
LIBERTY, PROPERTY, AND WELFARE RIGHTS: BRETTSCHEIDER'S ARGUMENT

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IN “PUBLIC JUSTIFICATION AND THE RIGHT TO PRIVATE PROPERTY”¹ Corey Brettschneider takes up an important project. The general subject of the book in which his contribution appears is “property-owning democracy”—a concept obviously in need of considerable discussion on its own, but I will table that for another time. Brettschneider’s special contribution is to defend the welfare state on the ground that it is required by the very property regime that libertarianism so crucially proclaims. In particular, he denies that we have only two alternatives: the welfare state and libertarianism (he correctly sees the latter as narrowing the focus of the state to “the protection of property through negative rights” p. 54). He instead wants to argue that “both types of rights are normatively interdependent.” He says—rightly—that property needs a “political justification” (though, see below for further discussion of just what that means)—and, again siding with

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¹ Corey Brettschneider, “Public Justification and the Right to Private Property” in Martin O’Neill and Thad Williamson, *Property-Owning Democracy—Rawls and Beyond* (Chichester, UK: John Wiley and Sons, 2012).

current “liberals,” that reciprocity considerations require a right to property *and* a right to minimal welfare. Indeed, he argues that private property can be justified “only in regimes in which basic material rights are guaranteed to all members of society” (54). Since one would think of the welfare state as an attempt to supply just that, this is near enough to insisting that a polity with private property rights *must* also be a welfare state at the same time.

It will be agreed, I’m sure, that this is a very important undertaking. If he should prove correct, then we libertarians need to revise much of what we say. But, as I shall show here, he is not correct.

The general structure of his argument is this:

First, I demonstrate why the institution of private property fundamentally implicates an active role for state coercion in enforcing the right to exclude.

Second, I argue that the burden for public justification is to demonstrate why there are reasons for the excluded person to accept her duty to respect others’ property rights.

Third, I claim that such an argument can be made plausibly only when welfare rights are guaranteed to all citizens. (55)

We should all fully accept the first two, which scarcely need argument. But the third is another matter, and takes us to fundamentals. Brettschneider, like many others, notes that property rights are rights of exclusion. And he thinks that the reasons justifying the exclusions entailed by private property must include positive rights to welfare. But I shall argue that he is wrong in this. The correct return for liberty is liberty: whatever liberties are foregone via the acceptance of property rights are properly compensated for by the liberty rights gained by all from the general liberty principle—that is, by libertarians. Going farther than this is a mistake.

1. Political and Moral

Brettschneider’s argument is either misleading or inadequate in one important respect. For he does not much distinguish between specifically *political* arguments, in the narrow sense in which all such arguments are about *the state* and really presuppose political institutions, and what we may call *moral* arguments, which are not essentially about the state. And he assumes that if coercion is to be applied in enforcing some provision, then it is the state which must do the coercing—following in that respect the arguments of Holmes and Sunstein. This is wrong, and correcting the error would require some recasting of Brettschneider’s argument.

To see that it is wrong, consider, for example, Locke's arguments about punishment. In the State of Nature, he observes, everyone would have to be said to have the right to punish violators of the Law of Nature. To be sure, he thought this fact so serious a disadvantage of that condition as to constitute a major reason why people should (and would) move from it to a political condition. But Brettschneider talks as though there cannot be any such move, because the idea of a natural right to punish is not even envisaged in his discussion. This is wrong. To be sure, he also disavows much interest in discussing the bearing of "natural law" on all this, and in fact seems to want to focus his argument exclusively on the structure of the state. Anarchists will sniff at this, and whatever one thinks of anarchism, that there is a workable conceptual distinction between it and statism is obvious. Since that distinction will affect specific discussion at some points, further application of it will be forthcoming as well. In particular, I will argue that his argument, even focusing exclusively on the state, still does not work, but the fact that it does not will be more readily seen in light of the moral-political distinction.

There is a broader sense of 'political' in which one option *within* political theory is anarchism, the *principled* advocacy of anarchy, as distinct from the use of that term as, pretty much, an expression of abuse. And that broader sense is what Brettschneider really should be, and I believe is, employing here. It seems to me that he simply slides from one to the other without argument. That helps to saddle us with the welfare state, in his argument. That states will seize on a "right to welfare" is no surprise; getting such a right in an anarchic condition of liberty, though, is not nearly so easy!

2. Property Rights and Coercion

With that caution in mind, let us now look at Brettschneider's specific arguments. The first two need little comment. Regarding stage one, as will be obvious, I agree with Brettschneider that the institution of private property fundamentally implies a potentially active role for coercion in *enforcing* the right to exclude—not, however, as so many think, a positive right to enforcement, but merely a moral permission to use it if necessary to deal with violators of basic moral rights. Indeed, I would simply *define* a right, for these purposes, as a moral status that may appropriately be enforced by coercive means, understanding other sorts of moral statuses as *not* allowing coercion but nevertheless having moral force. Thus if we speak of a "duty of charity," we may accept that terminology, but only on the understanding that coercive means may not be used on its behalf—but this is so whether the coercion is exercised by individuals, non-state organizations, or states. Brettschneider is

clear that he *is* defending coercive enforceability of a right to welfare, and clear that those welfare rights are *positive*, not just the negative right which is, of course, fully endorsed by libertarians.

3. Negative and Positive

This last may also require a quick note. A positive right is a right that calls not just for refraining from various actions, but potentially may require engaging in actions needed to supply what the right calls for, with coercion available if necessary to get people to supply it, as occasion may require. How much coercion and how much supplying is called for would, of course, be a matter of much debate, and quite variable from case to case, but we are not concerned about such things here. Brettschneider is sympathetic to the idea that what's called for is in general fairly minimal, and presumably coercion would be applied primarily to individuals' bank accounts. Even so, that's quite enough to distinguish his position from libertarianism—the debate is engaged, pretty much independently of a discussion of such details. For libertarians hold that coercion may not be used for charitable purposes, and they hold that there are no fundamental positive rights. (My positive right that you pay me the \$5 you promised yesterday is engendered by our negative right to liberty: nothing forbids you from binding yourself to do that, but once you do, you of course thereby underwrite a positive claim on my part, requiring a positive action on yours. Absent such self-binding, though, positive rights are invalid.)

Regarding stage two, that “the burden for public justification is to demonstrate why there are reasons for the excluded person to accept her duty to respect others' property rights” is clearly correct: if we do not have to demonstrate why persons who are “excluded” from property nevertheless have a duty to respect property rights, we simply aren't engaging the relevant philosophical issue. My agreement goes further than this, however. For not only do I think we must justify this duty to respect the property rights of others, even if the individual in question is “propertyless” himself, but I think we must do so in terms of *his* interests (in relation to the interests of all others, of course). In short, I agree that we are to operate within the broad tradition of social contract liberalism. (There will be further refinement on this shortly.)

Obviously, everything depends on just what the relevant terms are, and this will be discussed presently. To anticipate: I, agreeing with other libertarians, hold that the proper terms of reciprocity are just nonaggression: your nonaggression towards me calls for my nonaggression toward you, and

no more. That is the nub of the matter. The appropriation of something by you does not aggress against me; my seizure of it by force does aggress against you. Period. So I will argue.

4. Natural Law: Some Confusions

Can property rights exist in a “state of nature”? Holmes and Sunstein argue that they cannot, and Brettschneider agrees to this extent:

On some accounts a true moral theory suggests that all individuals have obligations to respect property rights. The appeal to truth to ground a duty to respect property is prominent in the liberal tradition. Lockean accounts, for instance, often appeal to the truth of natural law. A contractalist account, however, rejects such appeals to a comprehensive theory on the ground that it fails to respect all citizens’ status as free and equal...the state should not enforce political duties that are justified by reference to theories that are metaphysical or claim to posit moral truth. Rather, they should invoke an account of political justification that appeals to all reasonable citizens. Such an account is one specifically of political morality and avoids an appeal to a comprehensive moral theory. (58-9)

This passage reflects some important confusions. In the first place, the expression ‘natural law’ is importantly ambiguous. On the one hand, it simply means a law (or principle, if you prefer) that is *prior to state legislation*. On the other, it means a law that is somehow “inherent in human nature,” that being appealed to as the support of the natural law or right in the first sense. The idea is extremely unclear, but the main point is that it supposes that moral laws are due just to the nature of man *in abstracto*, rather than man in relation to other men, that is, in a social setting. Many writers speak as if they held this view. But it is untenable.

However, the first and more general sense has no such implication. A social contract can easily be pre-political (if it can “be” at all), and as a matter of fact, it *has to be*. Note Brettschneider’s own expression, “political morality.” That gets it right: a political morality is a morality *about* politics, a morality *for* politics. It is not a morality that *comes from*, nor one that *presupposes*, politics. Whether the state is justified is (that kind of) a moral question, and obviously the morality that would decide the issue cannot stem from the State, which by hypothesis is up for question rather than pre-existing. So the moral ideas on the basis of which we could argue for the state *must* be “natural” in the first sense, but need not and, agreeing with Brettschneider, should not be “natural” in the second sense. Ideas of the second sense are the type that

Bentham derides as “nonsense on stilts.” But rights as natural in the first sense are anything but. The basic question at issue is whether indeed there is a positive natural right to welfare.

5. Morality vs. Ethics

Next, a word about *morality*. Rawls popularized the word ‘comprehensive’ to apply to views about the ultimate good, what makes life worth living. And he famously claims that government does not depend on any particular comprehensive views. But what we should realize is that *morality*—the sort of rules and requirements for the general direction of our lives together in society—also need not be “comprehensive.” Needless to say, there is precious little agreement about the wider subject of what is absolutely good and bad apart from society—about the “value of life,” the supreme good for man, etc. But a natural law theory need not be comprehensive, as for example those of Hobbes and Kant. Yet Brettschneider appears to equate the two. This is a mistaken assimilation. Locke’s theory need not be founded on a comprehensive theory. He himself, indeed, does tend to invoke the Deity, which would of course suggest comprehensiveness. But it is quite obvious that his theory, which purports to be founded on *reason* (“The *State of Nature* has a Law of Nature to govern it, which obliges every one: and Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions.”)² To say that reason *is* that law is to make clear that it has nothing essentially to do with religion, whatever Locke may claim elsewhere. There is every reason to attribute to Locke a theory on all fours with Hobbes: viz., that there are rules that people, realizing what people and their natural circumstances are generally like, *rationaly* accept for the general direction of their behavior in society: that is, in relation to the miscellaneous other people out there. Most of those people have different tastes, religious proclivities, and so on, and thus a morality for us all that makes any sense must make suitable accommodations for this diversity. (For the same reason, it cannot possibly presuppose some or any religion.)

So, we should indeed agree that “contractualism requires coercion to be justified by reasons that all reasonable citizens can endorse regardless of their general moral standpoints” (59)—if we use the word ‘moral’ as standing for “comprehensive” theories. I instead propose another word ‘ethical’ for that, and we must agree that a good *moral* theory for people at large cannot be

² Locke, Second Treatise of Civil government, II.6

based on any one *ethical* or, therefore, comprehensive theory. But a political-moral theory, as noted, does not have to be “comprehensive”—indeed, not only does it not have to be, but, if it is to achieve its purpose in a diverse community, it *must not* be so. Contractarianism has the signal virtue that it is not such a “comprehensive” theory. It is, however, nevertheless a *natural* law theory in the first and more relevant sense: it is a theory about how to underwrite claims about how people are to behave toward each other—quite independent of and prior to any political institutions.

Invoking the idea of a social contract makes clear that what these fundamental moral rules are about is the mutual adjustment of our behavior to each other. Each, with his or her specific profile of interests and abilities, makes the best deal possible with others in the way of general rules, invokable by any and at all times. It being so, we all forego some liberties in exchange for the commitment by others to adhere to the same rules. Thus, it is a bargain in the sense that the costs of our own commitment are outweighed by the benefits of others’ similar commitment. The question before us is whether these commitments include *enforceable positive welfare rights*.

6. Possession vs. Ownership

Brettschneider’s next, and extremely important, confusion is between *possession* and *ownership*. As I have explained at length elsewhere,³ these concepts differ. *Possession* is descriptive, while *ownership* is normative. To say that somebody “possesses” something is to say that he has it “in his grasp”—he in fact controls it. But ownership is morally or legally approved, *legitimized* possession. The thief possesses my car after he steals it; while he possesses it, I do not, but I still *own* it—it is still *mine* in the relevant moral (or legal) sense.

Now I have said “moral (or legal)” though, of course, not meaning to equate them. And we cannot equate them, for legislated laws can be (and, I think, typically are) immoral. Yet what morality permits or requires may well be illegal in this or that place. Smoking marijuana is morally legitimate but illegal in the United States and most other states as well; murder is immoral and happily illegal almost everywhere.

³ Jan Narveson, “Property and Rights,” *Social Philosophy and Policy*, 2010, 27 (1): 101-134. The distinction goes back at least to Rousseau: “What we lose is our natural freedom and an unlimited right to everything we can get. What we gain is civil freedom and the *propriety* of all that we *possess*” (*Social Contract*, Bk. I, sect. 8; emphases added).

Thus our question is this: when and with what restrictions should someone's *possession* of something, either actual or potential, be protected in the sense that people in general ought to recognize it as legitimate and thus refrain from interfering with that possessor's use of the thing? In other words, when is possession to be recognized as *property*? The question is *not* "which possessions are *in fact recognized* by the law of the land?" Answers to the latter are all over the map. Answers to the former, quite possibly, are not. We need sound theory to settle the issue.

Note also that the subject of ownership is *intrinsically social*. *Possession* is not. Possession is two-termed: Jones either has *X* within his grasp, his control, or he doesn't. He could be in possession of something all alone on Robinson Crusoe's island. Whether anybody else is around to recognize or to dispute that possession is irrelevant. But *ownership* is a matter of everyone else either in fact accepting his possession and leaving him to it (as with the adoption of property laws, within a given political entity, aided by the authorities), or things being such that they *ought* to so recognize it (most states have wrong or inadequate property laws in one way or another.) In defense of their property, they might do well to go further and help other owners by defending them in their ownership of what they own, that is, what they *properly* possess or *ought to* possess.

Thus property is indeed, as Brettschneider sees, intrinsically exclusive. For A to have a right to do *X* is for B to have a duty to refrain from interfering with A's use of *X*. The entailment of duties by rights is *definitional*—rights would mean nothing if they did not entail duties. This is why Hobbes' famous "right of nature" is nonsense.⁴ It is logically impossible for everyone to have a right to do absolutely whatever he feels like, to and with what or whom ("even to one another's bodies," as Hobbes puts it), so long as people differ at all. For A's right is B's duty, but B's complete right to do as he pleases is logically incompatible with B's having any duties at all. When Hobbes talks that way about rights, he has to mean not *rights*, but *liberties*. In a state of nature we are *by definition* "at liberty," in the legal sense, to do whatever we like—since, again by definition, in that condition there are not (legislated, politically imposed) laws. But that in no way entails that we are

⁴ "The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reasons, he shall conceive to be the aptest means thereunto" (Hobbes, *Leviathan*, Ch. XIV, first sentence).

at liberty in the *moral* sense which is what Hobbes was supposed to be talking about. His First Law of Nature is about duties: we are enjoined, required, not to make war on each other. As Hobbes said, the point of the Law is to *restrict* our liberties, in respect of our relations to each other, and the result of those restrictions is that, as Rousseau later put it, we are far freer than we were before. Or at least, we are if those restrictions are also observed by any state that allegedly exists to protect us—as they all too often are not.

So now: which of a person's possessions, if any, should be recognized as legitimate, i.e., recognized as that person's *property*? And, of course, why? These questions are what a theory of property law is all about. Ownership excludes—it legitimizes exclusions. But why should those persons who are excluded put up with that exclusion? Brettschneider's subject is, "whether the right to exclude could be justified to a person with minimal or no ownership" (61). This is indeed a proper and crucial question.

In putting the matter this way, however, Brettschneider apparently assumes that the subject of property is *exclusively* the possession or ownership of things external to oneself. Locke, however, famously holds that a man *owns himself*. And he is perfectly right. Ownership is the right to use the thing owned as one sees fit (within whatever limits are imposed by *other* persons' ownership of whatever they own). Thus it is absolutely of the essence of the general right to liberty, of which Locke and presumably also Brettschneider is a proponent, that it is a *property right in oneself*: One is permitted to *do* as one pleases—which is to say, to *use* (all or part of) oneself as one pleases (within the same limit, of course). For doing, after all, is nothing more or less than using some or all of oneself so as to accomplish something or other.

The job of justifying property in this broadest sense is therefore the job of justifying liberty. What the social contract is fundamentally to give us, according to us liberals, is the general *right* to liberty. To do that is to agree that we are *not to interfere* with the liberty of others, i.e., to aggress against them in any relevant respects. And the contractarian defender of libertarianism holds that this is a good bargain for all: we should ask all others to respect our liberty in return for our respecting theirs. By narrowing down the range of our available actions, we greatly increase the value of our lives—we *all* do, rich or poor. This is the idea: let us now see whether it works. Brettschneider thinks it does not.

7. Propertylessness

Having noted the significance of property in relation to liberty, there is a problem in talking of "propertylessness." For we are *all* selves, and on the

general liberal view, we all *own* the selves that we are. That is precisely what it means to say that we all are to be allowed to do as we like, within the limits of others' like right. So in that sense, of course, it is logically impossible for a living, breathing human to be utterly "propertyless." Brettschneider is, then, talking about a *subset* of owned things, namely whatever such things exist outside of the selves whose ownership is in question. Of course this is important. But it is of more fundamental importance to recognize that the *only possible basis* of such ownership is *prior possession*. That is to say: it is people wading in to nature and making use of such things as they may find there that is the initial stage for property acquisition. We liberals assert that this person is to be free, to do as he pleases within the limits imposed by the like right of others. Thus he starts out with property, namely himself, and the only way you can take *that* away from him is to kill him. To insist on his right not to be killed (for any reason short of self-defense) is as basic as one can get in social theory. That is not just Locke's take on property—it is pretty much everybody's.

Now to say that people "*own*" things (such as ourselves) is to say that the rest of us have a duty to *allow* that person to *use* them. In the liberal view, we all own ourselves, and thus others are *excluded* from the free use of us; others have to *ask* before they use anyone. Brettschneider does not appear to think that the justification of *that* exclusion is a big problem. But why not? Would-be slave-owners, murderers, and manipulators might well complain! Yet it is the essence of liberalism that this complaint is rejected. The social contract take is that we each do better if all forego any supposed rights to possess others—people cannot be owned by anyone except themselves. Defending liberty in that way is fundamentally important to the philosophical defense of libertarianism.

So, why should we accept the liberty principle? Because when we humans confront each other, we each note, regarding all others, that they are the sort of beings that can, in the course of their practical deliberations, relate to *us* in one of three ways: either

- (a) they make war on us—that is, they simply *use* others as they can by employing whatever powers they have, irrespective of the interest or disinterest of the persons thus used in going along with it. That means, in short, they intervene to make life *worse* for the person in question; or
- (b) they do things that will make life *better* for the persons they interact with, so that we can in general expect those people's consent, often enthusiastic; or

(c) neither of the foregoing—we simply go our separate ways.

With regard to the other roughly seven billion human beings, the third is the norm. As to the other two options, though, it is utterly obvious that we prefer (b) to (a) in general. The other person's violent depredations against us make life worse for us—just what we do not want. The other person's helpful ministrations make life better for us—just what we do want. And with persons who affect us not at all, we have no complaint. So on the face of it, our preference is for peace rather than war.

Note that the peace we are all able to provide to each other is incompatible with compulsion, by definition. Compulsion is only acceptable insofar as it is necessary in order to protect the general right of liberty that we all give each other. Those who violate anyone's legitimate liberty are dropouts from the agreement, and so the rest of us are not bound to let them commit such violations, or to get away with it if they do. But also, we are not allowed to use force for any further reason against non-consenting others.

Is it always the case that we all gain maximally from general liberty? No. The strong might gain at the expense of the weak, who can, on occasion, do nothing about it. Maybe. Of course, there are the strong and the stronger; and there are, as Hobbes notes, people who gather together to overwhelm others, overcoming individual strength. But if our question is, when we think in a cool moment about how things should be in general—which should we have in society generally, war or peace?—then the answer is, hands-down, Peace. Even the warlike will have to sleep, and when they do, their maid Judith⁵ can sneak in and remove their heads. Partial peace, peace with at least a trusted few, is a necessity for all; war runs the prospect of losing, and the more warlike one is, the more enemies one makes. Peace, on the other hand, leaves us each free to do as we please. There's just no contest, among general rules for all to insist on and appeal to in relation to all.

So if people are to come to *own* anything else—that is, to have their use of things outside of themselves accepted as rightful and thus not interfered with by the rest of humankind—the natural route would be that, since they own themselves and are thus free to act in the world, and a lot of their actions involve using things in the world, we thereby also recognize as legitimate the possessions they thus come into, so long as they do not thereby jeopardize the liberty of others. This, in the classical accounts, is the general

⁵ See, for example, various paintings of *Judith Slaying Holofernes* from the biblical story. I especially recommend Artemisia Gentileschi's version.

contractarian agreement. Can we make it work? In my view, following Hobbes, Locke, Kant, and many others, the answer is yes. Brettschneider apparently thinks otherwise.

In an artificially specified model, what we have are people and things, and people undertaking to use those things. We will suppose that at this artificial “outset” much has as yet not been used, apart from the bodies of those present and some few things. So let us take the rest. At some point if we go back far enough, it must be that every particular thing outside of every particular body has at that point and before been unused by anybody. Our question now is this: Supposing that person A undertakes use of item *X*, and that person B is a “second-comer”: he perceives that he might have had a use for *X*, but alas, A beat him to it.

Question: has A thereby *imposed a cost* on B? Brettschneider and those many who argue as he does say yes. In taking anything anywhere, any person thereby imposes some kind of loss or cost on everybody else, and therefore owes those persons compensation in the form of *providing* them with something, over and above the respecting of *their* liberty. In this, I say, he is wrong.

So let us turn to Brettschneider’s concerns about this “natural” reasoning. He is concerned about usable external items of whatever sort might be capable of being brought into use by someone as an individual, or by some persons acting in concert. Do we allow this or don’t we? If our general argument for peace is correct, the answer is that we do, provided only that the uses to which people put things do not work to our harm. That requires, then, the premise that *my recognizing your right over some item that you have already brought into your use costs me nothing*. Brettschneider thinks this premise is generally false. It is this that I argue he is quite wrong about (along with the innumerable other recent writers who apparently think the same way).⁶

This commonly held view (among social philosophers) that when we *exclude* people from using what we have come to possess—apparently harmlessly to others—we thereby impose a cost on them, is to begin with misleading. And in the most obvious sense we can attach to that, it is normally, of course, just plain wrong. When the Australian aborigines killed kangaroos and ate them, or planted vegetables for their consumption, their

⁶ See, for example, several in Malcolm Murray, ed., *Liberty, Games, and Contracts* (Aldershot, UK: Ashgate, 2007).

actions imposed *no* costs on any of us anywhere else. That the taking into use of *X* by person A imposes a loss on other persons, B, is in almost all cases obviously false on any empirically sane account. To suppose that the exclusion which property rights do entail is the imposition of some sort of loss on those excluded *in general* is virtually always false, and about as obviously so as can be imagined. Presumably Brettschneider cannot really be arguing that they *have* had some actual cost imposed? But if not, then, what?

8. Exclusion and Competition

Why would philosophers think otherwise? There is one obvious thought here: it is, of course, true and necessarily so that when A comes into possession of pre-existing object *X*, then *X* thereby cannot be taken into the possession of anyone else. Possession of any given material item *X* is intrinsically competitive as between any possessor and any other would-be possessor. We'll set aside the basically irrelevant case of co-possession, even though that is sometimes quite possible and frequently actual. But it is irrelevant because, while sometimes quite possible, it is not the norm and can hardly be. In order for co-possession to be possible, the co-possessors need to be cooperating: they *agree* to share possession of *X*. In lots of cases, co-possession is not in any way possible: If I eat *X*, you do not. In many others, while it might be possible, the relevant candidates do not *want* it. This is a point that is insufficiently appreciated by utopians and socialist-anarchists. Their proposed sharing is compulsory, not voluntary, and is already a denial of liberty.

The fundamental point, then, is that it is *impossible* for *X* to be possessed by more than one would-be *sole possessor*. Not only can no man serve two masters, but no stone or prune or mountain, or anything, can either. It therefore *cannot* be a rational ground of objection that if A owns it, then B does not and is therefore excluded. But presumably Brettschneider believes that his objection is rational. So *this* cannot be his argument. What, then?

9. Ties and Such

There can, of course, be cases of ties or near-ties: cases where A seizes one end of *X* while B is seizing the other, only to find when they meet in the middle that there is a problem. Or perhaps A takes *X* into his possession ten seconds prior to B.

In the case of ties, various resolutions are possible: one actor can buy out the other (by in-kind trades, if money has not yet been invented), or conflicting individuals can agree to flip a coin, or they can agree that this time A gets the object and next time B does. Or of course they can fight it out, in which case one of them will end up without *X* anyway, and the other may have wounds to accompany his now-uncontested use of *X*. But the social contract, we are supposing, forbids this option. In enjoining aggression, it requires a fundamentally peaceable resolution.

Let us address the case of near-wins. When A arrives ten seconds before B, does A *impose a cost* on B? No. By the time A gets it, B is too late. B did not have it before, and now he still does not have it. So A has not *harmed* B; he has not worsened B's situation—he merely *has not improved* it. Thus there is as yet no case for claiming harm as a consequence of exclusion. A is engaged in case (c): mutual non-affecting and thus non-interference.

It is sometimes true that one person, B, has invested, perhaps heavily, in his search for *X*; person A then finds *X* by sheer luck. Has not A imposed a cost on B? Answer: No. A did not even know B prior to finding *X*. He is walking along the beach, and there is a diamond (as in Bastiat's wonderful example⁷), which he picks up and puts in his pocket. Along comes B with his expensive diamond-seeking gear and complains that A expended practically no time or effort in acquiring the diamond. This is true, but the complaint is misguided. A did not *impose* anything on B. All he did was find a diamond, by accident, with no one else having seen it first. Period. There are no impositions on A's part, only B's tough luck. In a sense. Of course, if B really wants the diamond, all he has to do is make A an offer for it that A will accept. That or use his equipment to find his own diamond—either way, there is no problem here.

Brettschneider addresses a familiar claim on the part of advocates of property, such as Aristotle and Adam Smith: that it is in the interest of all that people be able to own property, which entails that they are entitled to exclude others from the use of what they acquire or create. Both Aristotle⁸ and Smith, among countless others, plausibly argue that this is better for everybody. As Brettschneider puts it, “According to this view, it is only when land and wealth are privately owned that they can be productive for the entire society”

⁷ Frederick Bastiat, *On Value*. Esp. 5.52-5.53.

⁸ See especially Aristotle's discussion in *Politics*, Bk. V.

(61). The familiar reason is that individuals who own things have an incentive to improve and preserve them, whereas individuals who share common ownership have much less, or even no, incentive to do the same. This was also noted by Aristotle some 2300 years before the topic became popular among academics. Brettschneider continues, “Libertarians who embrace such reasoning contend that property ownership is not a zero-sum game in which society must divide up a given amount of wealth. Rather, private ownership increases the overall amount of wealth that exists in a society, and this aggregate increase in turn benefits all” (61). Precisely! But why does he express the idea with such tentativeness? What Aristotle and Smith and so many others “embrace” is, simply, true—no reluctance or qualification is called for.

So understood, though, we may appear to be confronted by the problem that as a matter of fact, not *everyone* need thus benefit. So Brettschneider says, “Minimal Owners reasonably could reject such a scheme because their reasonable interests are sacrificed for the interests of others in society” (61). But are they, indeed? How? Brettschneider cannot, after all, simply *say* that. In order for his argument to qualify as a genuinely contractarian one, this last question *requires answer*: it cannot be assumed, without analysis, that allowing private ownership will actually *harm* even the least fortunate among the non-owners. Yet unless there is some clear sense in which this is true, there is no foundation available for his conclusion. I got my *X* by luck and hard work. You lost out by an insufficiency of one or both. How does that mean that I’ve actually *harmed* you? How does that support a conclusion that I *owe* you some part of what I have thus acquired by virtue of my good fortune, hard work, or whatever?

Notice, if I actually *did* harm or deprive you of something, that would support the conclusion. But unfortunately for the Brettschneider argument, it is not obvious that I did. Indeed, what seems obvious is more nearly the reverse, as we have seen above. By hypothesis, we both started out with *nothing*. So I can hardly be thought to have *deprived* you of something by virtue of beating you to the pumpkin patch. What, then? If I had intervened to trip you up in the race, that would be arguably another matter. I then did indeed harm you. But the trouble is, I normally *didn’t*; and the general case is that there is a presumption that it *is* normal. Each, we assume, was just minding his own business—*viz.*, to acquire those pumpkins and thus ward off starvation for another day. Not everyone is so fortunate—so what? Universal altruism or pie-in-sky egalitarianism are *persona non grata* as premises here. Brettschneider is supposed to be showing us that libertarianism *entails* the welfare state. So far, he has done nothing of the kind.

10. A Note on the Commons

Locke notably holds that the earth is a “commons,” prior to the onset of private property. But this is wrong, strictly speaking. Prior to the onset of property notions, the earth is *not* a “commons.” There are *no* property rights of any sort. A commons is an area shared by a group of people on the mutual understanding that any member *may* use whatever he comes upon in it—the other members may not molest him for doing so. They have very limited or no rights of individual property acquisition. Such a social arrangement is logically possible, and has sometimes been actual, depending on the envisaged scenario. In many families, for instance, a good deal of property is common. But it is not similarly available to nonfamily members. And if there should be a native tribe occupying, loosely, some large area, then they too will share among themselves, but definitely not with those so-and-sos, the thieving tribe over the hill. The “commons” does not extend that far.

Commons in the proper and normal sense are actually cases of loosely held private property. Their looseness is itself a problem, for the newcomers who come along and unwittingly settle in place X, only to find, months later, that the tribe is back for its semiannual hunt or whatever, did not realize X *was* occupied. They have a problem of the same general sort as ties.

11. The Bigger Pie

Where Brettschneider really understates the libertarian case, however, is in making the familiar assumption that somehow, what there is in the world is *fixed* so that if I get more, you get less. Perhaps that is where he gets his apparent reluctance to recognize the (as most of us think it) obvious point that ownership adds to social wealth rather than leaving it the same. He attributes to libertarians the argument that things are *not* fixed, but he does not make much of it. That is unfortunate, though, for in fact, as time goes on, *everything* is made; almost nothing is “natural” such that getting wealthy is a matter of grabbing this pile of pre-existing stuff. The “libertarian argument” is so obvious that perhaps only social philosophers can overlook it. When people grow beans in a previously beanless world, the world has that much more usable resources available. When Neanderthal Smith picks an apple in the state of nature and eats it, the world now has one more satisfied individual for so long as its benefit lasts. And so on, for all cases in which someone makes a useful change in the world without doing so at the expense of others—the normal cases, in short.

The question is, once again: if I create some very valuable thing which did not previously exist, just how are you *harm*ed if I *don't just let you have it* (or

part of it)? Brettschneider does not even address this question. But it is far and away the most important question in this whole discussion. For if indeed you are *not* harmed by my inventiveness, then on Brettschneider's terms, you have *no* case for a right to a share. Only by invoking some prior right, which on his terminology would have to be based on a "comprehensive" scheme, would he be able to defend it. But as he has agreed, such schemes are not available as premises in this matter.

12. Reasonable Interests

Brettschneider puts into the mouth of his "Minimal Owner" these words: "I am entitled to have my basic interests met in exchange for respecting your right to exclude me from your property, because meeting my reasonable basic interests is the basis for justifying the right to exclude" (62). Unfortunately, Brettschneider's "Property Owner" is not perceptive enough to have noted that what Minimal Owner is asking for is a handout, pure and simple, rather than a sort of payment for a sacrifice that Minimal Owner made. For he made *no* such sacrifice, other than the "sacrifice" inherent in not being able to be in two places at once, or have a cake while eating it. Nonminimal Owner, however, is perceptive enough to notice this.

Is there another option? Well, Brettschneider and others are perhaps thinking that Minimal Owner, after all, *laid down his liberty to resort to the sword*—his liberty to get what he needs by taking it by force. As indeed he did. But was that a sort of down payment on a welfare allotment? No. For the property owners, by our assumption here, have *also laid down that liberty in relation to him*. They could, after all—being, let us suppose, relatively well provided for materially and thus able to afford better weapons—have taken up MO's challenge and probably dispatched him long ago. But they did not. And why? Because they got, and reasonably expected to get, the same from him. It is a fair exchange, and that is what makes the social contract so appealing.

Thus, in response to Minimal Owners' afore-cited plea, Nonminimal Owner says this: "If you mean by your "basic interests" the same basic interest we all have, namely in not living in fear of our neighbors' fists and swords, then of course you are entitled to have them met, and they *have been* met, as you see. I never set hand upon you nor anything of yours. But if by having them "met" you mean that I have to *feed* you, well, *why*? What have you done to deserve that from me? So far as I can see, nothing!"

Now, it will not be very surprising if people in desperate circumstances resort to force against those who were luckier or smarter or productively

stronger. No surprise, indeed—but it can hardly figure as a premise in an argument on this subject. Notionally, our Minimal Owner has no better a case against our Property Owner's using force to get what he wants than vice versa. It's a draw. And that is the point. The First Law of nature, says Hobbes, is universal and, so long as human nature remains anything like what it seemed to be at the time, necessary.

13. Coercion

Brettschneider does believe there is another dimension to this problem. Noting that an argument like the one just sketched might be used by the libertarian, the question arises why he thinks he has done better. To this he says, "As I have framed it, however, the question of political justification concerns why coercion itself is acceptable, not whether persons are worse off after coercion than they were before" (63). The first point to make is that this is a very odd claim, since coercion *by definition* leaves one "worse off than before," and thus its use against oneself can hardly be thought to be "acceptable" as such.

Why say that coercion *by definition* leaves one worse off? The answer is clear when we reflect on what coercion is. A coerces B into doing X when A threatens B with some evil unless B does X, which by hypothesis B *does not want to do*. If he *did* antecedently want to do it, there would be no need for coercion: A could just ask, and B would cheerfully supply! (As with charitable people who need no argument to spring into action and assist the needy.) The background for coercion, however, is *necessarily* that B does not, antecedently, *want* to do what A is trying to force him to do; B wants to do Y instead, which he regards as better. But along comes A who deprives him, perhaps at gunpoint, of the option of simply carrying on doing Y. This by definition has to leave him on a lower preference level, and hence, worse off.

Brettschneider continues, "Therefore, the relevant question does not involve a comparison of pre- and post-coercion status, but rather asks whether the society can justify coercion by explaining how it is consistent with meeting people's reasonable basic interests" (63). But this, alas, is fatally ambiguous. No one objects to others satisfying their own interests, reasonable or otherwise, so long as the process of satisfying them does not interfere with one's own interests. We all, of course, have the *negative* right to do this—the right to take any measures we can to achieve a result that is better for ourselves, *so long as* they are not at the expense of others. But welfare taxes *do* worsen the situation of those from whom they are extracted (or at least, from the subset of those taxpayers who don't *want* their money

used for that purpose)—that is how and why they are coercive. If people responded out of sheer charity to the situation of the needy, there would be no objection at all. Instead, there would quite likely be a round of applause from the libertarian community. But that is not what is in question here. Brettschneider's thesis is that we all have an *enforceable right* to a share of the work of others in order to meet *our* needs. To the extent that it exists—which is, to be sure, very considerable—charity would undercut any need for resorting to coercion. This is not at issue. What is at issue is society's *right* to resort to coercion for charitable purposes. And on the premises of the social contract, that right has not been established by the sort of arguments Brettschneider employs.

Brettschneider goes on to say, that “In societies that fail to guarantee all individuals’ reasonable basic interests, there is reason for citizens reasonably to reject the right to exclude” (63). Once again, there is a fatal ambiguity: *of course* society should *guarantee* (insofar as that is possible, to be sure, consistently with the liberty of all others) a person's *negative* right to do what he can to meet his basic needs. But that does not guarantee that those needs *will be met*; the person's powers and options might not be up to it, and others might not be generous enough to help out. As society gets wealthier, of course, this latter possibility recedes into the mist. In contemporary societies, we do not need welfare rights to keep the indigent from starving. But meanwhile, the poor have no case that they are poor as a general result of the acquisitive activities of their fellows. And that, on contractarian grounds, is to say that they have no case at all.

14. Baselines

A contractarian scheme requires baselines. A is wherever he is at time t ; B is wherever he is at time t . A proposes a change; B will accept if it is an improvement, or at least makes him on the whole no worse off than at t . A proposes the change only if it makes him, in his own estimation, better off than if he does nothing. But possibly someone could arrive at the baseline, a murderer, say. True. But of course, murderers are people who, on some previous occasion, chose to worsen the condition of someone relative to what that person previously was. Egalitarians complain if the baseline is infected with inequality. But where do they get their preference for equality, and why would anyone else pay any attention to it?

The thorough contractarian procedure would take us back to a pre-moral “state of nature” in which the rules being considered for adoption are not yet in place. Then we look for the arrangement that leaves everyone

better off or at least no worse off. If the pre-moral state contains, say, slavery, then suppose that the slave master proposes increasing his slave's diet by ten calories a day. Would that do? But the slave would point out that he himself was enslaved at some time, greatly worsening his own situation. If he is asked to put up with his condition as a slave, this last will help, but not much. What will help completely is to eradicate all the changes that were made at his expense without his agreement. Once we reach this point, however, we can no longer do better for all without thereby worsening someone else's position. So we stick there. And that is the libertarian pareto optimal position.

Achieving the world in which our rights to our general liberties—hence, our *lives*—are fully respected is undoubtedly very difficult. So is a political state in which everyone has fully guaranteed rights to life and health, either negative or positive. This has never happened, and probably never will. But a world at peace—a world that respects our *negative* rights—takes precedence, and it *can* happen. Being secure from the readiest source of danger, namely our fellows' capacity for doing evil to us, would be first on any list—even if having a square meal comes a close second. Alas, in today's world, due to the ministrations of power-wielding governments, the square meal is often easier to come by. But it is also easier to come by than in a world in which the person around the next corner is out to shoot you.

None of this is to deny that there could be other kinds of reasons why societies might be wise to inaugurate welfare-state schemes. It is only to show that the exclusionary nature of property ownership is not such a reason in itself. But that is what Brettschneider was arguing. So if there is to be a genuine *basis* for welfare rights, we have to do better than this.

15. Conclusion: Back to Square One

We should conclude by observing how Brettschneider misstates the case for the way in which we all benefit from general liberty rights, and their entailed exclusionary implications. A world in which these rights were fully observed would be one in which literally everyone *would* be better off than in a world where people were allowed to use force for whatever purposes they liked. We all, including the warlike, benefit from peace. The warlike “lose” in that they can no longer make gains at the expense of others. But they win in that they remain alive longer than they otherwise likely would, and would be unimpeded by their fellows in their efforts to improve their own situations, insofar as those efforts are compatible with respecting the like right of all others, including (therefore) their property rights. And that, as I pointed out above, applies especially to the poor, who would be generally much more

vulnerable than the well off. (It is odd how writers assume that property rights favor the rich. Those rights favor *anybody who has anything or could possibly acquire it*, and what little the poor have is arguably a lot more important to them than most of the goods of the rich are to *them*.)

There will be some who will still dispute this. I believe that is because they do not do justice to the terms of the social contract. Those terms are: we start where we are, *wherever it is*, and we address the question of what sort of general rules everyone should rationally accept to be imposed on everyone. We *all* address this, and we must *all* agree—not just a majority, say.

Of course we do not in one sense obtain universal agreement. For there may be a few people who genuinely relish warfare or who *think* they can maintain power over others. The truly universal agreement is simple: there are no rules at all. Thus we who fear you may, and if we know what we're doing, will, attack you before you attack us. If you believe war is better than peace, you will make war, and there is nothing the rest of us can do about it but beat you in the ensuing fracas.

But everybody *else* will note the implausibility of the position that *some* of us are entitled to make war on *some* of the others even though they have made no such war on us. Yet that is what Brettschneider is claiming: the non-producers, the “poor,” get to beat up the producers—the successful, the wealthy—and yet the latter do not get to defend themselves. How could Brettschneider think this will look to the well-off like an acceptable bargain? One has to guess that he shares the aversion to great wealth so typical of middle-class academics (since Aristotle onward). How else to explain their bias against the successful? But once we bear in mind that the social contract is for *everyone*, the need to take into account what they want, speaking from their interests like everyone else, should be clear enough—and should be kept in mind. No mere subset of those concerned—rich or poor—is able to get it all their way.

Another note along the same line can be addressed to those who playfully ask why we should be so concerned about “first-comers.” Why, they ask, not privilege 2nd-comers, or *n*th-comers? But to ask that is to misunderstand the issue. When someone, A, is using something and someone else, B, comes along and grabs it from A, probably whopping him with his cudgel in the process, B invades and aggresses. Invasion and aggression, of course, are precisely what the liberty principle disallows. No such thing is true of “second-comers,” though. So the answer is simple. The point about second-comers is that they *do not have* the things they want, which by hypothesis are already in possession of someone else. And so, while

aggression will have to be used to take it from those who possess, if they do not want to surrender them voluntarily, that is not true of (n th+1)-comers. Since such comers *don't* have things, no sort of aggression is needed to take them from them. And obviously people cannot be imagined to have a *general* interest in “second-comers” such that they would rationally abandon a right to what they have acquired in order to accommodate them.

Thus the correct solution is as stated: when it comes to using force against each other, the rule is that it is to be *universally* renounced as usable against any nonaggressive party. Peace from you deserves peace from me—no more, no less. All of us give up the liberty to gain by worsening the situation of others. The situations of the poor have not been worsened by the acquisitive activities of the rich—if anything, they have been greatly bettered. So the involuntary welfare state, in which the poor make war on the rich, who are not allowed to defend themselves—is not a contractarian-approved result. General liberty, on the other hand, is.

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