
SELF-OWNERSHIP, THE CONFLATION PROBLEM, AND
PRESUMPTIVE LIBERTARIANISM: CAN THE MARKET
MODEL SUPPORT LIBERTARIANISM, RATHER THAN THE
OTHER WAY AROUND?

MARCUS AGNAFORS*

LIBERTARIANISM AS A MORAL AND POLITICAL DOCTRINE is often the target of fierce criticism. Such criticism commonly takes as its starting point features that seem to come into conflict with widely and firmly entrenched moral intuitions. In this article, I will be concerned with a specific problem of that very sort, a problem that recently has been given a potent form by David Sobel: the conflation problem (Sobel 2012; 2013). The problem, in short, is the following: the basic libertarian tenet is full and stringent self-ownership. Transgressing self-ownership is strictly forbidden (or at least “a very big deal”). This implies that one infringement of self-ownership (say, being stabbed) is precisely as forbidden as any other such infringement (say,

*Marcus Agnafors is senior lecturer in philosophy at the University of Gothenburg, Sweden. The quality of this paper has been greatly improved by the comments of two anonymous reviewers. An earlier version of this paper was also presented at the Swedish Network for Political Theory’s annual workshop in Växjö, where the participants provided helpful suggestions. In particular, the author would like to thank Jörgen Ödalen for his insightful comments.

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touching someone's hand without that person's consent).¹ On a libertarian theory taking full self-ownership as its basic tenet, there is no way of deciding that the first such infringement is worse than the other. Libertarian theory thus assigns the same normative significance to transgressions commonly regarded as severe violations of self-ownership as those commonly believed to be insignificant transgressions, which seems absurd. Finding a solution to the conflation problem is pivotal to an adequate defense of libertarianism, as the problem is shared by many other criticisms of the libertarian family of theories.² Sobel suggests the (only) proper response is to allow that prospects of gaining or preserving important social goods can make some infringements permissible—a solution that drains libertarianism of its distinctiveness without offering a libertarian justification for doing so. This way out implies “backing away from self-ownership,” as in the title of one of Sobel's articles.

I will argue that the conflation problem can be handled in a way that allows us to honor basic libertarian commitments; hence, there is no need to back away from self-ownership, or at least not for reasons external to libertarianism. I suggest a version of libertarianism I call *presumptive libertarianism*, treating self-ownership as an assumption the actual content of which remains to be specified and validated in application, rather than as a dogma ready to be applied. In light of an analogy to a standard market model, we can arrive at intuitively acceptable conclusions from a libertarian point of departure without violating libertarian core commitments in the process.

¹ Are there other versions of libertarianism that are not exposed to the conflation problem? There might be. For instance, if the basic tenet of libertarianism is taken to be an injunction such as “Don't transgress self-ownership,” nothing is said about the normative weight of various infringements, and thus the conflation problem might not appear. However, in this article, I will focus exclusively on what I take to be the standard versions of philosophical libertarianism—that is, versions that take the idea of self-ownership as basic.

² Perhaps it can be objected that libertarianism is not committed to the idea that the self-owner is entitled to subjectively determine the seriousness of a particular infringement. While clearly a possible position, it seems inconsistent with taking, as I have above, the ultimate normative ground of libertarianism to be stringent self-ownership, where such ownership is explained in terms of control rights. On such an interpretation, which I believe to be the most common one, the self-owner is certainly within her rights to stop even the smallest of infringements of her property. What kind of compensation she is entitled to if someone does infringe her property rights may or may not be a separate question, but the conflation problem will remain a problem since it is concerned primarily with normative protection rather than compensation.

Since my radical proposal is likely to raise suspicion among libertarians, I will spend a large part of the paper defending it, although both my proposal and my defense of it will by necessity be much briefer than the ideal. In short, I will argue that presumptive libertarianism is not only a coherent and theoretically elegant notion helping us to disarm the conflation problem, but a version of libertarianism that honors pretheoretical commitments to self-ownership and liberty better than some mainstream versions of libertarianism.

In the first section, I will describe the conflation problem and explain in what way it is weighty. I will then turn to an outline of the proposal I claim solves the conflation problem. It involves a reconceptualization of what kind of theory libertarianism is: from self-ownership as dogma to self-ownership as presumption. Using a simple free-market model as an analogy, I argue any rational and committed libertarian should welcome my solution. In the last section, I offer a defense against various anticipated criticisms, the most important being a charge that the proposed solution is nonlibertarian. I argue that presumptive libertarianism actually holds closer to a libertarian core than does any standard version of libertarianism. Hence presumptive libertarianism ought to be accepted by libertarians—whether they will in fact accept it is a different matter, as doing so will come at the cost of removing some of the characteristics and outcomes usually associated with libertarian theories. But, as I will argue below, that is a price that must be paid to make libertarianism compelling.

I. The Conflation Problem

Mainstream libertarianism—both left and right—subscribes to the self-ownership thesis, claiming that every individual is the legitimate, full, and sole owner of their own person. Every self-owning person thus enjoys the same normative protection against all kinds of infringements of their property: dropping a pin on someone's head is as forbidden as is dropping a hundred-pound rock from three floors above. Hence, the libertarian self-ownership thesis establishes a strict moral boundary around the individual, who is controlled by that individual alone. Given the self-ownership thesis, Sobel describes the problem confronting traditional libertarianism in the following way:

The problem is that it is implausible that we enjoy the same degree of protection against all actions that infringe upon self-ownership. If we enjoyed such powerful protection against trivial infringements too much would be impermissible. Your trivial pollution, for example, that eventually falls to the earth and causes some small risk

of minor skin irritation, would seem to infringe upon my property rights over my skin. (Sobel 2013: 101; see also 2012: 36)

Sobel calls this the conflation problem, as the self-ownership thesis seems to conflate the severity of infringements.

While Sobel's version of the problem is paradigmatic, note that the conflation problem is not a singular problem, but a family of problems.³ Consider, for instance, proportionality in punishment. If all infringements are equal, then stealing a pin could be justly punished in the same way as genocide.⁴ Moreover, consider an inverted version of the conflation problem: if Andrew and Brenda respect Charlotte's rights, they equally deserve praise. But if Andrew abstains from stealing a pin from Charlotte despite being offered \$1,000 to commit the crime, and Brenda abstains from torturing Charlotte despite being offered \$1,000, it seems absurd to say that Andrew and Brenda equally deserve praise. Rather, it seems Andrew is more deserving of praise, since he could have gained much from causing only a minuscule harm, while Brenda could have gained the same amount but at a much steeper moral cost to herself. But someone claiming all infringements are equal cannot justify this assessment.⁵ Note also that the conflation problem could be described as the basic version of some of the most persistent and disturbing problems confronting libertarianism. For instance, we can understand the "easy rescue cases"—such as Shallow Pond examples—as challenges to the libertarian claim of self-ownership for conflating and

³ And, it should be noted, not a new family of problems. Robert Nozick, in his *Anarchy, State, and Utopia* (1974), seemed to recognize the problem, as did Thomas Nagel in his well-known review of Nozick's book:

Even if it is not permissible to murder or maim an innocent person to promote some highly desirable result, their protected rights do not all have the same degree of importance... It is far less plausible to maintain that taking some of an innocent man's property is an impermissible means for the prevention of a serious evil, than it is to maintain that killing him is impermissible. (Nagel 1975: 141–142)

⁴ No doubt many libertarians will be unhappy with this particular version of the conflation problem. However, I will not pursue the issue here, as I believe there is no fully acceptable libertarian theory of punishment at present; furthermore, I am inclined to believe that the theory proposed below might be applicable to all, or nearly all, versions of the conflation problem.

⁵ Libertarianism interpreted as a full-fledged moral theory will be exposed to more versions of the conflation problem than a libertarianism seen as a theory concerned only with enforceable duties. However, the strength of the conflation problem is arguably greater in the versions pertaining to the latter interpretation of libertarianism.

treating alike a minuscule infringement and a major infringement. The libertarian therefore cannot afford to ignore the conflation problem.

Note that the conflation problem challenges libertarianism in two ways. First, it suggests libertarianism conflates two extremes that, intuitively, should not be conflated. Stealing a hair and stealing a kidney are different, and hence they should be treated differently. In this respect, the conflation problem points to the apparent fact that traditional libertarianism, in subscribing to the self-ownership thesis, is mistaken, since it treats two different actions as if they were, normatively, the same. Second, if we were to conflate the ends of the severity spectrum and afford them both equal and strict moral protection, then everyone's liberty would be severely restricted. Hence, the conflation problem is a problem for any libertarian who values liberty.⁶ The conflation problem, then, criticizes standard libertarianism because of both how it describes our moral world and how it does not attribute the proper value to, or use the proper conception of, liberty. To understand the twofold character of the conflation problem it is crucial to identify a fitting solution and to discern the costs of such a solution.

II. Presumptive Libertarianism

When discussing possible responses to the conflation problem, Sobel outlines “the most natural and plausible fix”: “that we allow that different property infringements are differently important and we are owed different levels of protection against them.” (Sobel 2013: 101) This means that “differently important infringements can be made permissible by different amounts of social good” (Sobel 2013: 105) and that “the badness of the rights infringement vary continuously with the size of the risk and the harm” (Sobel 2013: 116). This solution he labels the “Value-Sensitive Self-Ownership View” (VSSOV).

According to Sobel, the VSSOV must be rejected by libertarians, as it requires a theory of value at odds with self-ownership. Sobel examines a version of the VSSOV relying on objective values (some infringements are less serious than others, independently of the right-holder's attitudes, broadly understood) and a version relying on subjective values (the status of an infringement stems from the attitudes, broadly understood, of the right-holder). Neither version appears promising. Reliance on a theory of objective values seems to conflict with the idea of self-ownership and the sphere of

⁶ For instance, see Sobel (2013: 101, 110), where he states that “such view no longer seems attractive from the point of view of liberty,” and also Sobel (2012: 36).

normative control it entails. And adopting a theory of subjective values requires troublesome trade-offs. For instance, if the general feeling within the moral community is that free speech is not very important, it will not be protected as a right. Your preferences and valuations can be overridden by others' preferences and valuations. Both approaches seem to run counter to libertarian theory (Sobel 2013: 120-122).

Sobel's criticism seems persuasive. But I contend that the subjective strand of the VSSOV can, *pace* Sobel, be successfully developed and defended on libertarian grounds. The presumptive libertarianism discussed below is a version of the VSSOV, but one that maintains a well-argued connection to libertarian values. But before expounding my proposed solution, it is paramount that we understand exactly what is required of an acceptable solution to the conflation problem. When Sobel rejects the VSSOV, he does so based on three criteria:

- (i) Any differences in the normative status of infringements must (a) stem from the idea of self-ownership, or at least (b) not be ad hoc or (c) be in tension with the self-ownership thesis (Sobel 2013: 119).
- (ii) The solution must vindicate a "broad impermissibility against paternalism and the near inviolability of our body when it comes to taking money, hair or blood for others who badly need it" (Sobel 2013: 119).
- (iii) The solution must allow for "infringements on our property rights where we think we surely must permit them" (Sobel 2013: 119).

Succinctly put, (ii) and (iii) in conjunction state that a reasonable solution must strike a balance between self-ownership and the welfare of others that aligns with deeply held moral intuitions. Criterion (i) is somewhat unclear, as self-ownership does not necessarily have content equal to that of the self-ownership thesis, the latter being a formal and technical notion. For reasons I will explain below, I will rely on self-ownership as primary in an evaluative standard. Sobel's criteria are no doubt sensible, and with some minor modifications to be outlined below, I will rely on them as the preferred evaluative tool for assessing libertarian theory. If (i)–(iii) are fulfilled, we then have an acceptable solution to the conflation problem.

Sobel rejects the VSSOV since it violates (i-a), (i-c), (ii), or (iii).⁷ In what follows, I will outline a response to the conflation problem that is an instance of the VSSOV but which nonetheless fulfills criteria (i)–(iii). My proposal will require a reconceptualization of libertarian theory, but the proposed reconceptualization preserves what I will call the *pretheoretical commitments* to self-ownership and liberty. Furthermore, it does so in a way that is not ad hoc from a libertarian perspective and that maintains a proper balance among our moral intuitions.

Build as You Go

Compare two approaches to any normative standard of moral behavior—approaches that we might call the *Build and Apply Approach* (BAA) and the *Build as You Go Approach* (BYGA). BAA is arguably the traditional, and standard, approach: first, you discover or construct a set of moral principles, and then, you apply them in practice.⁸ There is little or no feedback going from actual practice back to the principles themselves. Insofar as there is any feedback, it either modifies how the principles should be applied or revises the actual principles under the pretense that they were somehow misconceived to begin with.⁹ A clear instance of BAA is, of course, mainstream libertarianism as it is commonly depicted, since it builds on a self-ownership thesis seemingly immune to any subsequent deviant intuitions.

BYGA is different and, I hesitate to say, almost Hegelian. In BYGA, the first principles are intuitive *presumptions*: There is no construction prior to or within them. However, the presumptions are treated as if they were dogmas. This allows them to be filled with actual normative content—not merely “as if” content—as we apply the principles assumed. In contrast to BAA, which treats normative assumptions as solid and stable, the status of the first assumptions in BYGA is, beyond their roles as points of departure, entirely dependent on feedback from actual practice. Again in contrast to

⁷ It can be argued that the VSSOV also violates (i-b), despite Sobel’s insistence that the VSSOV is less ad hoc than Vallentyne, Steiner, and Otsuka’s (2005) qualifications to the self-ownership thesis (2013: 114, 117). Adding a theory of value might look better than just inserting a handful of qualifications, but it is difficult to see any convincing reason why appealing to a theory is any better than merely making intuitive qualifications.

⁸ For instance, see the well-known libertarian theories proposed by David Gauthier (1986), Hans-Hermann Hoppe (1993), Stephan Kinsella (1992), Robert Nozick (1974), Jan Narveson (2001), and Murray Rothbard ([1982] 1998).

⁹ Of course, most theories are not clean-cut instances of BAA. However, many theories (and families of theories) can be sorted under BAA as a matter of approximation.

BAA, the first assumptions in BYGA are likely, once applied, to change and actual content and normative weight will be added. The relevant analogy here is laboratory and field testing: on the assumption that your product or idea is of value, you set up tests to reveal what value the product or idea really has. In a similar fashion, BYGA assumes a normative principle (or set of principles), and by allowing people to act on it, it becomes evident what general limitations and normative weight such a principle(s) really has.

Now, it is important to differentiate BYGA from the more obvious cases of BAA, but it is also important to exclude cases of BAA that might easily be mistaken for cases of BYGA. One such case is John Rawls's well-known method of reflective equilibrium.¹⁰ Reflective equilibrium is, on standard interpretations, not an instance of BYGA. In contrast to BYGA, reflective equilibrium aims at equilibrium among theoretical elements: considered convictions, principles, and—in a wide reflective equilibrium—background theories and possibly also values. It does not supply content and moral weight through application. Application and practice might inform reflective equilibrium in the sense that actual practice can alter the elements in the equilibrium, but reflective equilibrium has nothing to say regarding how such influencing occurs or should occur. Practice and application thus constitute a black box that may or may not have any effect on the equilibrium that expresses the normative standard. BYGA, in contrast, is motivated by the belief that no non-provisional content can be established without subjecting the assumptions to actual cases, and that application and practice must influence the normative standard, since the standard cannot gain full-fledged content or precise normative weight without application and practice. BYGA then functions as a way to gain and validate actual content.

Self-Ownership as a Presumption

My suggestion is that libertarianism should be treated as an instance of BYGA rather than BAA. BYGA generates what I call *presumptive libertarianism*. Outlining presumptive libertarianism is fairly straightforward, but to defend it from some obvious challenges is a more demanding task. The rest of this section will be dedicated to that first task. Needless to say, a theory relying on BYGA will inescapably be rather messy in practice. Although BYGA entails that we must engage with that messiness, I will bracket the details concerned with actual implementation and restrict my presentation mainly to its theoretical features.

¹⁰ For instance, see Rawls (1951), ([1971] 1999), (1974–1975), (1980), (2001); Daniels (1979); Petersson (1998).

Presumptive libertarianism assumes, as its point of departure, self-ownership in the strict and technical sense: the self-ownership thesis. While there is some debate regarding how to define the thesis in a precise manner, for my purposes it is sufficient to use the characterization provided by Vallentyne, Steiner, and Otsuka: full self-ownership is a bundle of rights that is (roughly) equal to the logically strongest set of ownership rights that people can have over themselves compatible with others having equal such rights over themselves (Vallentyne, Steiner, and Otsuka 2005: 204). Vallentyne, Steiner, and Otsuka describe such full self-ownership as “initial,” with “full” implying that a person is allowed to sell herself into slavery and “initial” meant to signal that the possession of the bundle of rights can be changed because of, among other things, the right-holder trading away or renouncing his bundle of rights, in part or in whole, because the right-holder is indeed self-owning as a matter of doctrine (Vallentyne, Steiner, and Otsuka 2005: 202). I have no intention to pass judgment on whether such a notion of self-ownership is philosophically coherent or not;¹¹ the point I wish to make is simply that initial self-ownership as described by Vallentyne, Steiner, and Otsuka is an instance of BAA. In presumptive libertarianism, Vallentyne, Steiner, and Otsuka’s approximate definition is placed within a BYGA framework.

The assumption of self-ownership means that, as a starting point, each person is at liberty to do with her property in herself as she sees fit.¹² Some will prefer to maintain strict boundaries around their property, striving to keep their initial property as intact as possible. Such people will refuse any offer to trade some of their hair, no matter what kind of good is offered in return. But many people would find, say, \$100 for a hair a rather appealing deal, and would happily sell a handful of hair so they can afford a ski trip to Aspen or buy a new BMW. An even-greater number of people would not object to losing a hair if it would prevent someone else from losing a limb. At the same time, the hair owners are likely to shy away from any trading involving the removal of one of their kidneys, or one of their eyes, no matter

¹¹ To anticipate my discussion of presumptive libertarianism below, will the proposed theory of presumptive libertarianism not entail that self-ownership can be enlarged through voluntary trade? It does not, since while it certainly allows for people selling themselves into (voluntary) slavery, the self-ownership of the slave owner is thereby not added to; it is only his external property that has been altered or enlarged.

¹² The property currently under discussion is property of one’s own person and the space one occupies—not necessarily ownership of any external things. The latter form of ownership, and the conditions that govern it, is an open question, debated by the proponents of right- and left-libertarianism.

if offered very substantial goods in return. Some, of course, would still trade, thinking it is worth it. The liberty to trade one's property in conjunction with different preferences causes transactions (or lack thereof) that constitute an unregulated market that will, according to standard economic theory, eventually generate an equilibrium (or equilibria).¹³

Applied to self-ownership and infringements, market values in equilibrium imply we are able to determine the specific market value of a rights infringement at some specific time, that is, what kind of value—a “cost,” if following the market analogy—it would take to make an infringement legitimate at that particular point in time.¹⁴ For instance, slapping someone on the wrist would be an infringement the “cost” of which is (more than sufficiently) balanced if it thereby stops a school bus full of children from exploding. This is so since we are generally prepared to bear a greater cost to stop the school bus from exploding than we are prepared to bear to avoid a slap on the wrist. Touching someone's shoulder and stabbing someone in the back are thus attributed different social values—mirroring the same, or at least a similar, difference in intuitive valuation as that generating the conflation problem. Importantly, this result of presumptive libertarianism also opens the door for coercive action by the state, insofar it is undertaken to avoid some greater cost (as measured by the real valuations of people and not any utilitarian calculus).

While a rather straightforward claim, some comments might be needed. “Costs,” or values, in this context should obviously not be equated with some monetary value. Markets do not hinge on the existence of a currency, although they are greatly facilitated by it, and there is no reason to require

¹³ Such equilibrium is said to be Pareto efficient. An absence of possible Pareto improvements is commonly regarded as a virtue by economists, but not necessarily by egalitarian philosophers. For traditional libertarians, however, the egalitarian shortcomings of any market equilibrium generated by free trade on the basis of self-ownership are irrelevant. At most, considerations of equality, or of actual welfare, are seen as constituting a problem with some intuitive force, intuitions that the right-libertarian sees as misguided. Left-libertarians are better equipped to deal with egalitarian intuitions by postulating that external objects somehow belong to all of us. That said, even left-libertarians cannot reasonably object to inequalities directly linked to, or stemming from, ownership of one's person rather than external goods.

¹⁴ But until there is an equilibrium, what then? Then there is a period of decreasing indeterminacy of the value of self-ownership, meaning the presumption of self-ownership still stands. *When* market equilibrium is achieved is largely an empirical question, which I will not attempt to answer here.

that the value of infringements of self-ownership must be expressed in terms of money. Market equilibria are also liable to change, sometimes very rapidly. Certain infringements may in certain circumstances or contexts get a substantial value attached to them. Some sensitivity is thus called for. Market equilibria, at least in respect to certain types of infringements, will most likely also be local. While some moral theorists will regard such relativism as a shortcoming, libertarians should embrace the possibility of local equilibria as a natural outgrowth of particular people exercising their self-ownership.

Note also that value equilibria do not imply that I am entitled to take a good from you as long as I will compensate you with the competitive value of that good (an idea associated with Nozick). Rather, I (or anyone else, including the state) am entitled to infringe aspect *R* of your self-ownership *if and only if* my doing so is of greater social value—the act being valuable either in itself or in its consequences (that is, a value generated by the social interactions based on the presumption of strict and full self-ownership)—than the value of aspect *R* of your self-ownership not being infringed plus the social value of upholding a strict moral scheme of absolute ownership over aspect *R* of one's person or any other comprehensive moral scheme stemming from the assumption of full and strict self-ownership.¹⁵ It is crucial to note that a comprehensive scheme of full and strict self-ownership is still the normative baseline: it is the assumption that can only be modified with a reference to itself. Infringements of self-ownership are thus not only to be weighed against the value of some particular aspect of self-ownership, but also the value of maintaining a set of moral rules governing infringements and ownership. This would clearly put a stop to a full-fledged “cross-and-compensate” approach as envisioned by Nozick.

Consider an example. Should governments be allowed to take one kidney from nonconsenting citizens with two healthy kidneys to save the lives of people with severe kidney failure? According to presumptive libertarianism, the answer is very likely to be no. While a human life will certainly be attributed more value than a kidney, the disvalue of making

¹⁵ The social value of a particular moral scheme of ownership over some aspect *R* is determined with the help of the same market scenario as used when determining the social value of any other goods. While trading comprehensive schemes of ownership will no doubt largely be a hypothetical or an indirect affair (where the value of the scheme is derived from the type and extent of the infringements socially allowed), this does not mean it lacks a social value or that it cannot be properly socially valued. The actual value of a (particular) moral scheme of self-ownership should therefore not be equated with the presumptive value of strict and universal self-ownership.

exceptions to a regulatory scheme strictly prohibiting such violations of bodily integrity would most likely be immense. Hence we would not be allowed to harvest people's kidneys, despite the social value of a human life outweighing the social value of having two kidneys. Incidentally, these remarks also apply to aspects of our persons that we somehow value for personal or sentimental reasons—say, the long hair of someone who grows it in remembrance of a lost lover. Infringing such an aspect of self-ownership would then only be motivated by gaining something with a value that outweighs both the market value of the good in question (in this case, the long hair) and the value of the stringent protection of goods with personal or sentimental value (or whatever scheme of protection that has been generated by the present equilibrium). Now, note that this is not just another rule-consequentialist approach in a libertarian disguise. In contrast to a consequentialist calculus, the values (whether values of acts or rules) are initially assigned using a presumption of stringent self-ownership qualifying subjective notions of utility; they are not assigned simply with reference to some objective value or subjective notion of utility. At the starting point of presumptive libertarianism, then, an action cannot be justified and a rule cannot be valid on the basis of its largest net utility.

At this point, it is also helpful to fend off the potential objection that presumptive libertarianism is, if not rule consequentialism, then in all relevant aspects an undercover version of traditional welfarism. Welfarism in the version often embraced by economists says we are to assess states of affairs by examining their consequences on (human) welfare, but that because of the difficulties of measuring welfare, the best approximation are preferences revealed in actions, such as actions in a market. Markets then become natural arenas for revealing aggregate welfare. Given such an interpretation of welfarism, judging presumptive libertarianism to be just a version of it seems close at hand.

Yet such a conclusion is mistaken. Again, the starting point of a stringent presumption of self-ownership entails that any aggregative elements in presumptive libertarianism be qualified by initial self-ownership. While there is, or might be, a considerable resemblance in outcome, presumptive libertarianism hence includes a pivotal forward-looking dimension for distinguishing right from wrong: the initial assumption of strict self-ownership sets the parameters for what actions can begin the movement toward equilibrium. Welfarism offers a model for defining and finding utility with an *inherent* normative and aggregative element. Presumptive libertarianism, on the other hand, presents a normative theory where the weighing and aggregation is *allowed by* the theory and follows from the assumption of self-ownership. This might not seem like much of a difference,

but it is the crucial element that differentiates the consequentialist theory of welfarism from the deontological theory of presumptive libertarianism.

Second, and most importantly, there is no teleological value to be found in presumptive libertarianism—neither in its theoretical form, nor in any operational form. In welfarism, there is such a value, although it is kept out of sight because of practical difficulties of measuring and defining it, and the fact that removing it would cause the theory to collapse. Presumptive libertarianism has no such value and needs no such value.

Third, remember also that it is possible, while certainly unlikely, that the social value of all actions will remain less than the value of strict self-ownership, meaning that libertarianism as traditionally understood is maintained and aggregation of social values is forbidden under the present equilibrium. The difference between presumptive libertarianism and both rule consequentialism and welfarism might therefore appear slight in practice, but the difference is important, as self-ownership is given a privileged position at the outset, and values and permissible weightings flow from voluntary use of that self-ownership.

Apart from the differences from welfarism and general consequentialist theory, I should also stress that presumptive libertarianism does not settle the question of compensation. Even if an infringement is deemed legitimate under the value equilibrium generated by the assumption of self-ownership, this does not determine where the compensation should go or whether there should be any at all. In some cases, a legitimate infringement will give rise to suitable claims to compensation (say, if we cut someone's hair without their consent); in other cases, the legitimacy of the infringement seems to invalidate any claim to compensation (say, if confiscating explosive materials from a suspect terrorist). Given presumptive libertarianism, this is, I believe, largely a matter of what social relations and behaviors we value and thus also a question related to the value equilibrium presumptive libertarianism generates. That said, it appears likely that in most cases compensation is due to the person suffering an infringement.

Also, it should now be obvious that presumptive libertarianism is not an instance of *prima facie* (or *pro tanto*) rights. First, if self-ownership is treated as a matter of *prima facie* rights, then the rights can be overridden by other pressing moral concerns. In presumptive libertarianism, self-ownership is, in a traditional libertarian manner, presumed to be immune to tradeoffs at the outset. It is also understood as immune to tradeoffs in relation to values and principles other than those stemming from self-ownership: only actions allowed by the presumption of self-ownership can modify our self-ownership rights. Second, *prima facie* rights are stable, meaning they will remain a latent

consideration even if occasionally overridden or legitimately infringed. Self-ownership rights in a BYGA framework are obviously not stable in that sense, but allow us to modify them by acting on them.

In presumptive libertarianism, the “market” interaction—on the basis of a presumption of self-ownership—determines the actual (dis-)values of the various infringements by generating a value equilibrium. According to a plausible market-based value equilibrium, stealing a hair from someone’s head is more than sufficiently “paid” for if such infringement helps save someone’s life. Presumptive libertarianism will, once the assumption has generated an equilibrium, attribute normative weights to the various instances of self-ownership in a way falling fairly close to our common moral intuitions. Now, let me note right away that this seems to make presumptive libertarianism nonlibertarian, since self-ownership on its usual interpretation—as Sobel notes—is not compatible with externally determined costs that will also determine the legitimacy of an infringement (Sobel 2013: 120). Recognizing the challenge, I will spend the next section showing why such worries are unfounded. In the remainder of this section, I will comment upon another worry, which is of a more practical nature: must we start from scratch, forbidding all infringements of self-ownership until market equilibrium has been generated?

From Where Do We Start?

The return to full presumptive self-ownership would inevitably take place under nonideal conditions, where we have to grapple with competing rights claims as well as vague and incomplete information. Moreover, many of our current social structures are dependent on the acceptance of some past and present infringements, meaning a large part of our social world as we know it would disappear if we were to start from an unadjusted presumption of self-ownership. Hence the question of whether to go back to such an unadjusted presumption is crucial.

There are two main strategies by which we can avoid starting from the beginning. The first one relies on a hypothetical original position that will provide us with a test of whether the current pattern of valuations is acceptable as a point of departure for us today (it is not intended to provide a blueprint for future patterns of valuation) and what corrections need to be made to bring our current valuation of self-ownership in line with what it would have been had the presumption of self-ownership been respected from the start. While I believe such hypothetical scenarios can be fashioned using appropriate libertarian assumptions, I do not think that is a feasible option. Instead, my suggestion is that we simply proceed on the assumption

that the current valuations of various infringements are legitimate and bargain about infringements using existing valuations as the point of departure. The reason for preferring this alternative strategy is that even if we start with skewed valuations of infringements, the market will eventually correct itself, reaching a rough market equilibrium that functions as a standard for attributing values to goods, goals, and actions and for determining the (dis-)value of various infringements. At the same time, we will avoid the costs associated with the social turmoil that will inevitably be the result of dismissing, justly or unjustly, existing valuations as mistaken or corrupt.

Of course, relying on anything resembling Adam Smith's invisible hand is bound to generate objections pointing to the shortcomings of the market mechanism in real life. Indeed, clearly, real-life markets are imperfect.¹⁶ But imperfectness in an imperfect world may not be a good reason to reject a practice or a mechanism. Note also that the most frequent criticism of Smith's invisible hand is not concerned with efficiency, but its moral credentials, and in particular its egalitarian credentials. Naturally, a libertarian is not necessarily moved by egalitarian concerns. But note that the necessary preconditions of infringements—self-ownership rights—are, in contrast to most goods moveable on free markets, initially distributed in an egalitarian fashion. Unlike houses and sailboats, and the abilities and possibilities to acquire them, strict self-ownership rights are (as an assumption) held by everyone. Moreover, unlike such goods, one's self-ownership cannot be increased by acquiring another man's right to himself. In the market of self-ownership, then, inequalities will be limited to a considerable extent and in a way that material goods usually are not.

To sum up, the solution to the conflation problem involves a reconceptualization of libertarian theory. This seemingly drastic alteration involves treating libertarianism as a theory starting with an assumption of self-ownership rather than the axiomatic self-ownership thesis. The normative content of the theory is then continuously worked out in practice, when people act upon that very assumption. The resulting equilibrium can then help us determine when some social good outweighs the protection afforded the self-owning individual, in effect delineating more-nuanced boundaries of self-ownership. This version of libertarianism—presumptive

¹⁶ While the traditional criticism of the (free) market has often been delivered from the political and philosophical left (for instance, see the criticism summarized in Erik Olin-Wright's excellent work *Envisioning Real Utopias* [2010]), recent debate tends to be focused on heuristics that to various degrees interfere with the functioning of the market (for instance, see Kahneman [2003]).

libertarianism—draws heavily on standard market reasoning, although it deviates from the functioning of actual markets because of the peculiar character of the good in question—self-ownership.

III. The Libertarian Credentials of Presumptive Libertarianism

The status of presumptive libertarianism must be vindicated not only by showing it can handle the conflation problem, but also by showing it honors the pretheoretical commitments—deeply entrenched intuitions—that motivate most libertarians to endorse some version of libertarianism qua normative theory. The question here is not what complete philosophical foundation libertarianism can, ultimately, be made to rest upon.¹⁷ What is of interest to us here instead are the pretheoretical commitments to self-ownership and liberty, commitments that jointly function as a standard we can use to determine a theory's libertarian credentials, regardless of whether that theory enjoys a solid philosophical justification.¹⁸ These two pretheoretical commitments thus constitute a further revision of Sobel's standard expressed in his criteria (i)–(iii) by changing the focus from actual content to motivational foundations.

The commitment to self-ownership, in its pretheoretical version, can be characterized as the intuition that each person has full, or nearly full, and exclusive normative control over their person. This commitment is reflected in the doctrine of self-ownership. The pretheoretical commitment to liberty can be described as a desire to maximize liberty (qualitatively or quantitatively), understood as a set of reasonably available alternatives of action for each individual in a manner consistent with the same extent of liberty for everyone else. This is a somewhat-awkward formulation, but it

¹⁷ Quite a few libertarians would spell out such commitments in terms of rights. However, at the pretheoretical level, I find such terms, given their artificial and nonobvious character, unsuitable.

¹⁸ The idea of pretheoretical commitments is not as outlandish as it might seem. For instance, Vallentyne (2009a: 56–71) presents “five background assumptions” that “an adequate theory of justice must be compatible with.” Of them, the second (a negative freedom to pursue various life plans), the third (“protection from interference from others”), and the fourth (individuals should themselves bear the costs of their choices) assumptions are roughly matched by the two commitments described above. Let me also be clear that the philosophical justification of a normative theory may come apart from its motivational foundation, even if they would ideally go hand in hand. That said, what I describe as the motivational foundation can (but does not have to) here be seen as a part of the justification, as I, in effect, suggest that it be made a part of our evaluative standard.

captures the content found in such a commitment fairly well. That said, it must be remembered that the pretheoretical commitment to liberty is not, on its own, a full-fledged theory or definition of liberty as a moral ideal.

The pretheoretical commitment to liberty is also consistent with two strands of thought found in various versions of libertarianism: (a) that liberty is, at least *prima facie*, an important value, but (b) that any positive liberty for the individual cannot be guaranteed (it will be subjected to various limitations set by the legitimate property holdings of others). That liberty in the sense used above, and thus not only liberty in the sense of not having one's rights infringed by someone else's actions, is valuable for libertarians seems evident enough. Robert Nozick seems to attribute an important value to such an idea of liberty: "Since an enormous number of actions do increase the risk to others, a society which prohibited such uncovered actions would ill fit a picture of a free society as one embodying a presumption of liberty" (Nozick 1974: 78). Hence, Nozick's "presumption of liberty" not only includes a lack of (illegitimate) interferences, but acknowledges the value of having a wide range of actions to which the individual's negative liberty can be applied. Sobel interprets Nozick in this way and apparently makes the same assumption himself (Sobel 2012: 35-37, 41; 2013: 101). Peter Vallentyne goes even further and defends what he calls "robust libertarianism," a left-libertarianism that, while not explicitly stated, exceeds mere self-ownership and attributes vital importance to secure access to some basic external resources needed to give self-ownership practical significance: "All libertarians... want to guarantee a more robust initial freedom of action" (Vallentyne 2009b: 145). A similar idea of "robust" self-ownership is defended by Michael Otsuka (1998), and Eric Mack (1995) attributes the same importance to liberty, as he advocates not merely formal self-ownership, but also, because self-ownership is inherently "world-interactive," adds a proviso saying that others may not employ their property in ways that will effectively nullify others' ability to interact with the world.¹⁹

Taking such remarks seriously implies that the kind of liberty that counts, even for libertarians, is not only the absence of illegitimate interferences by others, but also the range of opportunities left open once such interferences have been blocked. Such opportunities are, according to the pretheoretical commitment to liberty, good and valuable, but not a matter of right. Moreover, the pretheoretical commitment to liberty does not in any way guarantee any liberty for the individual other than purely negative liberty.

¹⁹ The same importance of liberty also seems to be inherent in Mack's notion of an "ur-claim" underpinning self-ownership and the right of property (Mack 2010).

If we would, as a matter of basic entitlement, guarantee any modicum of positive liberty, we would arguably stray from libertarian ground.

I assume the pretheoretical commitments to self-ownership and liberty to be the motivational foundation of libertarian theory, not because such values are self-evident or somehow enjoy a comparatively solid justification, but because the twin commitments appear to be a common and inescapable denominator. All versions of libertarianism place a greater or lesser emphasis on one of the two pretheoretical commitments or attempt to account for one with the help of the other; no version of libertarianism, however, can completely rid itself of self-ownership and liberty as basic building blocks. The two pretheoretical commitments are not the same, and neither of the two can be subsumed under the other on the pretheoretical level. The commitments may or may not be underpinned by some further justification, and that justification might look different depending on which libertarian you ask. But it seems to me that few libertarians actually start with such justifications; instead, they recognize—implicitly or explicitly—the intuitive appeal of self-ownership and liberty, and then proceed to find an appropriate justification and expound its normative consequences. Now, I am certainly not saying this is the wrong way to go (I believe most moral theorizing takes this path), but I wish to draw attention to the fact that these two commitments—rather than any foundations or consequences—should, when combined, be seen as the defining characteristics of the libertarian family of theories. Hence, when assessing the libertarian credentials of presumptive libertarianism, it is the two pretheoretical commitments, to self-ownership and liberty, which should be used as a standard. The two commitments thus function as qualifiers on Sobel's criterion (ii).

A Libertarian Foundation?

Having the preliminaries under our belt, I proceed to discuss the objection that any proper libertarian theory must include self-ownership as an axiom, rather than as a mere assumption. Simply put, presumptive libertarianism is not libertarianism proper, since it does not have the kind of theoretical cornerstone required: it appears to violate Sobel's criterion (i). The only way to refute this objection is to convincingly show that a libertarian theory need not, or—even stronger—should not be based on an axiom of self-ownership instead of a presumption of self-ownership. This is not easily done, and some libertarian authors have reduced the stringency of self-ownership to avoid absurd consequences. However, in defense of presumptive libertarianism, I will argue for the stronger view that

libertarianism should not be regarded as a theory with self-ownership as its core axiom. My argument requires the approach labeled *nonideal theory*. Justifying such an approach obviously requires engaging in a much-larger discussion on ideal versus nonideal theory. Here I will only briefly state the main reasons for preferring nonideal theory and then simply assume this preference to be justified, thus bracketing much of the current discussion of the issue.

Nonideal theory is theorizing relying on a correct or abstracted model of reality. Ideal theory, on the other hand, is theorizing involving a description of the world not matched by reality (Hamlin and Stemplowska 2012; O'Neill 1996; Robeyns 2008; Stemplowska 2008). The modern discussion of ideal and nonideal theory, which often takes the works of Rawls as its point of departure (for instance, Rawls 1999), now includes a stern criticism of ideal theory.²⁰ According to the standard criticism—which is largely persuasive—ideal theory fails to provide sufficient action guidance (Farrelly 2007; Mills 2005). While normative ideals premised on ideal circumstances may well function as guiding stars, they do so without offering guidance that is rationally tied to the actual circumstances to which they are supposed to apply. Of course, nonideal theory does not exclude the need for ideal theory, and normative theories purporting to be genuinely action guiding should at least include a nonideal version.²¹ It seems reasonable then, to adopt a nonideal-theoretic framework when thinking about what an action-guiding libertarian theory should look like.²²

Adopting such a framework has important implications for presumptive libertarianism, as it allows it to escape the charge of being nonlibertarian. If working within the framework of ideal theory, axioms rather than assumptions are the natural choice, since idealized circumstances

²⁰ For a more complex view of Rawls' version of ideal/nonideal theory, see Simmons (2010).

²¹ For instance, G.A. Cohen (2008) recently defended a fact-insensitive conception of justice. While clearly an example of an ideal-theory conception of justice, it is arguably not an instance of ideal-theory action guidance.

²² There will, no doubt, be those who disagree with my preference for nonideal theory. However, as that is a much-larger question than can be dealt with here, I will simply bracket the entire debate, premising my account on the preferability of the turn toward nonideal theory. That said, it is worth pointing out that a nonideal-theoretic framework often appears to be present within debates over libertarianism. One small indication of this might be the preoccupations of many libertarians with "robust" self-ownership.

tend to be inert—they change only as a result of a conscious choice by the theorist. Hence, moral guidance can easily be derived from moral axioms, as idealized circumstances are both stable and (we can often suspect) tailored to fit the axioms. Under nonideal theory, one has to take into account the dynamic and sometimes chaotic nature of social reality, meaning that any axiom risks generating prescriptions that will, eventually or in principle, be self-defeating or absurd. If using the standard BAA interpretation of libertarianism, which is characteristically axiomatic, in a nonideal framework, we will end up with a normative theory that is actually less compatible with the pretheoretical libertarian commitments to self-ownership and liberty that motivate the axiom in the first place. The conflation problem, and Sobel's discussions of possible solutions to it, goes to show precisely that, as the conflation problem exists within nonideal theory. Given BAA and ideal theory, the conflation problem may or may not arise (depending on what form the idealizing takes), but under nonideal theory, it is unavoidable, as a correct description of the world includes the intuitions and facts needed to make the self-ownership thesis generate absurd consequences and as self-ownership is taken as axiomatic. As shown by Sobel, the only way to “solve” the conflation problem in nonideal theory, given the standard BAA version of libertarianism, is by introducing a third value component (welfare; Sobel 2013: 117) that modifies the basic status of self-ownership and liberty by reducing their normative weight as well as the weight of the self-ownership thesis. I take for granted that the introduction of such a third and decisive component is strikingly nonlibertarian, and I believe such a tactic is a more substantial deviation from the pretheoretical commitments to self-ownership and liberty than is presumptive libertarianism, which advocates similar conclusions but does so from assuming strict self-ownership to be a valid point of departure and thus allowing us to act, actually or hypothetically, on that assumption. Presumptive libertarianism, as a version of BYGA, then seems preferable, from the perspective of nonideal theory, to traditional BAA libertarianism. Presumptive libertarianism appears to be more closely aligned with the pretheoretical libertarian commitments than does traditional libertarianism under nonideal conditions, as it can present a coherent response to the conflation problem without invoking external, nonlibertarian values.²³ Hence the rational libertarian should accept presumptive

²³ Let me also point out that the pretheoretical commitment to liberty combined with a BYGA version of libertarianism yields the additional benefit of the individual self-owner being allowed to—having the liberty to—assign a value to liberty. Such metavaluation arguably adds a libertarian flavor to presumptive libertarianism, as it effectively relocates

libertarianism as the best theoretical approximation of the libertarian pretheoretical commitments.

The Need for a Cut-Off Point

Let us turn to a second worry: is not a cut-off point needed at which the market equilibrium yields the “right” value of the various aspects of self-ownership? Unregulated markets are inherently unstable, and therefore market equilibria will inevitably vary. So will there, especially under nonideal conditions, ever be a point in time at which we can reasonably identify a determinate value of self-ownership and a precise (dis-)value of an infringement? Note that appealing to any hypothetical contract or bargaining situation does not settle this question. Within a BYGA framework, a hypothetical scenario only brings theory up to the point at which we are now; it does not, as within a BAA framework, establish principles that are supposed to be normatively persistent. That said, this objection is much easier to reply to than the previous one. That the value of self-ownership and the (dis-)value of various infringements will vary is not necessarily a problem. In a market, values fluctuate without interfering, in any substantial way, with the functionality of the market. In fact, it is precisely the unstable character of a market that enables its efficiency and overall accuracy. This also holds with regard to presumptive libertarianism. Allowing a market equilibrium to be valid only at time t but not at t' has the benefit of allowing another equilibrium to better match common intuitions and valuations at t' . We should therefore not be overly worried about the lack of a determined cut-off point within a BYGA framework.

Nonlibertarian Consequences?

A third worry is concerned not with assumptions, but with conclusions: does not the conclusion that a person may see his self-ownership outweighed by more valuable considerations—that is, more valuable according to others—mean that presumptive libertarianism is actually nonlibertarian in its normative conclusions? Presumptive libertarianism starts out all right, the critic might argue, but it strays from the right path and ends up being nothing but standard liberal theory, according to which an individual’s self-ownership can, in part or in full, be sacrificed for some greater good—hence in clear

whatever liberty is lost in the outcome of the theory to a justificatory prior position in the same theory.

violation of Sobel's criterion (ii). That, the critic will tell you, is strikingly nonlibertarian. This reply should be taken seriously.

My reply is, first, that whatever infringements might be allowed under presumptive libertarianism are antecedent to people exercising their self-ownership. Any libertarian theory, whether teleological or deontological, that places strict and full self-ownership at its normative core must allow for the possibility of permissible subsequent limitations of self-ownership because of that very self-ownership. The permissibility of any infringements stemming from the collective exercise of individual self-ownership might be equally acceptable. For instance, libertarians typically accept free markets as arenas where self-owning individuals can bargain over whatever goods they desire (or do not desire). But outcomes in free markets are not coordinated in accordance with one self-owning participant's will; instead, they are unorganized collective activities, the result of which is nonetheless accepted by libertarians. For instance, let us assume that Leonard, a self-owning person, decides to buy a house and makes the down payment. Before the complete sum has been paid for the house, the housing market crashes and the house loses half of its market value. Few, if any, libertarians would argue that Leonard should get his money back since he could not have foreseen the crash on the housing market. Self-ownership clearly does not make one immune to unintended and undesired effects of other people exercising their legitimate self-ownership. This implies that a libertarian who places self-ownership at the center of libertarian theory must accept as morally legitimate whatever is the result of uncoordinated collective exercises of legitimate self-ownership—his own and others'. When paired with a BYGA framework, the supposedly nonlibertarian consequences might then be accepted on libertarian grounds.

But there is an obvious rejoinder that must be dealt with. Consider the *Robinson Crusoe libertarian*. Given the assumption of strict self-ownership within a BYGA framework, it is also permissible for a libertarian to refuse to participate in any kind of cooperative scheme. Such possibility entails that a self-owning person can opt to remain outside equilibrium-generating bargaining and thus remain unobligated by any of its consequences. He can then legitimately maintain that his self-ownership is preserved as full and strict and thus that no infringement of it is permissible. At least in regard to this Robinson Crusoe libertarian (or group of Robinson Crusoe libertarians), the conflation problem still stands.

Note, first, that such a scenario is in one aspect similar to a market in which some sellers decide to hold onto their (scarce and valuable) goods. The market value of such goods is bound to go up—not because the sellers value their items more, but because the supply is reduced, thereby causing an

increase in market value. Under presumptive libertarianism, the value of self-ownership is not initially settled, and its value will be influenced, but not determined by, the Robinson Crusoe libertarian's withdrawal from the market.

But, second, under presumptive libertarianism, infringements are then still allowed against the will of the self-owner. Surely, it can be argued, a libertarian has no problem letting a market determine the social value of an infringement; what is patently nonlibertarian is that an infringement is thereby made morally legitimate, regardless of whether the self-owner consents. But, to begin with, remember that Sobel's conclusion regarding the conflation problem is, largely, correct. Given a BAA libertarianism relying on the self-ownership thesis, the conflation problem cannot be solved in a manner acceptable to the BAA libertarian. As a possible way out, I have characterized libertarianism in a slightly different way: as a normative BYGA theory motivated by the two pretheoretical commitments of self-ownership and liberty. So far in my discussion, the commitment to self-ownership has played the leading role. But the commitment to liberty is equally crucial: self-ownership under conditions in which the self-owning libertarian has no choice regarding which action to pursue is only of theoretical and limited interest. This was also the message of the second interpretation of the conflation problem: it was a problem not only because it contradicted widely held conceptual intuitions, but since it appeared to imply there could be no substantial (negative) liberty for anyone, as strict self-ownership would effectively exclude almost all room for action. If my campfire will produce small particles that will end up infringing your bodily integrity, and hence is forbidden by a strict self-ownership thesis, then liberty as a value is certainly not taken seriously.

Now, if we take seriously the pretheoretical commitment to liberty, along with the commitment to self-ownership, and if we accept that the conflation problem cannot be satisfactorily solved if given a strict self-ownership thesis within a BAA framework, then presumptive libertarianism is simply the best libertarian alternative available even for the Robinson Crusoe libertarian. If someone decides to become a Robinson Crusoe libertarian, remaining outside any equilibrium-generating relations including valuations of infringements and valuable goods, and claims his withdrawal amounts to his self-ownership being preserved as strict and full, regardless of whatever equilibrium is generated by others, then his actions might nonetheless be circumscribed. For if the Robinson Crusoe libertarian claims full and strict self-ownership, he must also claim that others lack such full and strict ownership, or else reintroduce the conflation problem. But, crucially, if the process generating a complete valuation of self-ownership is the result of

social interactions interpreted as market behavior, nothing guarantees that such valuation will be valid outside the circle of parties interacting. And, if the Robinson Crusoe libertarian will retain his full and strict self-ownership by remaining outside the process generating an equilibrium of social valuations, the individuals taking part in the process can retain their strict and full self-ownership vis-à-vis the Robinson Crusoe libertarian but not vis-à-vis each other (or else reintroduce the conflation problem). If the parties involved in the process are not allowed to force a transaction involving an infringement and some desirable social good upon the Robinson Crusoe libertarian, then surely nothing necessitates that he can legitimately infringe any of their self-ownership rights in order to exercise even a reasonable modicum of liberty. The Robinson Crusoe libertarian then not only preserves the unacceptable conflation problem, albeit in a more confined version, but also fails to take the distinctively libertarian pretheoretical commitment to liberty seriously. For in such a scenario the Robinson Crusoe libertarian is only allowed to light his campfire because of the benevolence of the presumptive libertarians, and having one's actions depend on the approval of (more or less) benevolent individuals, rather than depend on a voluntary agreement, hardly seems consistent with the conjunction of the two pretheoretical commitments. The Robinson Crusoe libertarian then appears to maintain his full and strict self-ownership only by denying the commitment to liberty that motivates the libertarian position.²⁴ Thus, given the pretheoretical commitments to self-ownership and liberty, presumptive libertarianism seems superior to Robinson Crusoe libertarianism, qua libertarian theory.

A second reply to the worry of nonlibertarian consequences is to point out the question-begging nature of such worries. The critic, it seems, is worried because she takes libertarianism to be a BAA kind of theory, in which self-ownership as such is always, as a matter of axiom, strict and full. Within a BYGA framework, however, we cannot accuse a theory of having nonlibertarian consequences simply by comparing outcomes with a given starting point, since BYGA does not allow for inherently static axioms. If accepting a BYGA framework for our normative theory, then, whatever normative consequences are generated will be, as a matter of definition, libertarian, as long as the starting assumption is respected and as long as the resulting theory aligns itself with the pretheoretical commitments to self-ownership and liberty.

²⁴ Of course, this charge of inconsistency only applies if the Robinson Crusoe libertarian is explicitly a libertarian. While not a conclusive argument against the objection discussed above, it implies, slightly paradoxically, that self-conscious libertarians cannot be Robinson Crusoe libertarians.

Is Presumptive Libertarianism Ad Hoc?

Last, I address the worry of ad hoc-ness. The critics might argue that, as a response to the conflation problem, presumptive libertarianism is an ad hoc invention, designed only to provide an escape route for the ideological libertarian. If ad hoc, presumptive libertarianism fails to fulfill Sobel's adequacy criterion (i-b). Now, the first thing to note is that the idea of being ad hoc in the context of moral investigations and theories is slightly different from the notion used in the context of natural sciences. It seems additions made to normative theory are rarely, if ever, independently testable. Revisions prompted by moral intuitions are usually testable, or justifiable, only or primarily against the considerations that prompted them, and then in conjunction with the core theory to which the additions were made.

An accusation of ad hoc-ness in moral sciences is more readily describable as claiming that a revision is made with the purpose of improving the theory in a way that does not add coherence to the theory as a whole and that the revision is made without carefully considering, or by ignoring, any benefits and costs of revisions. If characterizing ad hoc revisions in this way, the VSSOV in the version discussed by Sobel appears to be ad hoc, when added to BAA libertarianism, in much the same way as Vallentyne, Steiner, and Otsuka's modifications. Presumptive libertarianism, on the other hand, does not seem to match such a definition of ad hoc. If my arguments above are not mistaken, the appeal of presumptive libertarianism is that it maintains its in-house character, as it preserves the pretheoretical commitments to self-ownership and liberty, hence safeguarding coherence. Moreover, given my discussion of possible criticisms above, I hope to have shown that adopting presumptive libertarianism is not a knee-jerk defense.

IV. Concluding Remarks

The reconstructed libertarianism I have outlined above may or may not be a good theory on its own merits, that is, regardless of whether we call it libertarian or not. Labels might not be that important (for instance, some left-libertarians do not mind being labeled as liberals) (Vallentyne, Steiner, and Otsuka 2005: 210-15). But to a self-confessed libertarian, committed to self-ownership and liberty, it might be of some importance whether a particular normative theory can be placed in the libertarian family, or if it deviates from it in important respects. What I have tried to show is that a libertarian theory that can handle the conflation problem is possible, and I have done so by sketching a reconstructed version of libertarianism that I have called presumptive libertarianism. I have argued that presumptive libertarianism is not just a response to the conflation problem, but a distinctively libertarian

response, as it preserves some of libertarianism's key commitments. While many libertarians will no doubt hesitate to endorse presumptive libertarianism as libertarianism proper, I have argued that the rational libertarian should do so.

Any libertarian theory—or rather, any theory strongly dedicated to individual self-ownership as a basic ethical tenet—will, I believe, face a number of difficult problems. I cannot say whether such a theory will eventually be able to navigate its way out of those problems. But if my proposal is convincing, or at least holds some promise, libertarians might not have to be chastened by the conflation problem.

References

- Cohen, G.A. (2008) *Rescuing Justice and Equality*. Cambridge, MA: Harvard University Press.
- Daniels, N. (1979) Wide Reflective Equilibrium and Theory Acceptance in Ethics. *Journal of Philosophy* 76 (5): 256–282.
- Farrelly, C. (2007) Justice in Ideal Theory: A Refutation. *Political Studies* 55: 844-864.
- Gauthier, D. (1986) *Morals by Agreement*. Oxford: Oxford University Press.
- Hamlin, A. and Stemplowska, Z. (2012) Theory, Ideal Theory and the Theory of Ideals. *Political Studies* 10 (1): 48-62.
- Hoppe, H-H. (1993) *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*. Boston: Kluwer.
- Kahneman, D. (2003) Maps of Bounded Rationality: Psychology for Behavioral Economics. *American Economic Review* 93 (5): 1449–1475.
- Kinsella, S. (1992) Estoppel: A New Justification for Individual Rights. *Reason Papers* 17: 61-74.
- Mack, E. (1995) The Self-Ownership Proviso: A New and Improved Lockean Proviso. *Social Philosophy & Policy* 12 (1): 186-218.
- Mack, E. (2010) The Natural Right of Property. *Social Philosophy & Policy* 27 (19): 53-78.
- Mills, C. (2005) “Ideal Theory” as Ideology. *Hypatia* 20 (3): 165-184.
- Nagel, T. (1975) Libertarianism Without Foundations. *Yale Law Journal* 85 (1): 136-149.

- Narveson, J. ([1988] 2001) *The Libertarian Idea*. Peterborough: Broadview Press.
- Nozick, R. (1974) *Anarchy, State, and Utopia*. New York: Basic Books.
- O'Neill, O. (1996) *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*. Cambridge: Cambridge University Press.
- Otsuka, M. (1998) Self-Ownership and Equality: A Lockean Reconciliation. *Philosophy and Public Affairs* 27 (1): 65-92.
- Petersson, B. (1998) Wide Reflective Equilibrium and the Justification of Moral Theory. In Van der Burg, W. and van Willigenburg, T. (eds) *Reflective Equilibrium: Essays in Honour of Robert Heeger*, 127-134. Dordrecht: Kluwer Academic.
- Rawls, J. (1951) Outline of a Decision Procedure for Ethics. *Philosophical Review* 60 (2): 177-197.
- Rawls, J. (1974-1975) The Independence of Moral Theory. *Proceedings and Addresses of the American Philosophical Association* 48: 5-22.
- Rawls, J. (1980) Kantian Constructivism in Moral Theory. *Journal of Philosophy* 77 (9): 515-572.
- Rawls, J. ([1971] 1999) *A Theory of Justice*, 2nd ed. Cambridge, MA: Harvard University Press.
- Rawls, J. (1999) *The Law of Peoples—with "The Idea of Public Reason Revisited."* Cambridge, MA: Harvard University Press.
- Rawls, J. (2001) *Justice as Fairness: A Restatement*, ed. Erin Kelly. Cambridge, MA: Harvard University Press.
- Robeyns, I. (2008) Ideal Theory in Theory and Practice. *Social Theory and Practice* 34 (3): 341-362.
- Rothbard, M. ([1982] 1998) *The Ethics of Liberty*. New York: New York University Press.
- Simmons, J. (2010) Ideal and Nonideal Theory. *Philosophy & Public Affairs* 38 (1): 5-36.
- Sobel, D. (2013) Self-Ownership and the Conflation Problem, In Timmons M. (ed) *Oxford Studies in Normative Ethics, Volume 3*, 98-122. Oxford: Oxford University Press.
- Sobel, D. (2012) Backing Away from Self-Ownership. *Ethics* 123 (1): 32-60.
- Stemplowska, Z. (2008) What's Ideal About Ideal Theory? *Social Theory and Practice* 34 (3): 319-340.

- Vallentyne, P. (2009a) Left-libertarianism as a promising form of liberal egalitarianism. *Philosophical Exchange*, 56-71.
- Vallentyne, P. (2009b) Left-Libertarianism and Liberty. In Christiano T. and Christman J. (eds) *Contemporary Debates in Political Philosophy*, 137-151. Malden, MA: Wiley.
- Vallentyne, P., Steiner, H., and Otsuka, M. (2005) Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried. *Philosophy & Public Affairs* 33 (2): 201-215.
- Wright, E.O. (2010) *Envisioning Real Utopias*. London: Verso.