources to which they have no libertarian right to individuals who have a libertarian right to those resources. I shall now examine some different versions of (unilateralist) libertarianism and see what their implications are for just redistribution. The key issue concerns what property rights individuals have.

One version of right-libertarianism is *radical right-libertarianism*, which holds that individuals have the power to appropriate unowned things simply by claiming them (or mixing their labor with them, etc.). Radical right-libertarians deny that any further conditions are relevant. In particular, they deny the necessity of satisfying any Lockean proviso that "enough and as good" be left for others. There is thus no room for the state to redistribute resources to the needy or to finance projects to overcome market failures.[16]

Lockean libertarianism agrees that individuals have the moral power to appropriate unowned things by (for example) claiming them, but it insists

[16] See, for example, Rothbard, *The Ethics of Liberty*, and Murray Rothbard, *For a New Liberty: The Libertarian Manifesto*, rev. ed. (New York: Libertarian Review Foundation, 1978). One might wonder whether even radical right-libertarianism would permit taxation to overcome market failure and make everyone better off (or at least some better off and none worse off), if it were based on the hybrid conception of rights. The version of the hybrid conception that I would defend does *not* have this implication. First, such taxation violates property rights if the owner dissents, and many or most would dissent. Second, without consent, the particular extraction of taxes must not make the owner worse off, and this condition will typically not be satisfied. Although all people may be better off if all are taxed, all else being equal, taxing an individual makes her worse off.

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that this is conditional on satisfying some kind of Lockean proviso.[17] Different versions of Lockean libertarianism specify different versions of the Lockean proviso. *Nozickian right-libertarianism* interprets the proviso as requiring that no one be left worse off with the appropriation than she would be if the thing appropriated were in common use.[18] Thus, a Nozickian right-libertarian private-law state would redistribute resources by taking from those who have appropriated things but not satisfied the proviso and transferring them to those who are made worse off by the appropriation. *Equal share left-libertarianism*[19] interprets the Lockean proviso as requiring that no one be worse off than she would be if no one appropriated more than an equal share of the competitive value of natural resources (i.e., the value based on supply and demand). Thus, an equal share left-libertarian private-law state would redistribute resources from those who have appropriated unowned resources in violation of this proviso to those who have been left with less than an equal share. Finally, *equal opportunity (for well-being) left-libertarianism*[20] interprets the Lockean proviso as requiring (roughly) that no one be worse off than she would be if no one appropriated more than is compatible with everyone having an equally valuable opportunity for well-being. Unlike all the previous versions of libertarianism, this version gives greater entitlements to external resources to individuals who are disadvantaged in terms of internal resources (such as beauty, intelligence, and strength). I shall focus on this version of left-libertarianism.[21]

Equal opportunity left-libertarianism (like other versions of libertarianism) comes in several variations. Here I will focus on the following version. Agents who do not own any natural resources (i.e., those who merely use resources, but with no rights of exclusive use) have no duty to promote equality of opportunity for a good life. If agents appropriate natural resources (i.e., claim and acquire rights of exclusive use), however, the rights acquired are conditional on the payment of competitive rent for the rights acquired (i.e., the supply and demand equilibrium price

[17] For superb analysis of Locke's own quasi-libertarian views, see A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992).

[18] See, for example, Nozick, *Anarchy, State, and Utopia,* 175–82. There are many exegetical questions about how Nozick intended his version of the Lockean proviso to be understood, but this is one natural reading.

[19] See, for example, Hillel Steiner, *An Essay on Rights* (Cambridge, MA: Blackwell Publishing, 1994).

[20] See, for example, Michael Otsuka, *Libertarianism without Inequality* (Oxford: Clarendon Press, 2003).

[21] For more on left-libertarianism generally, see Peter Vallentyne and Hillel Steiner, eds., *The Origins of Left Libertarianism: An Anthology of Historical Writings* (New York: Palgrave Publishers Ltd., 2000), and Peter Vallentyne and Hillel Steiner, eds., *Left Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave Publishers Ltd., 2000). For a critical assessment of left-libertarianism, see Barbara Fried, "Left-Libertarianism: A Review Essay," *Philosophy and Public Affairs* 32 (2004): 66–92, and Vallentyne, Steiner, and Otsuka, "Why Left-Libertarianism Isn't Incoherent, Indeterminate, or Irrelevant."

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for those rights in some suitable hypothetical auction or market).[22] Moreover, if the rights are later transferred to someone else, the duty to pay such rent is also transferred.[23] That is, ownership of natural resources is always conditional upon the payment of this rent. Finally, the rent payment must be used to promote equality of opportunity as much as reasonably possible.[24] If, for example, an individual has rights over land that have a competitive rent value of $100 per year, then she has a duty to promote equality of opportunity as much as is reasonably feasible for her with a budget—covering all implementation costs (including her time and effort)—of $100 per year. This duty is owed to those individuals who are the beneficiaries of the equality-promoting payment. The beneficiaries, that is, have a right to such payments, although the right is highly qualified and conditional: they have a right to a payment only when it turns out that they are the beneficiaries of the most effective way of promoting equality with the sum in question. These beneficiaries' rights, like all libertarian rights (we are assuming), are enforceable. As indicated above, the state is permitted to enforce these rights with the consent of the right-holders, or when it is in the holders' interests and they have not dissented from such enforcement.[25]

An equal opportunity left-libertarian private-law state thus redistributes resources by taking from those who own natural resources but have not fully discharged their equality-promoting duties relative to the competitive rent owed for the rights they hold. Of course, there are significant limitations on the distributive activities of such a state. It does not tax income or wealth other than natural resources. It does not take resources from all rich people nor give them to all poor people, since many rich people have fully discharged their equality-promoting duties and many poor people have had an equal opportunity for well-being and have simply made bad choices or been unlucky in the risks they freely under-

[22] Although rights over natural resources can be sold to others, their price, given the accompanying duty to pay competitive rent, will be close to zero. Artifacts (including improvements to natural resources), however, are not subject to any rent payment, and thus their actual market value will not be so reduced.

[23] I would argue that acquisition of property by gift also generates a duty to promote equality of opportunity as much as reasonably possible with the competitive value of that gift. For simplicity, however, I ignore this issue here.

[24] Throughout, when I speak of promoting equality, it should be understood as shorthand for promoting equality in Pareto-optimal ways. Thus, for example, an unequal distribution should be chosen over perfect equality, if everyone is better off under the former distribution. For more on combining equality with Pareto efficiency, see Bertil Tungodden and Peter Vallentyne, "On the Possibility of Paretian Egalitarianism," *Journal of Philosophy* 102 (2005): 126–54.

[25] It is worth noting that, on this version of equal opportunity left-libertarianism, both individuals and the state will have a duty to help enforce the rights of individuals when this is what the relevant equality-maximization duty requires. (This will tend to favor enforcement of the rights of the disadvantaged over enforcement of the rights of the advantaged.) Moreover, where the state is reasonably efficient at promoting equality of opportunity for well-being, individuals will also tend to have a duty to establish and maintain such a state.

took. Moreover, this version of the libertarian private-law state redistributes resources in this way only when the beneficiaries have consented to the state's enforcement of their rights or when they have not dissented and it is not against their interests (i.e., enforcement does not decrease their expected benefits). Finally, the state is permitted to recoup only the costs of efficient enforcement, and thus, if the state is an inefficient enforcer—either in general for certain kinds of right-violations, or in specific cases—it will typically not make sense for the state to get involved.

So far, then, I have shown that the state's enforcement of rights can be just according to nonpacifist libertarian theories that allow third parties to enforce rights. The range of cases in which this is so will be much broader on versions of libertarianism that adopt a hybrid conception of rights (for which consent is not necessary for third-party enforcement) rather than a narrow choice-protecting conception. Moreover, if enforcers are permitted to use coercion to extract the costs of enforcement from violators, then the state, if suitably efficient, can justly finance its enforcement activities. Finally, according to equal opportunity left-libertarianism, individuals have enforceable rights to a certain level of equality-promotion against those who appropriate natural resources, and the state may justly enforce such rights.

Let us turn now to our final topic: the justness of the state's activities to overcome market failures.

VII. Overcoming Market Failures

Under ideal conditions (e.g., perfect competition), the market is an efficient provider of goods and services. Under other conditions, however, the market is not an efficient provider in the sense that it is not Pareto optimal: some other feasible arrangement would make some individuals better off without making anyone worse off. This is so, for example, when the market provision of a good (e.g., vaccination against contagious diseases) brings with it significant positive externalities, and therefore encourages free-riding (e.g., one can benefit from the vaccination of others without being vaccinated oneself). This is also true when a good to be provided is nonexcludable; an example here is national defense, where it is not practically feasible to provide the good only to those who pay for it. These are cases of market failure.

Of course, the mere fact that the market fails to be efficient does not guarantee that state intervention will be efficient, or even more efficient than the free market. There can be government failure as well. Market failure merely opens up the possibility that government provision might be more efficient. Modern states typically subsidize a variety of activities for which there is some degree of market failure (e.g., national defense, research, and education). I shall now show that a libertarian private-law state can do the same, according to equal opportunity left-libertarianism.

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Recall that, according to equal opportunity left-libertarianism, those who appropriate natural resources have a duty to promote equality of opportunity for well-being as much as possible with the payment that they owe for the rights that they claim over such resources. The most natural way of understanding this requirement is that appropriators have a duty to promote *long-term* equality of opportunity, and it is this version that I shall consider here. Thus, if government investment of the sum owed for appropriation better promotes long-term equality of opportunity, then individuals have no right to receive any benefits from that sum in the short run. Individuals have a right to the benefits they would receive if the payments were used efficiently to promote long-term equality of opportunity.[26]

This is particularly relevant because one thing that individuals—and the state—can do is invest justly extracted rental payments in ways that increase the competitive rent of natural resources and thus increase the rental payments owed in the future. The competitive rent of rights over natural resources (e.g., land) is sensitive to the availability and price of various goods and services. For example, each of the following features will make land more valuable (all else being equal): (1) the presence of effective legal and national defense systems; (2) the presence of low-cost and well-functioning transportation, communication, energy, and information systems; and (3) the presence of healthy, knowledgeable, hardworking, and trustworthy individuals. Where markets work well, it is counterproductive (i.e., it is not equality-maximizing) for the state to invest funds to provide such goods and services. Where markets work poorly (e.g., because of indivisibility in the production of goods, nonexcludability of goods in exchange, or positive externalities in use), however, state investment may be an effective way of promoting long-term equality of opportunity. First, the benefits provided by investment in such goods and services may sometimes themselves help promote long-term equality (by providing significant benefits to the relevantly disadvantaged). Second, and more importantly, such investment, when made wisely, will typically increase the total rental payments owed by owners of natural resources by more than the cost of the investment. Such investments will, that is, increase the long-term pool of funds available for promoting equality of opportunity for well-being. Of course, beyond some level, such investments will cost more than the increase in rental payments that they generate. When this is so, the equal opportunity left-libertarian private-law state will not use rental payments for such purposes.

In general, then, for any given budget, there is some, typically positive, optimal level of investment in "market-failure" goods and services with

[26] Given that sometimes there is more than one way of maximizing equality of opportunity with the payment owed—with different people being beneficiaries—a more careful statement of the relevant right would be suitably conditional.

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respect to maximizing long-term (Pareto efficient) equality of opportunity for well-being. Individuals who appropriate resources thus have a duty to invest their payments at the appropriate level in such goods and services, and the state has the duty to do so if it justly extracts such payments. This tells us nothing, of course, about what the required level of investment is in the real world. It might be small or it might be great. That is an empirical question (given the requirements of equal opportunity left-libertarianism). The important point here is simply that, in principle, a libertarian private-law state may indeed, at least sometimes, invest where the market fails.

VIII. Conclusion

I have argued that a state can be just according to libertarianism. The first step was to understand justice as a threshold concept that merely requires respecting rights as much as is reasonably feasible. Justice is thus compatible with occasional lapses due to ignorance, reasonable implementation errors, etc. The second step was to focus on states that are sufficiently modest in what they prohibit and sufficiently reliable in how they enforce those prohibitions. More specifically, we focused on states that prohibit only activities that violate libertarian rights, that are reasonably cautious in enforcing those prohibitions (and thus rarely use morally excessive force), and that do not engage in other activities that violate libertarian rights. Such states are libertarian private-law states. Although they claim a monopoly on the use of force in their territories, they prohibit the use of force only when it violates libertarian rights, and they normally (occasional mistakes aside) use force only when it violates no libertarian rights.

Even such states are judged unjust both by radical pacifist libertarianism and by versions of libertarianism that hold that third parties are not permitted to enforce someone's rights. These, however, are not very plausible positions, and, in any case, I restricted my attention to versions of libertarianism that hold that it is permissible for third parties to help enforce rights with the consent of the right-holder.

I then showed how a libertarian private-law state could be reasonably extensive if certain additional—undefended, but plausible in my view—assumptions were made. First, if rights are understood on the proposed hybrid conception, then the state may enforce the rights of citizens even without their consent; it may also enforce their rights when the enforcement is not against their interests and they have not dissented. Second, if right-violators have a duty to bear the costs of any efficient enforcement procedures, then the state has the means to cover the costs of efficient enforcement. Third, if we assume (as I do) equal opportunity (for well-being) libertarianism, then the state may justly use force, where this is efficient, to ensure that those who have rights over natural resources pay

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the competitive rent of the rights that they claim and that these funds are used to promote equality of opportunity. Finally, if we assume (as I do) that it is *long-term* equality of opportunity for well-being that matters, then the extracted rental payments may be partly invested in goods and services that the market fails to provide efficiently—provided that the costs of such investments are less than the increase in the rental payments that they generate.

Although I believe that each of these assumptions is plausible, I have not attempted to defend them. Thus, the implications are modest: I have merely attempted to show the possibility of some version of libertarianism recognizing the justice of significant state activity. The assessment of whether such a version of libertarianism is plausible must await another occasion.

If my argument is correct, then, almost all minimally plausible forms of libertarianism are compatible with the justice of some kind of state, and some forms of left-libertarianism are compatible with a reasonably robust state. This does not, of course, mean that any existing state is just on libertarian grounds. Indeed, this is clearly not so. Existing states typically tax inappropriately (e.g., income taxes); they are significantly inefficient in how they use resources; they restrict people's freedom against their will for their own benefit (e.g., drug laws and helmet laws); and they require forced labor for the public good (e.g., jury duty, court testimony, and military service). Still, the possibility of a libertarian just state—perhaps a robust one—helps show that libertarianism, and left-libertarianism in particular, is not a utopian dream.

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