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Libertarian Rights within Pluralistic Consequentialism

Abstract: This essay questions the self-sufficiency of abstract, non-consequentialist, principles as a defence of a libertarian regime. The argument focuses on the difficulties involved in attempts to defend the priority of negative rights if an attractive conception of freedom and an agent-relative view about our reasons to respect rights are to be upheld. The paper closes by suggesting how libertarianism could gain support from various, and perhaps mutually irreducible and even conflicting, considerations in a wide consequentialist system.

1. Introduction

Unlike other political doctrines, political libertarianism promises to yield concrete advice on institutional matters. Libertarianism is not a *criterion* for the moral assessment of basic institutions (like Rawls' difference principle) but rather a doctrine about what *institutions* we ought to live under. Being a libertarian in this political sense¹ means, basically, believing in the moral justifiability of stringent legal private property rights, and, consequently, that legal rules ought to protect those rights through certain enforcement agencies (police and courts). In its concern for institutional issues, the advocacy of libertarianism is on a par with the advocacy of the welfare state, Soviet-like communism, and other arrangements defined in terms of its basic political and economic institutions.

This essay addresses the question: can the specific (legal) property rights protected by a libertarian regime possibly be grounded on more or less abstract philosophical criteria? I want to suggest a negative answer to this question, not because of being skeptical about the possibility of providing a good case for libertarianism, but because of my distrust of abstract philosophical criteria accomplishing this task. In the remainder of this introduction I will characterize philosophi-

¹ My use of the word "libertarianism" departs in some aspects from other uses in the literature. Thus, Shelly Kagan (1994, 18) characterizes the 'core' of libertarianism as the claim that individuals have *moral* rights not to be interfered with except when they are interfering with others (which leaves open the question whether morally justified infringements of those rights can obtain in consequence of the priority of conflicting, institutionally-based, rights), and Will Kymlicka (1989, 95) defines libertarianism as the doctrine that "the free market is inherently just", that is, *regardless of* its consequences in terms of certain alleged social values, like productivity, welfare, or distributive justice.

cal defenses of libertarianism and situate them within the framework provided by alternative strategies for defending libertarianism. Sections 2-4 will be devoted to examining and rejecting what I think is a particularly well-argued philosophical (and in particular, deontological) defense of libertarianism. Finally, in Section 5 I propose a pluralistic consequentialist defense of libertarianism which makes room for various deontological and axiological intuitions.

The relations between institutions and philosophical criteria can obviously be ascertained by means of complex social and economic theory. This makes the defense of institutions crucially dependent on empirical (and many would add, controversial) theories. It is therefore unsurprising that the Lockean strategy for grounding private property rights has long been favoured by libertarians. For such a strategy promises to circumvent the contingencies of empirical claims, at least claims which are controversial-theory-laden. Roughly, the Lockean argument runs like this. Man owns his own body and the labour he does with it, labour is somehow injected into external objects, and these thereby become his property, provided that (the famous Lockean Proviso) there be "enough and as good left in common for others". This argument has been shown to suffer from many difficulties. One which is particularly striking is this: once one has taken seriously the Lockean Proviso and the fact that we live in a world of scarcity, libertarian property rights over most things can hardly emerge.²

Attempts have been made to reformulate the Lockean Proviso in ways that allow widespread and strong private property rights. According to such reformulations, we should require appropriations to leave non-appropriators at least as well-off as they were in the state of nature – i.e., before appropriations took place and hence everything was held in common (see Nozick 1974, 175ff.). From here on, familiar Paretian arguments for private property do the job (see, for example, Miller 1987 and Schmidtz 1991, 20). It should be noticed, however, that the philosophical self-sufficiency of the Lockean strategy has by now vanished. For now the argument relies on empirical considerations; we need to ascertain, armed with reliable economic theory, whether a libertarian system of property rights meets the 'as well-off' requirement (and, armed with a sound theory of distributive justice, why such a system should be the preferred one among the systems which satisfy that requirement).³

Can libertarianism be defended without relying on the contingencies of economic theory? A step in this direction would be to claim that certain conceptual features of libertarian property rights are an appropriate response to (as something different from being instrumental to, in any sense which renders the argument dependent on empirical considerations) the acknowledgement of certain valuable goals. An argument along these lines would run against my initial

² This is a frequent objection. See, for example, Kirzner 1989, 155ff.

³ The presence of empirical (and, in his view, false) claims in Nozick's purported demonstration that libertarianism satisfies his version of the Lockean proviso is stressed by G. A. Cohen in his 1986. Cohen also disputes here Nozick's assumption that a Lockean state of nature should count as the baseline against which the 'as well-off' proviso operates.

suggestion that philosophical defenses of libertarianism can hardly be successful. By a 'philosophical' defense of libertarianism I mean a defense which does not rely on (sophisticated) social or economic theory and which, typically, purports to show that libertarianism is the best interpretation of (as something different from being instrumental to the compliance with or the advancement of) certain independently justified principles and/or value judgements. The 'conceptual' strategy sketched at the outset of this paragraph is an example of a philosophical defense of libertarianism.

Admittedly, this characterization of a philosophical defense of libertarianism is rather vague. For my purposes here, it can be sufficiently delimited by pointing to the difficulties which must be overcome by the kind of strategy I have in mind. Let me briefly explain the main ones.

Traditional philosophical defenses of libertarianism have rested on a so-called 'negative' conception of freedom, according to which, roughly, one is free to perform a certain action if and only if others don't interfere with its performance. It has often been observed, however, that this conception of freedom is not attractive enough as a political ideal; for example, we can hardly be comforted by learning that someone's inability to walk is caused by irretrievable paralysis instead of by another preventing him from walking by physical or psychological (e.g., credible threats) means. We want people to be *positively* free, in the sense that they have the power to act on their unforced choices.⁴

Once this move towards positive freedom has been made, it is clear that the libertarian insistence on the supremacy of negative property rights (that is, rights which are correlative with duties of noninterference with the use and/or consumption of others' holdings) seems arbitrary. How could it be possible (and what would it mean to say) that the typically *negative* libertarian rights are the appropriate *response* to this revised axiology, which gives priority to *positive* freedom? And even if we do explain how this is possible, there remains a serious problem related to the scope of the reasons generated by those alleged (negative) duties not to attack others' positive freedom. Suppose that I am credibly threatened by a terrorist gang with killing five innocent people unless I kill a single innocent person. How can I justifiably resist this threat, given that complying with it would be not only more detrimental (on an ordinary understanding of 'being *more* detrimental') to positive freedom than my killing the innocent person, but also more detrimental to the goal of minimizing the number of killings, i.e. violations of people's *negative rights* not to be killed? To put it in the jargon of current moral philosophy, libertarians conceive of rights as providing *agent-relative* reasons not to violate rights (that is, giving each a differentiated goal, namely, the goal of bringing about the state of affairs in which *he* is not violating rights), not *agent-neutral* reasons to minimize violations of rights (thereby giving everyone

⁴ Isaiah Berlin's 1969 is a locus classicus for the statement of the two concepts of freedom and a defense of the negative view. For further refinements on the distinction and arguments for positive freedom, see, for example, Crocker 1980 and Spector 1992.

the *same* goal, namely, bringing about the state of affairs in which violations of rights are minimized).⁵

To the best of my knowledge, the most rigorous and systematic attempt to construct a philosophical defense of libertarianism is Horacio Spector's book *Autonomy and Rights. The Moral Foundation of Liberalism* (1992).⁶ This makes probing into Spector's argument particularly interesting for my purposes here. For, given that Spector's argument carefully addresses the above difficulties faced by any philosophical argument for libertarianism, showing that it fails in fundamental ways would strike a serious blow to the hope of defending libertarianism on philosophical grounds. In other words, my interest in his argument stems partly from its attempt at rescuing libertarianism from its shortcomings in accommodating the value of positive freedom and agent-relativity, and partly from its rigour and systemic nature. The next section is devoted to examining this argument. But let me first briefly explain the sense in which Spector offers a philosophical defense of libertarianism.

Spector wholeheartedly acknowledges that positive freedom is the value to be protected by rights, but argues that negative rights, a non-aggregative treatment of positive freedom, and the agent-relativity of the reasons for respecting others' positive freedom are the rational responses to that acknowledgement. It is worth noting that Spector's argument is not (and does not claim to be) a defense of the specificities of libertarian property rights. Rather, as we will presently see, it is an attempt at justifying key structural features of libertarianism; in particular, Spector does not try to show why Lockean property rights are the best realization of those features. Hence, Spector's defense of libertarianism is philosophical in the (admittedly vague) sense indicated above.

2. Spector's Project

Spector's central aim is to justify what he calls "the basic libertarian thesis", namely, the contention that "individuals have moral rights involving, in some way

⁵ Among the most discussed accounts of agent-relativity are those of Nagel 1986 and Williams 1973.

⁶ It should be clear that Nozick's influential *Anarchy, State, and Utopia* (1974) does not provide a philosophical defense of libertarianism, as I characterized this notion. He explicitly *departs from* the acknowledgement of (libertarian) rights, and is mainly concerned with the question whether the state is compatible with respect for those rights. In particular, Nozick does not attempt to *ground* the agent-relative interpretation of libertarian rights (what he calls "rights as side constraints"), but rather exposes it as the favoured conception of rights in our political culture. Unfortunately, I cannot discuss here the important attempts to justify libertarianism made by Lomasky 1986 and Narveson 1988. Let me briefly observe, however, that in so far as they are read as emphasizing the Paretian, Hobbesian-contractarian, argument for libertarian rights, they fail to be philosophical arguments in my sense (they would be too dependent on controversial empirical claims), and in so far as they (particularly Lomasky's book) insist on value incommensurability as a basis of agent-relative rights, they find difficulties in accommodating negative rights for reasons I will show in dealing with Spector's argument.

to be determined, the moral impermissibility of interfering with their choices and actions", and that these negative rights "prevail as a rule over other possible moral reasons that may compete with them" (1992, 7). Unlike traditional defenses of libertarianism, centered on the promotion or protection of this negative kind of freedom, Spector argues that the value underlying the basic libertarian thesis is positive freedom. However, he constructs a novel theory of practical rationality which blocks the derivation of the 'positive' rights (i.e., rights to receive certain benefits through the positive actions of others) that are usually thought to flow from the recognition that positive freedom is a value and to ground redistributive policies. Instead of adopting the widespread view that "maximization of positive freedom is the rationally appropriate response to the fact that positive freedom is valuable", Spector advances a "deontological theory of practical rationality that involves the following three principles: (1) the duty not to actively damage positive freedom predominates over the duty to prevent the emergence of a detriment to this same value, (2) each person's positive freedom has distinct and unique worth, and (3) the requirement not to attack each person's positive freedom is agent-relative." (1992, 180) So, if Spector is right, the above shortcomings of traditional philosophical defenses of libertarianism vanish: positive freedom could safely be acknowledged to be a value of paramount importance without compromising agent-relative negative rights.

I will show in Section 3 that Spector's argument for principle (2) (henceforth, 'the Uniqueness Principle') is either misdirected or inconsistent with his defense of principle (1) (henceforth, 'the Priority Principle'). In Section 4, I will argue that Spector's defense of the Priority Principle fails in its own right, and for reasons which undermine the Uniqueness Principle as well.

3. Damage to Freedom and the Priority of Negative Rights

Spector says that the Uniqueness Principle "bears upon" the distinction between a "numerical" and a "material" conception of damage to a value (1992, 152). The numerical conception affirms that "an agent damages a value if and only if he causes a net loss of this value" (1992, 152). According to the material conception, "an agent damages a value if and only if he causes the loss of an instance of this value, irrespective of whether or not this loss is made up for by the benefits accruing from the creation or conservation of other instances of this value" (1992, 152-3). It is easy to see that the numerical, but not the material, conception "permits trade-offs between the gains and losses of positive freedom of distinct persons" (1992, 155).

Spector needs to show, of course, that we must endorse the material conception of damage to a value. For this conception, unlike the numerical one, blocks reasoning in terms of compensation. Thus, the material conception conflicts with those numerical views according to which value, in this case positive freedom, is to be aggregatively maximized. Hence, Spector seeks to undermine a presupposition of the numerical conception, namely, the commensurability of different persons' positive freedoms. He argues that the claim that positive freedom is

valuable involves a distributive predication – each person's positive freedom is valuable. By contrast, when the property of being valuable is predicated collectively, i.e. of a whole in which positive freedom would consist, it seems natural, Spector says, to conceive of A's positive freedom and B's positive freedom as parts of this whole which "are of equal value, since they cannot be said to make a differential contribution to the value of the whole" (1992, 156). Now, equality of worth presupposes commensurability, and so the possibility, which Spector wants to exclude, of trade-offs between the positive freedoms of distinct persons. Spector tries to avoid this result by questioning the assumption that positive freedom as a whole is valuable. "Of course", he writes, "to infer the proposition that positive freedom as a whole is valuable from the proposition that each person's positive freedom is valuable would involve committing a fallacy of composition" (1992, 156).

I agree that

(a) Positive freedom as a whole is valuable
cannot be inferred from

(b) Each person's positive freedom is valuable.

Nevertheless, one can argue that positive freedom as a whole is valuable and at the same time argue that the positive freedoms of different individuals are mutually incommensurable. For (a) does not entail that a person's positive freedom is worth more or less than any other's, nor, indeed, that they are equally valuable. Let me show this by means of a familiar axiological view according to which a whole composed of mutually incommensurable valuable parts is itself valuable. Many people believe that, as an object of moral evaluation, a life is composed of several long term complex pursuits, like having deep personal relationships and having a successful career. Now, it is often the case that an individual is indifferent between such pursuits and would remain indifferent even if, in his own eyes, one of them were improved to a certain extent – e.g., because the financial rewards of choosing a certain career were increased by a certain amount. Arguably, the intransitivity of that individual's preferences establishes that he views the original alternatives as incommensurable (see Raz 1986, 325-8). And, in so far as axiological theory is sensitive to his judgments, it has to depict such a situation as one in which a whole (a life) is valuable, its parts (the pursuits) being mutually incommensurable – though valuable or, as Spector would put it, having "distinct and unique" worth. It is true that a life's value cannot be inferred only from the values of the pursuits that shape it, for further moral premises are necessary – in particular, premises drawn from a value theory which explains a life's value as a function of the values of each of its parts. But Spector's warning about this fallacy of composition is beside the point, given the compatibility between the value of a whole and the incommensurability of the values of its parts. Thus, accepting that positive freedom as a whole is valuable does not commit us to the numerical conception of damage to positive freedom. I conclude, then, that the target of Spector's criticism (collective predication) is innocuous to what he needs (incommensurability), and that he leaves untouched the numerical conception of

damage to positive freedom, which presupposes what he needs to disprove, namely, commensurability.

Can we not attribute to Spector the more modest goal of discrediting the belief in an *homogeneous* whole of positive freedom by tracing it psychologically back to the unawareness of the above fallacy of composition? On this reading, Spector would be arguing that the tendency to commit this fallacy would be accompanied, as a matter of psychological fact, by a belief in the homogeneity of that whole, and, consequently, in the possibility of trade-offs among its parts. Once it is shown that the value of that whole cannot be derived from the values of its parts, a widespread motivation behind an aggregative treatment of positive freedom vanishes. Given this, and Spector's constructive arguments for an agent-relative conception of rights (1992, esp. 176-8), the aggregative view of positive freedom seems to lose its appeal.

However, Spector is not entitled to trade on this reading of his argument against commensurability, for he presupposes the commensurability of different individuals' positive freedoms when he assesses the intuitive support of the Priority Principle. He considers the following well-known case:

Trolley. An out-of-control trolley is hurtling down a track. Straight ahead of it on the track are five men who will be killed if the trolley reaches them. Bloggs is a passerby, who happens at the moment to be standing by the track next to the switch; he can throw the switch, thereby turning the trolley onto a spur of track on the right. There is one man on that spur of track on the right; that man will be killed if Bloggs turns the trolley. (1990, 176)⁷

It seems permissible for the passerby to turn the trolley, thereby killing the one. Now Spector tries to show that this result is not seriously detrimental to the Priority Principle. Thus, he says that there is a "distributive exemption" which allows an agent "to achieve a positive balance in human lives by modifying the range of a threat" (1992, 145).⁸ Notice, however, that the reference to lives must be merely incidental here. For Spector is defending an exemption from compliance with the Priority Principle, which asserts the priority of duties "not to actively attack positive freedom" (1992, 100). So, the wrongness of taking the one man's life ultimately resides in damaging his positive freedom. To put it differently, the one's life matters only as a receptacle, as it were, of positive freedom. But then, and taking seriously the 'other things being equal' clause that is implicit in the example, the other five lives should matter as receptacles of positive freedom as well. Hence, the permissibility of throwing the switch has to rest on a comparison between the amounts of positive freedom contained in each of the alternatives (saving the five or letting them die) open to the agent, a comparison which in turn presupposes that the positive freedoms of different individuals are mutually commensurable, and hence suitable for aggregative treatment.

⁷ All indented examples are textually quoted.

⁸ Spector is resorting here to an idea formerly defended by Judith Jarvis Thomson. See 1986.

4. Distributive Exemption, Mutual Advantage, and Positive Duties

We have seen so far that Spector's objection to collective predication is irrelevant as a defense of the Uniqueness Principle, and that his endorsement of the material conception of damage to a value conflicts with presuppositions of the distributive exemption. One may nonetheless wonder whether the distributive exemption narrows the class of exceptions to the Priority Principle (and, for that matter, to the Uniqueness Principle) to such an extent that both principles could still be invoked in defense of a largely libertarian order. Indeed, a reply along these lines is suggested by Spector's own text, which in turn follows Judith Jarvis Thomson's idea that *Trolley* belongs to "a narrow class of exceptions" to the general rule that one may not kill one to save five (1990, 178).

However, this strategy is doomed to failure, since (i) we have grounds for rejecting the distributive exemption as a correct account of *Trolley*, and (ii) on Spector's narrow reflective equilibrium criterion for accepting moral principles,⁹ a correct account of *Trolley* is likely to have devastating consequences both for the Priority and the Uniqueness Principles. In support of (i), we can consider, for example, the following variant of *Trolley* proposed by F. M. Kamm:

Two Trolleys. I must press a switch to turn the trolley headed toward the five onto a track where no one sits. This switch also controls another trolley which has been inactive till now. When the switch is pressed it not only turns the first trolley away from the five but also turns the second trolley toward one person on another track. (1989, 228)

While in this case the switch action generates a new threat, rather than modifying the range of the original threat, it seems permissible to redirect the first trolley. This result is clearly incompatible with the distributive exemption theory.

Let us now turn to (ii). Thomson's current explanation of *Trolley* is in order here. She now maintains that the permissibility of killing the one, thereby saving the five, requires the fulfillment of the following two conditions: (a) there was an earlier time at which the six (the five and the one) would increase their probabilities of surviving should Bloggs, the passerby, save the five when the threat arrives, and (b) there exist no other factors, like contractual duties to work in teams of five or alone, or an especial aversion to dying in certain ways, which would override the fulfillment of (a) (1990, 181 ff.). To bring home how these conditions work, it is useful to consider Thomson's treatment of the following case:

Transplant. Here is Bloggs, who is a transplant surgeon, an extraordinarily good one – he can transplant anything at all successfully. He has five patients who need parts and will soon die if they do not get them: two need

⁹ Spector's methodology of testing moral principles against our intuitions in imaginary cases is here adopted for the sake of argument. As a matter of fact, I propose below (Section 5) a different criterion for the acceptance of moral judgements, which I call 'pluralistic consequentialism' and which can also be presented as a kind of *wide* reflective equilibrium, on a certain interpretation of this Rawlsian idea.

one lung each, two need one kidney each, and one needs a heart. Here is a young man in excellent health; he has the right blood type and can be cut up to supply parts for the patients who need them. (Let us bypass a possible objection by supposing that none of the patients can be cut up to supply parts for the others.) The surgeon asks the young man whether he would like to volunteer his parts, but the young man says "I deeply sympathize, but no" (1990, 135).

It is clearly impermissible for the surgeon to cut up the young man (and save the five). Let us see now how Thomson's conditions work.

(a) gets satisfied in *Trolley*, and, given certain assumptions about probabilities of needing transplants, in *Transplant*,¹⁰ however, only *Trolley* complies with (b) – or at least so Thomson believes. Thomson says that when both (a) and (b) are met, it is "to the advantage of all" at the earlier time referred to in (a) that the five be saved when the threat arrives (1990, 191ff.). Let us refer to this view as the 'mutual advantage' theory.

I find the mutual advantage theory persuasive, particularly if we take condition (b) seriously¹¹ and, to avoid circularity, independently specify the ways of dying and other factors falling under it. Now, given this theory, it is apparent that *Trolley* severely undermines both the Uniqueness and the Priority Principles. For, on the one hand, mutual advantage considerations aggregate the positive freedoms of different individuals, thus violating the Uniqueness Principle. And, on the other, a consistent application of the mutual advantage theory leads to justifying the *duty* to save the five in *Trolley*-like situations, rather than its mere permissibility, and this involves violation of the Priority Principle. Let me explain. Assuming, as Thomson does, that condition (b) is met in *Trolley*, the maximization of the six's probabilities of surviving ought to be Bloggs' goal. But if this is so, he should not keep still: if Bloggs fails to deflect the trolley, he is not performing the action whose performance was to the advantage of all at an earlier time. Thomson's argument, then, places Bloggs under the *positive* duty to save the five.¹²

¹⁰ As Thomson says, this holds true for *Transplant* in a world in which the probabilities of survival of all of its inhabitants would increase should the surgeons proceed in future *Transplant*-like situations. She agrees that this is not true of the actual world – persons differ in their probabilities of needing transplants. See 1990, 186-7.

¹¹ Failure to do so (by solely focusing on condition [a]) underlies some misdirected critiques of Thomson's views, like those by Bernard Gert 1993, 173-8, Eric Mack 1993, 163-7, and Bruce Russell 1993, 169-72, as shown by Thomson herself in 1993, 187-9.

¹² Notice that not all situations where it is to the advantage of every member of a group to be saved at a later time by killing one member are *Trolley*-like situations in the sense needed by my argument. Consider the following case: "I can save five others from a 90% risk of dying by doing something whereby I incur a 90% risk of dying myself. Surely, it is morally permissible (most would say) for me to risk my life, but I am not morally required to do so (even though maximization requires that I risk my life)." (I am grateful to Kasper Lippert-Rasmussen for this remark, quoted from a letter he sent to me.) By the way, Thomson rejects the idea that Bloggs is under the positive duty to save the five in *Trolley*, but not on the basis of counterexamples like the one just expounded (which could be countered

This result paves the way for a recognition of positive duties far beyond what is tolerable by a libertarian order. For most of us belong to many groups of people such that it is to the advantage of all their members that a third party help some by harming some others if certain circumstances obtain. Thus, the state can be viewed as the 'passerby' who is in the position to (re)distribute burdens and benefits by taxing some individuals in order to assist others. Notice that the analogy between the state and the passerby of *Trolley* can be stretched quite far; a recession, for example, could be 'redirected' through unemployment benefits from the unemployed to the taxpayers, who arguably would thereby bear lower losses in positive freedom.¹³

I conclude, then, that Spector's project fails at crucial points. Firstly, his defense of the Uniqueness Principle is either misdirected or postulates a material conception of damage to a value which conflicts with the presuppositions he needs in his account of *Trolley*. And secondly, an appropriate account of *Trolley* seems to undermine not only the Uniqueness Principle but also the Priority Principle.

5. Libertarianism as a Convergence Point in a Pluralistic Consequentialist Calculus

The failure of Spector's project is symptomatic of a deep difficulty in what I have called a 'philosophical' defense of libertarianism. For, as we have seen, the principles of 'deontological rationality' proposed by Spector are obvious candidates for structural features of a libertarian regime. It might seem, then, that only one reasonable strategy remains available to anyone committed both to positive freedom and libertarianism. This would be the simple strategy of requiring positive freedom to be aggregatively maximized and hoping to find some (empirical) connection between such a maximizing policy and negative rights (like the ones presumably possessed by the one in *Transplant*) in their agent-relative version. However, this would be a *non sequitur*. The values and principles we have found

by appropriately specifying *Trolley*-like situations; for example, by requiring that a *passerby* has to decide whether to kill the one, thereby saving the five) but on general antiutilitarian grounds (1990, 196). It should be noticed, however, that the mutual advantage theory does not entail, as its application to *Transplant* shows, utilitarianism. A related point is that Thomson seems to be unaware of the tension (to say the least) between the mutual advantage theory and her rejection of positive *rights*.

¹³ In general, an analysis of the notion of an individual's positive freedom should take into account the number, the variety, the probability, and the value (from his perspective) of the alternatives open to him, and some weighted sum of these factors must be involved in the measurement of his *global* positive freedom, as something different from his positive freedom to perform particular acts (see Crocker 1980, 48 ff.). Given the probability and value dimensions of global positive freedom, it is arguable that the amount of positive freedom enjoyed by an individual is partly a function of the (expected) utility he can derive from the alternatives open to him, and hence should be marginally diminishing as well.

to be mutually conflicting and insufficient¹⁴ to ground libertarianism might individually have *some* force, and, consequently, they might *together* build a strong case for libertarianism. In fact, I want to suggest arguments for this possibility, and, furthermore, to suggest that those values and principles could be incorporated into a wide, and in principle pluralistic, consequentialist calculus in which values and reliable economic theory work together. Should this suggestion hold good, we need not take sides with central tenets of general moral theory (like those advanced in the dispute between utilitarianism and deontology) in order to make out our case for libertarianism (though we would probably need to take sides with those tenets should we undertake the task of explaining the whole realm of morality). For independently of whether the more or less general or local principles or values we believe in could be integrated into a single-value consequentialist framework, the claim could be made that those principles and values all point in the same, libertarian, direction. In other words, they may converge on grounding libertarianism, while travelling diverging paths in so far as the furtherance or frustration of alleged all-encompassing goals are concerned. Therefore, a defense of libertarianism need not inherit the difficulties faced by general moral views; it could simply rest on consequentialist considerations whereby diverse (and *perhaps* mutually irreducible) values and principles, *including deontological ones*, are assigned various weights.

Two points should be emphasized. The first one is that the *principles* figuring in such a consequentialist calculus might well be deontological, in the sense of providing agent-relative reasons for performing or forbearing certain actions. And, secondly, the weights assigned to values or principles need not depend solely on how valuable certain goods are, or how strong certain principles are, but also on our *confidence* in the arguments we have for proclaiming them to be goods or principles. For example, everyone familiar with contemporary moral theory is much more aware of the difficulties faced by utilitarianism than 19th Century scholars were. While the latter discussed difficulties primarily related to the need to accommodate certain counterintuitive consequences of utilitarianism, like requiring penalties for innocent people in happiness-promoting circumstances, current moral philosophers discuss not only many more and possibly stronger counterexamples (like *Transplant*) but also more fundamental objections, like those originating in alleged value-incommensurability (for example, in Raz 1986) and the alleged self-defeatingness of certain formulations of utilitarian theory (for example, in Parfit 1986). In addition, utilitarians now confront well articulated deontological theories, like those advanced by Samuel Scheffler (1982) and Thomas Nagel (1986). Of course, we are now familiar as well with utilitarian attempts at replying to those objections and at undermining those deontological theories. However, given the *status quaestionis* in moral theory, it seems safe to conclude that today it is much more difficult than in John Stuart Mill's times to

¹⁴ Strictly speaking, I have been trying to show that Spector's commitments to the value of positive freedom and to his three principles of 'deontological rationality' cannot be reformulated to accommodate certain counterexamples without their content being dramatically modified and without their conflicting with each other.

build a convincing case for utilitarianism. Hence, in the kind of pluralistic consequentialism that I am favouring, the balance of reasons for and against utilitarianism now counts against assigning it the same weight that we would have assigned it one century ago, given the balance of reasons *then*. In short, we have to conduct our consequentialist calculus assigning *expected* weights to morally relevant factors (basically, values and principles enjoying independent support, intuitive or otherwise). That is, we should try to maximize a moral function whose independent variables stand for the weights of the morally relevant factors present in a choice situation, discounted in proportion to our confidence in the soundness of our arguments for assigning them those weights (confidence is here the analogue of probability in the familiar notion of 'expected utility').¹⁵

It is worth observing that a good case for libertarianism does not require the morally relevant factors which might count for it to have great expected weights, nor that they can be reduced to a single factor. Let me sketch what such a pluralistic consequentialist case should look like. On the one hand, relatively new developments in economics could be employed in arguments from efficiency for free markets and strictly limited governments (think of the relevance of Coase's theorem in support of full privatization of the world, and the relevance of the theory of government failure developed in public choice theory to oppose traditional arguments for various forms of state regulation in order to overcome market failures).¹⁶ On the other hand, deontological considerations having to do with stringent negative rights are obvious candidates for explaining intuitions otherwise difficult to explain, like those we have in connection with *Transplant*;¹⁷ they should be granted an important weight in the consequentialist calculus. Finally, there are many 'local' arguments pointing in the same (libertarian) direction; for example, whatever the intrinsic or derivative value that tolerance and free circulation of ideas have, they seem clearly much more enhanced by free markets than by most, and perhaps all, state regulations of the media (and, of course, the resources needed by them).¹⁸ As said, professional philosophers know the difficulties involved in the efficiency, deontological, pluralism, etc., arguments for libertarianism. But, in so far as discussion among experts about the pros and cons of these views is going on and there is no obviously decisive proof of their

¹⁵ My emphasis in confidence in shaping the (final) weights of morally relevant factors differentiates my approach from otherwise similar proposals made by Amartya Sen towards incorporating rights into a broadly consequentialist calculus. See, for example his 1982.

¹⁶ Of course, the literature on law and economics (e.g., Ronald Coase, Richard Posner) and public choice theory (e.g., James Buchanan, Gordon Tullock) is relevant here in support of these sweeping claims. Let me also add that transaction costs, which (contrary to the assumptions of Coase's theorem) figure in virtually all market exchanges, should not be invoked, within the efficiency argument, to restrict property rights, but rather to confer property rights to the party whose costs to initiate and conduct negotiation are higher. See Ronald Dworkin 1986, 179-80.

¹⁷ Well argued defenses of the priority of negative rights can be found in Philippa Foot 1978 and Horacio Spector 1992.

¹⁸ For a classical defense of the connection between free markets, tolerance, and ideological pluralism, see Milton Friedman 1962.

unsoundness, those arguments could add *some* force to the libertarian case, and, together, they could add great force to it.

It might be thought, however, that this is insufficient to make it rational for us to accept libertarianism, for there might be some reasons *against* libertarianism as well.¹⁹ Why not compute the weights of, say, Ronald Dworkin's arguments for progressive income taxes as a real-world substitute for ideal equality of resources (see his 1981), Alan Gewirth's defense of moral positive rights on the ground of conceptual features of human agency (for example, in his 1982), and G. A. Cohen's defense of communal ownership on the ground of a 'non-moralized' conception of 'collective freedom' (see his 1979)?

I think that there is a deep difficulty involved in the attempt to justify nonlibertarian arrangements on arguments like these. For there is nothing in such arguments (as, indeed, in many others in contemporary political philosophy) in favour of a non-libertarian society, as I understand it in the present essay, but rather, typically, of any or both of the following: (i) certain social goals (like Dworkin's equality of resources or Cohen's collective freedom), or (ii) certain *moral* rights (like Gewirth's positive rights). If those goals were to be promoted by the state in ways which would violate libertarian rights, or if those moral rights were enforced by the state, the resulting society would surely be nonlibertarian in character. But those arguments fail to show that the attainment of those goals requires violation of libertarian rights (Dworkin's and Cohen's theories need to be supplemented with factual evidence of the connection between progressive income or communal ownership, on the one hand, and equality of resources or maximization of collective freedom, on the other) or that the alleged moral positive rights are legitimately enforceable. They leave untouched the libertarian claim that there exist only negative *legal* (hence, enforceable) rights.

Indeed, there *are* good reasons for rejecting the jump from social goals or moral positive rights to their legal enforcement, namely, the theory of government failure when it takes charge of such tasks; in other words, such a jump would require us to abandon well-supported public choice findings about the endemic deviation of government's behaviour from the path leading to promote such goals, or enforce such rights, through redistributive policies. Unlike the libertarian argument I have been favouring, the one now under consideration would fail, then, to accommodate sound social and economic theory. Furthermore, if public choice analysis of redistributive policies as responses to the differential political influence of various interest groups is correct (which in turn can be shown to depend centrally on morally irrelevant factors, like the organization costs of those groups and the lust for power or wealth of politicians and bureaucrats), then awarding the government the powers needed to pursue allegedly worthy goals or to enforce alleged moral positive rights would clash with values such as equality

¹⁹ For a good presentation of major lines of thought for and against free markets in contemporary political philosophy, see Allen Buchanan 1985. In think, however, that the balance of reasons resulting from Buchanan's book would be much more in favour of free markets than it suggests, if it had taken seriously the government failure and public choice arguments I refer to below.

under the law, and possibly with much subtly defended criteria of distributive justice, like the Rawlsian difference principle,²⁰ whose expected weights may well be high as components of the pluralistic consequentialist calculus I have been proposing.

A major upshot of the above is that the failure of philosophical defenses of libertarianism need not lead the libertarian to adopt efficientism or utilitarianism to defend the kind of society he longs for. If we adopt the sort of pluralistic consequentialism I proposed as a reasonable way to conduct our moral thinking, and if sound social and economic theory, along with more or less weighty principles and goals, are employed in the consequentialist calculus, then moral reasoning seems likely to support a largely libertarian society. How much weight we should assign to those principles and goals will depend on the direction taken by standard moral enquiry.

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²⁰ Infringement of the difference principle by the welfare state is a major theme of Milton and Rose Friedman 1980.

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