

JUSTICE, AUTONOMY AND LAISSEZ FAIRE

by
Kai Nielsen*

Contemporary conceptions of justice can be usefully divided into two general categories: those which conceive of justice as impartiality and those which conceive of justice as mutual advantage. The former most typically, though not invariably, are of a Kantian inspiration; the latter of a Hobbesian one. John Rawls's conception of justice as fairness, to take the most influential conception of justice in our time, is a subspecies of justice as impartiality. Other subspecies of the impartiality conception are to be found in the work of Thomas Scanlon, Will Kymlicka, Brian Barry and Ronald Dworkin among others. David Gauthier's account is a rigorous and sophisticatedly argued articulation of the latter Hobbesian conception and in Jan Narveson's work we have a cruder but (for good or for ill) a politically more explicit articulation of justice conceived as mutual advantage.

In speaking of justice as impartiality, I am speaking of justice conceived as involving a set of practices requiring equal societal concern for the interests and needs of everyone alike. In this conception the interests and needs of everyone have equal *prima facie* weight. One person's interests or needs can legitimately have pride of place over another's only where (a) both persons' interests and needs cannot be satisfied and (b) where, in deciding what is to be done in such a circumstance, we deploy some universalizable and impartial procedures for deciding whose interests shall in that circumstance prevail. But the benchmark here is an equal consideration of the needs and interests of everyone alike.

Such a conception of justice is (though in a rather indeterminate way) an egalitarian one. I shall in Part One make that egalitarianism more determinate by articulating an autonomy respecting egalitarianism, as a distinct subspecies of justice as impartiality. In doing this I shall try to show that autonomy properly conceived and equality properly conceived require each other. In Part Two I shall critique a libertarian conception of justice with a strong commitment to private property as a deep moral right, a conception which has it that any attempted matching in a theory of justice of autonomy and equality (including, of course, the one developed in Part One) is misconceived and that egalitarian conceptions of justice are (as Nietzsche also believed) in reality terminators rather than respecters of justice. A just society will be a free society and a free society (where the society is reasonably complex) will be a *laissez faire* society defending the right, indeed the inviolable right, to private property (including property rights to privately owned means of

* Professor of Philosophy, University of Calgary.

production) where that property acquisition was justly initially acquired or justly transferred from such an initial acquisition.

Against such libertarian conceptions, whether of Lockean or Hobbesian ancestry, I should argue that while a just society is indeed a free society, it is not a society which sanctions, let alone requires, such property rights so acquired and so sustained, and it is not a society which will reject egalitarian principles of justice or any redistributive conceptions not rooted in correcting for violations of past entitlements.

This defense of an autonomy respecting egalitarianism is a specific articulation of the general conception of justice as impartiality which I take to be the subject matter of justice. We cannot render justice or have just practices where we do not impartially consider the interests of every party to the dispute alike. Where the parties bargain to an agreement to their mutual advantage, where this impartiality condition does not hold, their agreement will only *per accidens* be a just one. Indeed, the likelihood is that it will be unjust, particularly where one party has a lot more power than the other. In certain social contexts, where there are great disparities of power and control, it might well be to the mutual advantage of slaves and masters to strike a bargain and to stick to it but the agreement rationally concluded, given the circumstances, could not be just. It is just the best that the parties can do for themselves given their inequality and given the determination (a determination which need not at all be irrational) of the more powerful to hang on to as much power as it is to their advantage to keep. The parties may very well engage in rational deliberation here when they so bargain but not in moral deliberation. (Moral deliberation may be also rational but not all rational deliberation need be moral deliberation.) We might show that justice sometimes *pays* by showing that it is sometimes to our mutual advantage to do what amounts to the just thing. But that is not to show what justice is any more than we have shown what truth is by showing that sometimes we test the truth of a proposition by showing that it has been warrantably asserted. Something might be warrantably asserted and still false and something might be to the mutual advantage of the parties in question and still be unjust. To show that it is prudent to be just is one thing; to show what justice is and what justice requires is quite another thing. Mutual advantage theory confuses the former task with the latter.

Part One AUTONOMY AND JUSTICE

I

Against an autonomy respecting egalitarian conception of justice, it is frequently claimed that equality and autonomy are mortal enemies. We cannot have a free society that is also an egalitarian society where the commitment to equality is stronger than an

acceptance of equality before the law or a formal conception of equality of opportunity.¹ Any egalitarianism that goes beyond that, and most particularly any commitment to an equality of condition, will undermine, if that commitment is widespread, liberty and autonomy. A genuinely free society cannot be an egalitarian society. Freedom and equality, the claim goes, not infrequently stand in conflict. Respect for persons as autonomous agents — a commitment to a world in which people are in control of their own lives — will be a commitment to a world which resists the blandishments of egalitarianism with its acceptance of some substantive conception of equality.

Against this anti-egalitarian conception of a just and free society, I shall argue that, at least for modernizing societies with the economic potential of such societies, a perfectly just society will be a society of equals. Moreover, for such a society to obtain, there must be a rough equality of condition where power is sufficiently equally shared for it to be securely the case that no group or class or gender can dominate others through social structures either with their frequently thoroughly unacknowledged latent functions or, more explicitly and manifestly by social structures sanctioned by law or custom. Roughly equal material resources or power are not things which are desirable in themselves but they are essential instrumentalities for the very possibility of equal well-being and for as many people as possible having as thorough and as complete a control over their own lives as is compatible with this being true for everyone alike.² In fine, I shall argue against anti-egalitarians that a commitment to equality of condition, far from undermining liberty and autonomy, is essential for its most extensive flourishing.

To make this argument at all persuasive I shall have to give a proper reading to 'equality of condition', explain what I mean by equality of power, defend its feasibility and desirability, elucidate what has been called 'moral equality', articulate and defend two egalitarian principles of justice, and show how all of this is, not only compatible with, but necessary for the flourishing of autonomy.

II

A defense of egalitarian justice must give a plausible and morally attractive characterization of equality, particularly of equality of

¹ Charles Frankel, "The New Egalitarianism and the Old" (1973), 3 *Commentary* 56, 54; "Equality of Opportunity" (1971), 3 *Ethics* 81, 191; John Bunzel, "Rescuing Equality" in Paul Kurtz, ed., *Sidney Hook, Philosopher of Democracy and Humanism* (1983), 171; Friedrich Hayek, *The Constitution of Liberty* (1960).

² Harry Frankfurt, in attacking egalitarianism, attacks equality of resources or material equality as an end, failing to see that it is instead an essential instrumentality: Harry Frankfurt, "Equality as a Moral Ideal" (1987), 1 *Ethics* 98, 21. Robert E. Goodwin's reply seems at least to be exactly on the mark: Robert E. Goodwin, "Egalitarianism, Fetishistic and Otherwise" (1987), 1 *Ethics* 98, 44.

condition, and show why equality is desirable and establish its links with justice. An egalitarian must make clear what she means by a society of equals and why such a society, and eventually a world with that very structure, is a fundamental moral *desideratum*. In doing this she should start with a deeply embedded considered conviction widely shared in modernizing societies by both egalitarians and non-egalitarians alike, namely a belief in *moral* equality by which is meant the belief that the life of everyone matters and matters equally.³ Egalitarians will add that if we really believe in moral equality, we will want to see come into existence a world in which all people, capable of self-direction, have, and have as nearly as is feasible equally, control over their own lives and can, as far as the institutional arrangements for it obtaining are concerned, all live flourishing lives where their needs and desires, as individuals, are met as fully as possible and as fully and extensively as is compatible with that possibility being open to everyone alike.

It should also be the case that people who are not capable of rational self-direction, and for whom little in the way of human flourishing is possible notwithstanding their needs and desires, should, as far as possible, also be satisfied in the way I have just described. No preference or pride of place should be given to those capable, in varying degrees, of rational self-direction. This is an essential commitment of anyone believing in moral equality.

In believing in moral equality, in believing that the life of everyone matters and matters equally, we must also believe, if we would be consistent, that whatever human rights we have we, to be pleonastic about 'human rights', all have. And the liberties that go with them require equal protection for all. Moreover, we must also believe, in believing in moral equality, that the interests of every human being matter and matter equally. What is aimed at by the egalitarian is a bringing into stable existence of conditions, perhaps principally by providing equal basic resources for everyone, such that it would be possible for everyone, if they were personally capable of it, to enjoy an equally worthwhile and satisfying life or at least a life in which, for all of them, their needs, starting with and giving priority to their more urgent needs, were met and met as equally and as fully as possible, even where their needs are not entirely the same needs. Where their needs are met, then, at least as a heuristic ideal for a world of wondrous abundance, their wants are to be met as well and met equally if this is possible or indeed even coherently conceivable. An individual coming to have what she wants in such a circumstance should only be constrained by the wants being compossible and the satisfying of those wants not harming, genuinely harming and not merely offending, others. By stressing the priority of needs, and the satisfaction of compossible wants under conditions of abundance, we can skirt around the problem of expensive wants. With the stress on equally meeting needs, variable though they be, the stress is

³ Thomas Nagel, *Mortal Questions* (1979), 106.

on equal well-being as a goal. Equal resources is a rough instrumentality in achieving, or even approximating, well-being. The value of equal resources is purely instrumental. There is nothing (to put it minimally) particularly desirable in itself about everyone having the same thing: the same stock of means. Indeed where people have different needs — A needs a dialysis machine, B doesn't, C needs a big library, D doesn't — their resources will, in a just society, be in certain respects different, though care needs to be exercised that resources and access to resources between people are not sufficiently different so that some people with greater resources can dominate other people. In seeking a society of equals we seek an equality of condition, by which I mean a society where there is a rough equality of power and a society in which there exists social conditions, as far as this is possible given native human variability, of equally meeting the needs of everyone. For humans to stand in situations of equality of condition there must be such a rough equality of resources to make equal need satisfaction possible and there must be sufficient equality of power such that no person, class or other group of persons can, in virtue of their position in society, dominate another person, group or class. Without equality of condition we cannot have a society of equals and without such a society — a society which is by definition free of domination — we cannot have a free society or a just society.⁴ A just but unfree society is an incoherency.

What the defender of egalitarian justice seeks as a goal to be attained is, as far as possible, to approximate an equality of well-being at the highest level of well-being achievable, where that equality is not purchased by lowering the well-being of some, capable of a greater well-being, to compensate those capable of less, or (to take the other side of it) by lowering the well-being of those less capable of a high level of well-being in favour of those capable of more. *Instead, the egalitarian seeks, as fully as possible, compatible with everyone, in the respect considered, being treated the same way, to see a society come into being which develops social structures which would help each person to attain the most complete well-being of which that person is capable.* Moreover, through these structures, this concern is to be directed equally, as far as this is possible, to each person in the society. Each is to count for one and none to count for more than one. This is what being committed to the equal well-being of everyone should come to and this, as well, is a structural way of giving institutional flesh to a belief in moral equality: to, that is, showing what it would be like for the belief that the life of everyone matters and matters equally to be more than mere rhetoric.

What the defender of egalitarian justice aims at, along with conditions making for equal well-being, is, in a society of considerable abundance, an equality of whole life prospects for everyone, where that is not read simply as the right to compete for scarce

⁴ Richard Norman, *Free and Equal* (1987).

positions of advantage but where there is brought into being social structures that would provide everyone equally, as far as possible, with the resources and the social conditions to satisfy their needs as fully as possible in a way that is compatible with everyone else doing likewise. Such considerations may never have a status beyond that of being heuristic ideals but that does not render them nugatory.

III

Suppose someone asks, after reminding us of the variability of human beings, why we should care about moral equality. After all, when we consider that there are creative and uncreative people, people with integrity and people without integrity, lazy people and industrious people, caring and uncaring people, why should we believe that the lives of all these very different people matter and matter equally? Isn't that belief rather religious?

We should do so, I respond, because when we reflect on, and take to heart, the arbitrariness of social fortune and genetic inheritance, we will come to see that this is what it is to be fair and that a commitment to fairness just goes with taking the moral point of view. If people were not so different and were starting *de novo* without prior entitlements, then fair treatment would plainly come to, as far as society is concerned, an equal respect for their persons and an equal concern for their life prospects. But people are plainly very different. However, we will not, when we duly reflect on genetic and social roulette, give more than pragmatic weight to talk of moral desert: to the belief that one person's whole life prospects should be better than another because he is morally more deserving. Indeed, if we are reflective and knowledgeable, we will be loath to talk about *moral* merit at all. There are, of course, all sorts of structural and pragmatic reasons for making job allocations according to merit and for there being recognition according to merit — but that is another thing.

However, entitlements are different things. In the world, as we know it, we all just find ourselves with certain entitlements, though some of us, in the world we know, will have far fewer entitlements than others. Must not these entitlements be respected? Yes, in the sense that for most of them in most circumstances, they have moral weight and *prima facie* they should, with respect to issues of individual justice, be respected if they are indeed genuine entitlements and not gained illicitly in something like the way Marx describes primitive accumulation to have been carried out. Suppose I own a family farm and, at first, I simply till the soil myself (perhaps with the help of my family). And further suppose that the farm has come to me by just transfer from my parents and it came to them by just transfer from their parents who got the land by an initial just acquisition. If the initial acquisition was just and justice in transfer was preserved then I am entitled to the farm and can, *ceteris paribus*, rightly farm it and exclude others.

Suppose I work the farm diligently and gradually, by my labor and sagacity, build up the farm sufficiently to hire farm labor and

gradually turn it into an agro-business. Do I not have a right to do so, if I do not cheat anyone, and do I not have an entitlement to that land and to use it as I wish as long as I do not harm others? Again the answer is yes, as long as I do not harm others. However, given what an agro-business is or will in the normal course of events tend to become, if it is successful, it will very likely come, by the very way the system of wage labor works, to harm the farm laborers by either actually dominating them or, if not them, by the setting up of social structures that further down the line, with my children or my children's children, when they in turn become agro-business capitalists, will be structures which come to harm the laborer's children or children's children by dominating them. It need have nothing to do with the behaviour of the boss. He may be a perfectly decent person. But the feasible options open to him are constrained by the socio-economic system. It is the very system of wage labor that makes domination inescapable. The freedom of wage laborers, particularly when taken as a group, is considerably less than what it would be if the farm was jointly owned and controlled by the wage laborers and me, where I become a laborer among laborers but on a farm we own together and manage in a democratic fashion. (Such an arrangement is a microcosm of a world in which every able bodied person is, was, or will be, a worker and we do not have a statist form of socialism.) *Perhaps* my freedom in such a circumstance is a little less; certainly I have lost an entitlement that I previously had but I have the freedom and the ability to be self-directed, to control the conditions of my life, afforded by joint ownership and control. But while, that notwithstanding, I may lose some freedom, far more freedom will be obtained in the society than before and I will also gain the added autonomy and security that goes with living in a more democratic and co-operatively autonomous society. This obtains even if, as is not very likely, there is, at least in that instance, a clean road to capitalism and my grandparents, under good Lockean conditions, made an initial just acquisition and did not just seize the land from the aboriginal people. Still, in losing that entitlement, I lose a kind of freedom, though in doing so I may gain other and perhaps more extensive or more important freedoms and certainly there will be more freedom and more equally distributed freedom in the society.

In acknowledging this we should not deny that if there is a just initial acquisition, justice in transfers and, if I do not set in train domination through wage labor, or in some other way, I am entitled to the land. If under those circumstances I merely run it as a family farm, assuming I do not exploit my spouse and our children, then I have an entitlement that must be respected. However, like any entitlement or indeed any substantive moral claim, it could, under certain circumstances, be overridden. The right, given by the entitlement, like all rights, is *prima facie* or defeasible but, for all of that, it is perfectly genuine. Indeed a right might be overridden without ceasing to be a right. Inalienable rights are not rights that

cannot be overridden though in overriding them they do not cease to be rights for as inalienable rights they are rights we cannot lose.

IV

If we really prize autonomy, if, that is, we prize a world in which as many people as possible are self-directed and have as full as is compossibly possible control over their own lives, then we will be such egalitarians.⁵ Extensive equality and autonomy go together like hand and glove. But what is the link between such an autonomy respecting egalitarianism and justice? What, that is, is the link between equality and justice? I think it can most readily be seen if we note that a central and essential element in justice is fairness. Just treatment often comes to fair treatment and fairness has a close link with equality and the impartial consideration of the interests of everyone where this comes to giving *prima facie* equal weight to the interests of each person. Suppose my department has ten Ph.D. students and has summer bursary money to give out. The baseline to start with in distributing it is one of equality. There is a presumption in favor of an equal division of the money. The presumption can be rightly defeated under special circumstances such as differing needs among the students, or some of them having done more adequate work than others, or the money not being sufficient to usefully be divided among all the students. But the thing is to start with the presumption of equality and only to move from that presumption if there are, as in the above cases, good reasons for departing from it. There is nothing unusual about this example and other cases can easily be trotted out. Equal treatment is the benchmark here. Departures from it must be justified by showing that there are relevant differences between people in such situations. Otherwise a departure from equality is unfair and unjust.

Let me now state two egalitarian principles of justice which will give abstract and articulate expression to this felt link between justice, fairness and equality. It is something felt, though rather inarticulately, in our reflective moral sensibilities. It is a philosopher's generalization of principles of social justice for the design of a just society under conditions of abundance which I hope will square with our considered moral judgments in wide reflective equilibrium.

1. Each person is to have an equal right to the most extensive possible control over her life compatible with the same right being in force for all.
2. There should generally be an equal sharing of the social and economic benefits and burdens of society. However, sometimes, for certain specific purposes, we should depart from an equal sharing. Paradigm cases are (1) in certain circumstances where people have different needs (not everyone needs a dialysis machine) or abilities and (2) in certain circumstances where they have different entitlements or deserts. Different treatment is

⁵ For clear distinctions between negative liberty, positive liberty and autonomy, see Andrew Levine, *Arguing for Socialism* (1984), 15.

justified here where recognizing these differences does not lead (a) to inequalities of power and control such that some could come to dominate and exploit others or (b), where (a) is satisfied, it does not lead to considerable inequalities of whole life prospects where the inequalities in the prospects do not advantage the worst off strata of society more than any other alternative arrangement compatible with non-domination. (These qualifications indicate how my 'in certain circumstances' is to be understood.)

Desert and entitlement have a role here though, compared to libertarian and similar theories, a diminished one. Certain people have plainly desirable and admirable traits. And they can be, and typically are, rightly proud of them and can in fact reasonably prize them. Indeed, their very self-identity is in the standard case, in part at least, tied up with them. Others in turn ought to acknowledge the accomplishments that go with them. But our sense of genetic and social roulette, as I remarked above, should also make us feel the sheer arbitrariness of who it turns out comes to have them. That, without undermining our self-ownership, or harming our self-identity, should lead us also to see these traits as not only our own assets, but as social assets as well. Moreover, to escape at long last (if indeed we can) a world in which there are dominators and the dominated, bosses and bossed, we will in the name of liberty and justice override these entitlements where they bolster such power structures. Entitlements are important but even more importantly, we do not want, if we are morally sensitive and reflective, a world with (if that is avoidable) social structures that enable a few to have control over the lives of the many. If it is necessary to override, or set aside, some entitlements to avoid that then we should do so. But to do this is not to show a lack of respect for entitlements.

Entitlements should not have the quasi-absoluteness that some right-wingers give them. People want, and indeed should want, their entitlements respected but they should not want them to have pride of place where doing so would tend to undermine or even to lessen autonomy in the society. Moreover, that entitlements and deserts can sometimes be rightly overridden or set aside to maintain conditions making for or sustaining moral equality, does not mean that entitlements can be rightly, massively and routinely overridden or set aside. Indeed if our entitlements were routinely overridden it would so deeply affect our sense of self-respect that our autonomy and our moral equality would come under severe attack. But belief in the good of self-respect, the good of autonomy and that of moral equality are all deeply embedded considered judgments. My claim is that they can be seen to stand coherently together in wide reflective equilibrium. Extensive autonomy requires equality. But it is also true that the good of self-respect is something hard to sustain where we are not a society of equals or of people struggling for such equality. The values of autonomy, equality and self-respect go

together as a package. It is difficult to have much of one of them without having the others.⁶

V

In discussing justice and autonomy, I have stressed autonomy or what is sometimes called 'positive liberty' rather than non-interference or 'negative liberty'. I do this because it is self-direction (that is autonomy) which is intrinsically desirable not non-interference (that is negative liberty).⁷ Non-interference is only valuable where it is an aid to our being able to do what we want and where we are sufficiently autonomous, including sufficiently rational, to have some reasonable control over our wants. What is centrally valuable here is to be an autonomous, self-directing person in control of one's own life. And, as we have seen, for this desirable state of affairs to be at all extensive, there must obtain a rough equality of condition.

All that notwithstanding, non-interference is still a very important instrumental good and rights have come into being to protect it. To keep in place the rough patterned distributions necessary to sustain equality of condition would involve, many believe, a pervasive interference in people's lives and would require an interventionist State with extensive powers actively used. Such egalitarian commitments, the claim goes, would carry in their wake so much interference in people's lives as to constitute something approaching tyranny. This is the familiar claim stemming from Hume, argued for again by Hayek, and returned to by contemporary libertarians.

However, recall that the distribution of resources necessary to achieve equality of condition only requires a rough equality. It is the equal well-being of people (interpreted as in Section II, *supra*) that is to be aimed at principally through providing them with conditions for equal life prospects and the conditions (including, of course, the material conditions) making possible an equal satisfaction of needs at the highest possible compossible level of need satisfaction. There can in the nature of the case, given differing needs, be no *strict* equality of resources if we are being reasonable. But to try to maintain some reasonable and fair distribution here, particularly with people desiring a society of equals, will lead, some will maintain, to the zealous hand of the State repeatedly intervening to balance things up. What the State, and indeed the society, would and should be vigilant about is whether there is starting to emerge sufficient inequalities of resources, or more generally of wealth, such that this would be likely to give rise to inequalities of power, inequalities that would in turn give rise to human domination and exploitation. No autonomy loving society would welcome that and

⁶ Kai Nielsen, *Equality and Liberty* (1985).

⁷ Andrew Levine in *Arguing for Socialism* makes the essential distinctions and arguments here. He also shows how we should in turn distinguish between positive liberty and autonomy. For my purposes I need not advert to those differences, though they seem to me genuine.

they would quite rightly take steps, if they could, to keep this from happening. This requires staying close to a situation where people are equal in power. To keep that state of affairs, the society must prevent there emerging extensive inequalities of wealth. Autonomy-respecting egalitarians want a society, and in the ideal case a world, of autonomous, self-directing, self-respecting people standing in relations of equality to each other. This is what must obtain if we are to have a society of equals and we cannot have that where there are considerable differences in wealth and power. No matter what the legalities of the matter, we will not be able to escape disparities in power if there exist extensive differences in wealth. Moreover, there can be no question of imposing an autonomy respecting equality because anything that was *imposed* would not be autonomy respecting.

Someone could grant that and still claim, as do such classic anti-egalitarians as Hume and Hayek, that to attain and sustain anything even approximating an equality of life-prospects would involve so much State interference in people's lives as to be undermining of liberty. If that is true, and if it is also true that a close link exists between extensive differences in wealth, inequalities in power, and autonomy undermining domination, then it surely appears at least to be true that a free society is quite impossible and justice — or at least social justice — becomes a useless passion.

If people really deeply believe in moral equality and want a society of equals, as people genuinely committed to democracy do, then they would want to see social structures, including legal structures, brought into being and sustained which would support that. Taxation to balance out wealth would not bother them. (Recall we are already talking about a society of abundance. We should remember the effect of diminishing marginal utility here.) Moreover, the equality of resources is only rough. We do not need or want the interference necessary to carry through an exact accounting here but only the rough equality necessary to prevent the inequalities of power that would generate domination and the like. So the interference need not be nearly as pervasive and onerous as Hume and Hayek believe. The moderate interference that would be involved in the form of taxation and the like would be a price people, in conditions of abundance, would be quite willing to pay to attain and keep a democratic and free society — a society of equals — where conditions of life between people would be fair.

VI

I have argued that under conditions of productive abundance there should be an approximate equal sharing of wealth and that this is both necessary and fair because without it there can be no equality of power. And without something approximating an equality of power, there can, I have argued, be no society of equals in which conditions making for equal liberty obtain. This, of course, would be a society where the conditions that obtain make it possible for each person to be in control of her own life. Such autonomy is

both intrinsically good and instrumentally good. It is something we, on reflection, would want for its own sake and thus it is intrinsically good.⁸ It is, as well, instrumentally valuable for attaining and sustaining something else which is itself both intrinsically good and instrumentally good, namely the *equal* well-being, as far as this is possible, of all human beings. Well-being and equal well-being are both intrinsically good and instrumentally good. Moreover, that, as far as possible, there should be equal well-being is a requirement of fairness. And that social arrangements should be fair is both a requirement of the moral point of view and something which is itself another intrinsic good.

It might be said that the above argument cannot be sound for the very idea of equal power is incoherent. Power cannot be divided up like a cake or like money. It is indeed true that power cannot be divided up *in that way*. Power is not a stuff like dollars to be so divided. But power can be shared and shared equally. It is shared equally where each person has an equal say in determining what is to be done. Let us go at this indirectly by saying something about what inequality of power would look like. We have inequality of power where a class, gender, race, ethnic group or any other kind of group or some individual dominates, controls, decides what is to be done, determines the life prospects and the like of others. To the degree that these conditions are lessened we move toward equality of power. If they were somehow completely to disappear we would have an equality of power. This would be a condition of life where no one dominates anyone else and where each has an equal say. It would be a world without domination where, for all adults and mentally competent people, they are equally in situations where they can live their lives as they wish provided they do not harm others, where they decide or (depending on what is involved) have an equal say in deciding what is to be done and where their life choices and whole life prospects are not determined by forces or conditions external to them which notably disadvantage some. Such remarks require a careful reading and they imply radical democracy. But they are not incoherent.

Someone might respond, "Perhaps not incoherent but so utopianly unfeasible as to approach incoherence". In anything, to continue this objection, even approaching a complex society, there will, even if there is representational democratic rule, be rulers and ruled. Some, both in the workplace and in the political arena, will be in positions of authority and some not. Things would be unworkably chaotic without it. Suppose, to translate into the concrete, we try to organize a university, a factory or a city. In the various day to day decisions that would have to be made, not everyone could have an equal say. Some people (though they might be frequently

⁸ Georg von Wright, *The Varieties of Goodness* (1963), 103.

rotated) would have to be in charge and take responsibility for what was done. The very idea of equal power is, some claim, a will-o'-the-wisp. There can be no having an equal say for everyone concerning what is to be done. The very idea is incompatible with what it is to have a workable social organization at least in a tolerably complex society.

Certainly there is no escaping some kind of authority in complex social life, but, as Marx argued, in discussing the Paris Commune, a genuinely democratic authority could be (perhaps must be) exercised by persons whose tenure is revokable if a democratic majority doesn't like what they are doing. Moreover, authority, particularly when it is anything like political authority, rather than the authority of technical expertise, can be rotated and people could be randomly selected for many political offices as we now select a jury and for a limited term. And the authority, rooted in technical expertise, is of the form 'If you want to do this then you must do such and such'. Whether we want or should want to do this in the first place is not under the scope of authority rooted in technical expertise. Moreover, there could be various combinations of representational and direct democracy that could be combined with allowance for various matters, the decision to be made by referendum.⁹

These things (and things like them) would have to be worked out and there would have to be a lot of trial and error testing here, but it seems clear enough that there could be a much more extensive democratization of social life than we have now and with that more control, for each of us, over our own lives. People could have a lot more say (to understate it) than they do now concerning what is to be done and how they are to live their lives; domination could be brought to an end and power could be more fully shared. Thus there need not obtain, at least in theory, a situation in which people stand in relationships where one has power over another such that that person is subject to his will and has no recourse to democratic procedures to break that subjugation. As we approach a situation (if we ever do) where we actually live in a sustainable radical democracy, we approach a situation (quite unlike our present lives) where we fully share power and become, what liberal capitalist democracies extol but cannot become, a society of equals.¹⁰ Such a society, if it ever came into being, would be the social exemplification of an autonomy respecting egalitarianism where we each, as individuals, have the most extensive freedom compatible with a like freedom for all.

⁹ Richard Norman has some interesting suggestions concerning such matters in the last chapter of his *Free and Equal*.

¹⁰ Ronald Dworkin, *A Matter of Principle* (1985), 181. For how capitalist democracies cannot meet their own ideal of a society of equals, see Joshua Cohen and Joel Rogers, *On Democracy* (1983).

Part Two
SELF-OWNERSHIP AND LAISSEZ FAIRE

I

Self-ownership has become a deeply embedded value in the Western tradition. It is the belief that our persons and our powers are our own and that we do with them what we will as long as in doing so we do not harm others. Such a conception, on one familiar reading, respects our autonomy by insisting that we should be free to live our lives as we wish without interference as long as we do not violate the rights of others. We must, the constraint goes, not make people worse off than they would otherwise be without our intervention. But, with the exception of such restrictions, if self-ownership is being fully respected in a society, I will in that society be free to live my life as I wish without interference from others. Without that I do not have self-ownership and I will not be in control of my own life. And without a respect for self-ownership and without institutions that protect it we will not have a free society.

It is extensively believed in our capitalist societies that we cannot have such self-ownership without there being in place, at least in complex societies, private ownership and control of the means of production. There will be no self-ownership where there is no private ownership of productive property. Robert Nozick has mounted a well-known and, in some circles, much admired defense of such a tight link between capitalism and self-ownership.¹¹ G.A. Cohen, while having his own reservations about squaring egalitarian commitments with self-ownership, has trenchantly argued that Nozick's defense of capitalism will not wash. Cohen's arguments are carefully wrought indeed, and it is tempting to believe that they are about as decisive as anything we are going to get in social philosophy.¹²

I want to inspect his arguments to see if we can ascertain if they are in reality as decisive as they seem. This, if we can sort out what is the right thing to think here, is something worth doing for self-ownership is, and rightly so, a much prized thing. It would be no small matter to us if it has been established that at least in advanced industrial societies self-ownership requires capitalism. That, if it really could be shown to be so, would be anything but a mere curiosity. Has Cohen succeeded in refuting a powerful set of arguments that there is such a link?

¹¹ Robert Nozick, *Anarchy, State and Utopia* (1974), 28, 42, 48.

¹² I refer here to the following three connected articles which I will refer in the text to as CI, CII, and CIII respectively. G.A. Cohen: "Self-Ownership, World-Ownership and Equality" in Frank Lucash, ed., (1986), *Justice and Equality Here and Now*, 108; "Self-Ownership, World-Ownership and Equality, Part II" in Ellen Frankel Paul, et al., eds., (1986), *Marxism and Liberalism*, 77; and "Are Freedom and Equality Compatible?" in Jon Elster and Karl Ove Moene, eds., (1989), *Alternatives to Capitalism*, 113. See also my "Equality of Condition and Self-Ownership" in Guy LaFrance, ed., (1989), *Ethics and Basic Rights*, 81.

II

For Nozick, self-ownership is the fundamental thing, morally speaking. The scope and nature of the freedom we should enjoy is a function of our self-ownership. Even if workers in capitalist societies are forced to sell their own labor, that unfreedom is not, according to Nozick, such a bad thing as long as they continue to have self-ownership. That is the sort of freedom it is essential to preserve and, Nozick argues, that is the sort of freedom that is preserved in capitalist societies as distinct from slave-owning societies, serf societies and (Nozick would have it) socialist societies. He believes that to own themselves, or at least to fully own themselves, people must, if they happen to have the capacity and drive, be able to become with, an equally strong right, "sovereign owners of potentially indefinitely unequal amounts of worldly resources which they can gather to themselves as a result of proper exercises of their own and/or others' self-owned personal powers." (CII 78) Even private property in natural resources, when rightly generated, comes under this net even if it results in great inequalities, including inequalities of power, as a result of expropriation or limitation. Any attempt, given Nozick's way of viewing things, to promote equality of condition at the expense of private property is a violation of people's rights and an undermining of the really central moral reality of self-ownership. (CII 78) This, if accepted, would, of course, legitimate a considerable amount of market activity. But how does market activity acquire legitimacy in the first place? What (if anything) would be a rightful original acquisition of private property? Suppose I (given the conventions of our society) legally own a bit of productive property, say, a farm. Suppose, apart from the particulars about how I came by this property, it is more fundamentally asked "with what right it came to be anyone's private property in the first place," particularly when in the "prehistory of any existing piece of private property there was at least one moment at which something privately unowned was taken into private ownership. . . ." (CI 110)

It may be, for the reasons that Marx made famous in his discussion of original appropriation, that actually existing private property did not become private property in a morally legitimate way. But, even if it did not in fact, how, we might ask, could it even in theory have come about in a morally legitimate way? What would have had to have been the case for it to be true that the original acquisitions were just so that there could have been a clean road to capitalism? We can start, as Nozick does in such a search, with John Locke's conception that a person may appropriate what she mixes her labor with provided that she leaves, after her appropriation, enough and as good for others and does not waste what she takes. The 'enough and as good' is an important provision. Where 'enough and as good' is left over, the acquisition of an unowned object — say, a tract of land — is likely to be harmless in its effect on others. When this is so, it is difficult to criticize this original acquisition. It is

like my appropriating a bucket of water from the Great Lakes. Why, in those circumstances, shouldn't it be rightly acquired?

The crucial point, Cohen and Nozick agree, is "whether an appropriation of an unowned object worsens the situation of others" from what it would have been if the appropriation had not been made.¹³ (CI 123) What is to count as worsening another's situation? If I appropriate a previously unowned tract of land, a tract of land previously available to all, I do not, on Nozick's reading, make anyone worse off than they were before, if the withdrawal of the land from general use does not make anyone's prospects "worse than they would have been had the *land remained* in general use." (CI 123) Moreover, and by way of an addition, another person's life could, Nozick argues, be made in some respects worse off by my appropriation without the appropriation being unjust "as long as his position is in other ways sufficiently improved to counter-balance that worsening." (CI 124) Cohen infers from this that Nozick is concluding that a person appropriates something "legitimately if and only if no one has any reason to prefer its remaining in general use, or whoever does has some reason to prefer that he gets something in the new situation which he did not have before and which is worth at least as much to him as what [the other person] caused him to lose." (CI 123)

This sounds innocent enough. Could there possibly be any sound objection to it? Cohen believes there could and indeed is. Even when Nozick's conditions — Nozick's proviso — is satisfied, people, Cohen proceeds to argue, can still be made worse off than they could reasonably expect to be. In that way it is significantly different than Locke's proviso. Nozick contrasts the justified private appropriation of property (justified by his lights) only with what would have remained the case if the previously unowned property had remained in general use, accessible to all. But that is not the only relevant contrast. (CI 25) The contrast instead could be with what it would be like if it were jointly owned or owned in some non-exclusive, partly private, partly cooperative or public scheme. Recognizing this will show, Cohen maintains, that Nozick's proviso is too lax. It is Cohen's belief that these "possibilities. . . [some of which we will consider below] compose a decisive case against Nozick's theory of private property formation, and a case, be it noted, which raises no challenge to the thesis of self-ownership." (CI 125-26)

Suppose, to translate into the concrete and to begin considering these possibilities, Hans and Erik are the sole inhabitants of an island and both are self-owning persons living entirely off the land and out of contact with others. Suppose further that the initial situation for them is such that the land is common land between them and that they both freely use it. They use it in such a way that, without obstructing the sustenance sustaining activities of the other, each draws his sustenance from moose milk taken from moose

¹³ *Supra* note 12, 175.

living off the land, land that neither of them privately own. Hans gets by his activity n from the land (where ' n ' stands for litres of moose milk) and Erik by his activity gets m litres of moose milk. We can say that m and n represent what Hans and Erik "are able to obtain through the exercise of the personal powers each separately owns under common ownership of the land." (CI 126)

Cohen notes that the relative sizes of m and n , which reflect the relative personal powers of Hans and Erik, play no role in his argument. Suppose, however, things change because Hans appropriates for his own an amount of the land such that, after that appropriation, Erik no longer has enough land to live on. There are not sufficient moose on the land remaining for Erik's use so that Erik could eke out a living. Let us call the altered actual situation a situation altered by an act of appropriation. Hans now in this new situation offers Erik a salary of $m + p$ (where p is greater than o) to milk moose on the newly appropriated land. Hans, by this arrangement, gets $n + q$ where q is greater than p and n is greater than m . Hans, that is, gets more moose milk than he got before and more than Erik does under the new arrangements, given the productivity of the new division of labor where Hans, let us assume, is an efficient organizer. While under this arrangement, as we noted, Hans indeed gets more than Erik, still it is also the case that Erik with his $m + p$ gets more milk than he did before with only his m . So it looks at first glance at least as if in this situation Nozick's proviso is satisfied. This being so, at least on Nozick's criterion, Hans has legitimately acquired that private property.

However, appearances are deceiving here for, if we count "being subject to the directives of another person" as a relevant effect of Hans' appropriation, we cannot say whether or not Hans' appropriation violates Nozick's proviso. Nozick, however, does not look at situations like that. This, Cohen notes, is strange, for one would think, given the value libertarians attach to self-ownership and to autonomy, that they would not neglect "the value people may place on the kind of power relations in which they stand to others." (CI 127) But they do neglect this and this is bizarre, given the value that a believer in autonomy would be expected to place on being in charge of one's life. If this is not something a believer in autonomy would be concerned about, pray tell what would he be concerned about? Even if Erik gets more moose milk (more of the means to life), being no longer in charge of his life would, for a believer in self-ownership and autonomy, surely outweigh under those circumstances his greater gain in goods where before he had goods sufficient for life. In his new situation there is plainly a loss in autonomy. Erik is less autonomous than he was before the appropriation.

As important as this consideration is I shall, for the sake of continuing the argument, simply (following Cohen) assess benefit and disbenefit in terms of numbers of litres of moose milk each

get. Suppose now that Erik is, as a matter of fact, as good an organizer as Hans and had Erik appropriated the land before Hans — had beaten Hans to the draw, so to say — he would have profited in the same way Hans in fact did. The relevant difference between them in such a circumstance is that Hans is more aggressive and ruthless than Erik. But why should Erik, or anyone else, take that to be *morally* relevant and accept, given this behavior, a first-come-first-serve principle? That is plainly morally arbitrary. Indeed, it rewards ruthlessness.

Consider an even clearer case. Suppose Erik is a much better organizer than Hans and had Erik appropriated the land before Hans they would both have more moose milk than under the actual situation. But Nozick's proviso is still satisfied in the actual situation even if that counterfactual holds. But again we have here something which is morally speaking very counter-intuitive. Nozick's "condition licenses and protects appropriations whose upshots make each person worse off than he need be. . . ." (CI 128)

Again, to alter the situation slightly, let us postulate that Hans was not a better organizer than Erik and that indeed Erik was a better organizer than Hans. That notwithstanding, Hans just ruthlessly appropriated the land. After the appropriation Hans, operating from his position of power, proposes to Erik that Erik design an optimal division of labor and then play his role in it for the same $m + p$ wage. Erik, his back against the wall, preferring exploitation to starvation, accepts. But again Hans' appropriation is still justified under Nozick's proviso. But this is even more counter-intuitive and morally arbitrary than our previous case. But Nozick's proviso is still satisfied even when the privatizer is not, as he is not in this case, the value adder.

III

Nozick assumes that the world's resources are simply, where not previously owned, very much up for grabs. He shows no awareness of any need to provide an intellectual and moral defense against someone who would so moralize the world that we should alternatively think of the world's resources as jointly or commonly owned. But the simple cases discussed above might make us at least come to consider whether or not moral reflection would push us toward the desirability of accepting some sort of common ownership. This is a question we should at least consider. That reflective morality might push us in that direction never seems to enter Nozick's conception of moral possibilities.

Let us, in trying to get a grip on such questions, ask whether, as Nozick seems to believe, the existence of capitalism makes non-capitalists better off than they otherwise would have been. Nozick plainly believes that they typically would be. Even the proletariat and the lumpen-proletariat are better off in a capitalist world, he claims, than they otherwise would be. With the existence of private productive property stably in place, there will be incentives for people to invest and to take risks in ways that will build up the productive

forces and thus put more social wealth in the world than there would otherwise be. This is used by Nozick not to provide a utilitarian justification of private productive property, but, in a world with nothing more left to appropriate, to afford something parallel to the Lockean proviso of “enough and as good left over.” Nozick needs to devise something like this for he must have something for a world — our actual world — where there is nothing, or at least very little, left to appropriate which serves something like the function of the Lockean proviso. In such a world, people without property — since there is nothing left to appropriate — are to that extent worse off than they otherwise would have been. But, Nozick argues, “the mechanisms of production and distribution under capitalism ensure that they are more than adequately compensated for their loss of freedom of access to resources that are not privately owned.” (CI 131)

the empirical claims about the utility of private property figure here in an argument whose major premise is not utilitarian. The argument is not: whatever makes people better off is a good thing, and private property makes people better off; but: anyone has the right to appropriate private property when that makes nobody worse off, and appropriation of private property in general makes everyone better off (and therefore not worse off). And Nozick’s conclusion, unlike the utilitarian one, is not that a private property system, being best, should be brought into being or, if it exists, kept. It is that if a private property system exists, then the fact that some people own no or little private property in it is not a reason for removing it. (CI 131)

This, however, shows clearly enough that Nozick’s theory does rest on empirical claims and is not the *a priori* argument it is often thought to be. Thus Nozick cannot rightly claim such an authoritative transcendental or purely logical basis for his account even *if* such an *a priori* basis is an advantage. As we can see from the above passage, his argument has an empirical minor premise. This being so, Nozick’s argument lacks what might be taken by some to be the clarity and authority of a transcendental argument founded solely on pure practical reason. (CI 131)

IV

Hal Varian has addressed and rebutted these empirical arguments for capitalism.¹⁴ Market socialist property arrangements are even more productive than the pure capitalist property arrangements that Nozick defends. Market mechanisms, as has been widely recognized ever since the von Mises-Hayek defense of *laissez faire*, have many desirable features, but they, as Varian puts it, “can work perfectly well without such a notion of property.”¹⁵

¹⁴ Hal Varian, “Distributive Justice, Welfare Economics and the Theory of Fairness” (1975), 14 *Philosophy and Public Affairs*, 235.

¹⁵ *Id.*, 238.

He goes on to remark:

The fundamental feature of the market mechanism is not private property but the price system. Within the market mechanism, prices serve two roles: an allocative role and a distributive role. The allocative function of prices is to indicate the scarcity value of goods and thereby reward efficient use of resources. This is quite distinct from the distributive function which provides one way of distributing wealth among agents — namely, via permanent private ownership of the factor payments of property. It is perfectly possible to use prices for *allocation*, while basing *distribution* on the factors other than the blind-chance assignment of initial endowments.¹⁶

Nozick maintains that the existence of private property — permanent private property over which the individual who is the owner has complete control — puts this property in the hands of people who will maximally increase the social product by using their productive property most efficiently and creatively. But, Varian points out, this use of productive property to so increase the social product does not at all require our system of permanent private property, property which is exclusively in the hands of their individual owners. Consider instead

... a scheme of the type where the ownership of the factors of production was indeed private, but this ownership was non-transferable except through the market and reverted to the state upon death to be distributed equally to new generations. This “people’s capitalism” still has the above desirable characteristics of encouraging efficiency and innovation, without any notion of permanent, inheritable property.¹⁷

Let us, to continue our examination of Nozick’s defense of private property, look at some more specific empirical claims that he makes. He maintains that small private enterprises will take more risks than large socialist enterprises. But that, to put it conservatively, is not so overwhelmingly evident. Where there is a large corporation there is protection in the law of large numbers. A large organization can pool risks. Some economists have argued, for example, “that government-owned electrical power plants are more innovative technologically than privately owned plants because mistakes made in one plant are outweighed by success in another plant.”¹⁸ A small private plant, by contrast, does not have that playroom for innovation.

Nozick also maintains that private property is better at husbanding resources for future persons because some private enterprises will hold back resources from current consumption for future markets. But a free-market capitalism, particularly when unregulated by the government, may overuse resources, going after the quick buck. Think, particularly in North America, of the fishing, forest and mining industries. Consider, for example, drilling for oil. “If a number

¹⁶ *Id.*, 238.

¹⁷ *Id.*, 237.

¹⁸ *Id.*

of independent competitive wildcatters are all drilling on the same pool of oil, they will tend to sink too many wells because each producer views his actions as being independent from those of the rest and ignores the total feedback from his decisions."¹⁹ Such things are inevitable in *laissez faire*. So on empirical grounds it is very uncertain whether firms operating in a situation of *laissez faire* capitalism with their firm commitment to a strong form of unfettered private property will be more efficient or more productive of the well-being of people or, all around, make for greater human flourishing than firms in a state regulated by welfare state capitalism or a workers' controlled form of socialism where there could be various mixes of market and plan. There are good reasons for using the market mechanism for allocating resources, but so accepting the market does not give us grounds for accepting the existence of permanent private property or for allowing wealth to be distributed in society in accordance with the private ownership of productive property.

Nozick, as Cohen points out, could counter-argue against Varian that his proper comparison is not between capitalist private property and organized non-capitalist or quasi-capitalist property systems but between capitalist property systems and systems with unstructured common ownership.²⁰ This is indeed what Nozick does. But this only reveals how Nozick has arbitrarily restricted the range of permissible comparison. (CI 132) Why limit the comparisons in this way? If one allows in comparisons between *laissez faire* and market socialist arrangements or more managed forms of capitalist private property, Nozick's confidence in *laissez faire*, as we have seen Varian shows, is not well-founded. The claim that capitalism satisfies Nozick's streamlined version of the Lockean proviso is anything but evident.

V

Self-ownership is a morally fundamental conception, fundamental for Nozick and fundamental for others as well. It is not just libertarian hype. Each of us is the morally rightful owner of herself. We are entitled, morally speaking, to dispose over ourselves in the way a slave-owner is entitled to dispose over her slaves as a matter of legal right. We own our own bodies, persons, powers, and talents and we may do with them what we wish as long as we do not use them to violate the rights of others. This commits us — or at least so it would seem — to being anti-paternalists. Nozick, consistent with his libertarian view of things, is an anti-paternalist. The basis for his rejection of the taxation of people's property for social welfare purposes is rooted in his commitment to self-ownership and in his anti-paternalism. But, Cohen points out, Nozick inconsistently allows paternalistic appropriations of private property. An action is paternalistic if it is performed for someone for the

¹⁹ *Id.*, 238.

²⁰ *Supra* note 12, 177.

sake of his benefit against his will, even if it does benefit him as intended. A government health insurance plan may be forced on me against my will but still benefit me. But, in such a circumstance, it is still paternalistic. And, as such, unacceptable to Nozick and to most libertarians. He will, that is, reject such a scheme of government health insurance as paternalistic. But, if in a world where, after Hans' appropriation of, say, land, there will be no more to appropriate, he still does so legitimately, according to Nozick, where Erik benefits or even simply does not lose, even if Erik does not agree to the arrangement. Actually attaining Erik's agreement is not, Nozick maintains, important here. But if, as Nozick agrees, paternalistic acts are wrong in the health case and the taxes case, it is totally mystifying how Nozick can claim that it is nevertheless right in the appropriation of private property case. An appropriation of private property can contradict a person's will just as much as in the taxation case and the health care case. In both cases self-ownership and autonomy are challenged and it is false that Nozick's account is an account which protects human freedom. Nozick confuses the freedom of people to do what they wish with their private productive property with a more comprehensive freedom. Freedom to truck and trade is one thing; freedom to control one's life is another.

VI

This is Cohen's case against Nozick, borrowing some empirical considerations as he does from Varian. It is now time to take stock. Is there any plausible reply a defender of *laissez faire* capitalism can make here? Nozick's core defense is in his replacement or (if you will) streamlining of the Lockean proviso. Put succinctly, the Nozickean proviso comes to this: I can appropriate something legitimately if and only if either no one has any reason to prefer it remaining in general use or where whoever does have some reason to prefer that it remain in general use gets something in the new situation (after the appropriation) which he did not have before and which is worth at least as much to him as what by the appropriation he has been caused to lose. We have seen that there are to this claim a series of counter examples or disconfirming instances that would seem at least to sink the Nozickean proviso and with it Nozick's account and with that one influential defense of *laissez faire*.

We should keep in mind that this defense of *laissez faire*, as any defense of it, if successful, would undermine any autonomy respecting egalitarianism by showing that equality is incompatible with autonomy. We cannot have, Nozick claims, self-ownership without *laissez faire* and with *laissez faire* we will not have equality. An autonomy respecting egalitarianism is, if Nozick is right, an impossibility. But this Nozickean attempt to show that self-ownership and autonomy require *laissez faire* fails. Perhaps some other defense will succeed where Nozick has failed but it is anything but evident that this is so.