

**SUSTENANCE, OPPORTUNITY, AND THE MINIMAL STATE:  
LEARNING FROM NOZICK'S LIBERTARIANISM**

**STEPHEN O'HANLON  
THE LONDON SCHOOL OF ECONOMICS  
M.PHIL. THESIS  
PHILOSOPHY  
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## ABSTRACT

This thesis will argue that sustenance, opportunity, and substantive civil equality can, for the most part, be achieved through a correct interpretation of Robert Nozick's libertarian entitlement theory. Where sustenance, opportunity, and civil equality cannot be derived from Nozick, supplemental considerations will be put forward.

Chapter 1, Sustenance, will consider Nozick's interpretation of the Lockean proviso, his Wilt Chamberlain argument, and his conception of the Kantian injunction. It will be argued that Nozick's underlying principles, properly interpreted, may not rule out the universal provision of sustenance and may not establish the libertarian property rights that Nozick generally wishes to establish.

Chapter 2, Opportunity, will assess Nozick's refusal to endorse state mechanisms to provide universal opportunity in the form of education and his failure to be able to counter discrimination. Equality of opportunity will be prescribed as a policy goal.

Chapter 3, Civil Equality, will consider the legal and political bodies of the minimal state. It will be argued that Nozick must address complexities associated with his principles of rectification and compensation. In addition, Nozick must safeguard his legal process from the effects of flows of money. With regard to the state, it must be justified by its actions. It must also safeguard against the effects of flows of money.

The concluding chapter will assess charity as a means of providing for the provisions advocated. The role of the liberal state that I develop in this thesis will be assessed. It will be argued that the provisions and safeguards espoused in this thesis provide a framework for utopia. Following the implementation of a system that ensures sustenance, opportunity, and civil equality, there will be a political system that considers bargaining

by citizens for other roles of the state. The thesis will end with some brief considerations regarding paths for future study.

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-Of course, Mr Bloom proceeded to stipulate, you must look at both sides of the question. It is hard to lay down any hard and fast rules as to right and wrong but room for improvement all around there certainly is though every country, they say, our own distressful included, has the government it deserves. But with a little goodwill all round. It's all very fine to boast of mutual superiority but what about mutual equality? I resent violence or intolerance in any shape or form. It never reaches anything or stops at anything. A revolution must come on the due instalments plan. It's a patent absurdity on the face of it to hate people because they live round the corner and speak another vernacular, so to speak...

All those wretched quarrels, in his humble opinion, stirring up bad blood...were very largely a question of the money question which was at the back of everything, greed and jealousy, people never knowing when to stop.

*Ulysses*, James Joyce

# INTRODUCTION

Having myself written an earlier book of political philosophy that marked out a distinctive view, one that now seems seriously inadequate to me...I am especially aware of the difficulty of living down an intellectual past or escaping it. Other people in conversation often want me to continue to maintain that young man's "libertarian" position, even though they themselves reject it and probably would prefer that no one had ever maintained it at all.<sup>1</sup>

## 0.1 Thesis Overview

Much of the debate in political philosophy over the last thirty years has surrounded the libertarian position formulated by Robert Nozick. Nozick's libertarianism is grounded on his entitlement theory of justice in holdings which states that so long as people come to hold resources either through just initial acquisition or just transfer, they are entitled to those resources. There are rectification and compensation procedures that address situations where holdings are unjustly held. From this entitlement theory, Nozick argues that if individuals are entitled to their holdings, it is unjust to take these holdings from them against their will. This is true for other individuals and it is also true for the state. The state that evolves from Nozick's state of nature is a minimal state. The state cannot interfere in people's lives and coerce them into giving up their justly held holdings. The state, as a minimal state, is 'limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on.' As a consequence of the entitlement theory, the state cannot coerce individuals into giving up justly held holdings in order to fund programmes that the state believes are in the common good. So, while individuals can voluntarily contribute to certain schemes, individuals cannot be forcibly taxed in order to provide for public goods, provisions for the poor, public education, and so on.

In this thesis, I will argue that provision of sustenance for the poor, universal education, and substantive civil equality form the basis of a just society. Such conclusions will often be seen to be consistent with Nozick's principles and outcomes he expects from his

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<sup>1</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, p.17



libertarianism. Where such conclusions do not follow from Nozick, I have reformulated and supplemented his arguments. Nozick himself came to disregard aspects of his libertarianism in later life and, although he did not write in any great detail on the reasons behind his reconsiderations, it is likely that many of the topics discussed here were also behind Nozick's belief that his views were inadequate. Nevertheless, and contrary to Nozick's belief in the quotation above, his libertarianism is not a belief that I would have preferred that he would have never maintained at all because it helps greatly in forming my own views. If liberal egalitarian outcomes can be derived from the proper implementation or proper supplementation of a theory that rejects such outcomes, this is a meaningful task because it helps hone the liberal views that will form the basis of this thesis in the light of failures in libertarian theory.

The key principles that form the foundation of Nozick's entitlement theory are the Lockean proviso, the Wilt Chamberlain argument, and the Kantian injunction. I will begin discussing these principles in Chapter 1 in the context of sustenance. Nozick's adapts Locke's proviso in order to justify initial acquisition. Acquisition is justified, according to Nozick, so long as others are left 'no worse off' following acquisition. This 'no worse off' limit on acquisition refers to no worse off than individuals would have been in Nozick's state of nature. If individuals are worse off than they would have been in the state of nature had acquisition not occurred, then they are entitled to compensation, Nozick argues, that would bring them back to levels of welfare that are no worse off than state of nature levels. The Lockean proviso also has a 'historical shadow' that allows one to consider the 'no worse off' constraint on acquisition given changing conditions of scarcity in society. I will argue that the Lockean proviso is: (1) too strong to establish the permanent and inviolable property rights that Nozick wishes to establish and that a proper interpretation of the proviso will ensure levels of sustenance for most people, (2) too weak in that those unable to acquire because of the acquisition of others will likely be owed more than state of nature 'no worse off' standards of living once acquisition by others has occurred, and (3) unlikely to lead to the non-redistributive, efficient market economy that Nozick envisions because the proviso is always susceptible to

reinterpretation, does not adequately recognize entrepreneurship, and does not establish the stability needed to promote efficiency.

Nozick uses his Wilt Chamberlain argument in order to illustrate justice in transfer. A number of fans voluntarily pay money to see Chamberlain play basketball. As a result, Chamberlain ends up with a large amount of money. Nozick argues that there is nothing wrong with voluntarily disposing of resources and, as a result, there can be nothing wrong with distributions that come about as a result of voluntary transactions. I will not contest Nozick's assertion in this context – that it is okay for individuals to spend their money – but I will argue that redistributive claims of third parties, especially the very poor, can legitimately change once there has been a change in the overall distribution in society. In addition, while I will accept that the Wilt Chamberlain argument has intuitive appeal, I consider that arguments, such as mine, that seek to justify the provision of sustenance for the needy have greater appeal.

The Kantian injunction, that people should be treated as ends and not as means, is used by Nozick in order to counter arguments that seek to use taxation in order to provide for redistribution. Nozick argues that people are used as means if they are taxed and used to fund redistributive goals, goals that they may not wish to contribute towards. Forcible taxation not only infringes upon people's entitlement rights and self-ownership in the form of ownership over the fruits of one's labour, it upsets individuals' plans for meaningful lives because one is never sure if a redistributive state will seize one's holdings. I will argue that Nozick interprets Kant in too narrow a manner, that the effects of taxation in a liberal state are exaggerated by Nozick, that people can still plan meaningful lives in a state where there is taxation, and that sustenance may be seen as a prerequisite for the planning of a meaningful life.

Chapter 2 will address the concept of opportunity. The libertarian Nozick cannot sanction the provision of opportunity for all because legitimately held entitlements cannot be taxed in order to fund an education system. Added to this is the fact that, according to the entitlement theory, there are unlimited powers of bequest and inheritance. I will contend

that such a state of affairs is unfair because individuals from better-off classes will be able to afford extensive education and be able to develop talents that will make it much easier to succeed to desirable positions in society should they choose to do so. In general, poor people will have fewer choices and will usually succeed to undesirable positions. This could lead to a violation of the Kantian injunction because the rich may come to see the poor as means and the poor may consider themselves as means that can be used to achieve rich people's ends. Nozick rightly considers that such a system of unlimited bequest is unfair in later writings and it is unfair for the reasons that I will consider in this chapter.

In addition, the overriding importance given to individual choice in Nozick's entitlement theory means that there is little that can be done to counter discrimination in the workplace. This results in potential further unfair treatment of individuals in Nozick's minimal state and, although Nozick is unlikely to be able to sanction it, state interference may be warranted in order to guarantee opportunity and curtail unfair employment practices.

Furthermore, failure to provide even minimum levels of opportunity, potentially for many people, will likely result in inefficient outcomes in society. There is likely to be only a small pool of candidates for important positions in society, much of the workforce may lack basic competencies such as literacy, and motivation to progress and succeed may diminish in an unfair Nozickean society.

Finally, I will argue that the concept of equality of opportunity needs further and continuous study but should be used as a policy goal that is far more favourable than Nozick's system which will likely provide no opportunity whatsoever for many people. In taking such a stance, I will briefly counter some arguments against equality of opportunity. I will align myself with those who see equal opportunity as a 'better than' policy, a policy that sustenance must precede so that substantive equal opportunity can realistically come about.

Chapter 3 will consider civil equality in the minimal state with regard to the legal and political systems therein. The legal system is founded upon Nozick's principles of rectification and compensation. I will claim that imperfections associated with the practical implementation of these principles may warrant the provision of sustenance and opportunity for all. In addition, I will argue that the system is not adequately safeguarded against the effects of flows money, that the legal system has to consider even very minor complaints, that the compensation principle may rule out punishment beyond the paying of compensation and therefore rule out imprisonment of dangerous persons, and that the paramount importance of consensual transfer in Nozick will scupper efforts to establish a fraud standard leading to the potential exploitation of individuals and market failures. The implication will be that a non-minimal state can adopt a more effective, fair, and pragmatic legal system than can counter the effects considered in this section.

With regard to the political apparatus of the minimal state, I will argue that in order to decide whether or not a state is just one must judge that state by its actions and not only by the way in which the state evolved from the state of nature. I will conclude that, contrary to Nozick's assertions, political power in the minimal state is vitally important and that safeguards need to be implemented in order to thwart the plans of those that attempt to corrupt the political process to suit their own ends.

In the concluding chapter, I will consider charity as a means of guaranteeing the provisions and safeguards argued for in the first three chapters. I will conclude that charitable fundraising is an infeasible way of raising funds to guarantee certain provisions because it places unreasonable expectations on individuals. Charities are also unlikely to have the resources or means to deal with a wide variety of important issues. I will argue that the liberal state that I will develop will not enforce certain contracts such as voluntary slavery that the minimal state may have to enforce because, irrespective of voluntariness, there is more to individual rights than rights that can be bought and sold. The liberal state that I will espouse cannot sanction the ownership of people as commodities that can be subjected to unjust treatment unfit for humans. In addition, such a liberal state, if accepted, will likely be able to interfere to a greater extent than the

Nozickean minimal state in order to curtail unsafe, inefficient, inconvenient, and other practices and outcomes in the name of the common good.

I will argue that Nozick's framework for utopia is not compelling, especially for the poor, and is unlikely to realise the diverse communities and stability that he envisions. I will end by concluding that the provisions and safeguards that I have argued for provide a genuine framework for utopia for all persons but that there will be a bargaining process, accepted by the later Nozick, associated with the political system that will consider arguments for other roles of the state. Much will have been learnt from Nozick and potential further routes for progression will be briefly considered.

## **0.2 Nozick Overview**

Before continuing to the main body of the thesis, I will state the main arguments of Nozick's libertarianism. I will then consider the secondary literature on Nozick and will situate the arguments that I will develop in the context of Nozick's thesis and related commentary.

The central theme of Nozick's libertarianism is that a state will rationally evolve from an anarchical state of nature in the interest of individuals without infringing upon their rights. This state will be his so-called minimal state. The minimal state will restrict certain state of nature freedoms but, by doing so, it will respect individual rights to non-interference. However the minimal state, as a protector of liberty, will not interfere in people's lives by taxing them (beyond the taxation needed for the state's protective apparatus) and redistributing to meet ends that are judged to be in the common good. The minimal state that evolves from the state of nature will not proscribe the setting up of communities within the state. These 'meta-utopian' communities, Nozick contends, provide a framework for utopia.

The beginnings of the state are what concerns Nozick in Part I, *Anarchy, of Anarchy, State, and Utopia*. He starts off in a state of nature that is considered to be anarchy and wonders how a state would develop from such a state of nature. In his state of nature, there is morality and individuals have rights. For Nozick, this amounts to people having rights to 'life, health, liberty, [and] possessions' and other individuals should not harm individuals in the pursuit of such rights. Individuals have rights to defend themselves and exact compensation from those that encroach upon these rights. However, in the state of nature and in the absence of non-partial arbitrators, individuals will overestimate the amount of harm done to them by others and, as a result, 'passions will lead them to attempt to punish others more than proportionately and to exact excessive compensation.' Such a state of affairs will lead to feuds, retaliation, and paranoia in the state of nature because one can never take one's enemy at his word if he says he will stop feuding because there is nothing to bind his words.

Because of the lack of objectivity when disputes involving oneself occur, because others will also not be objective if they are involved in disputes, and because some individuals will be more powerful than others, 'mutual protection associations' develop in order to protect rights and to sanction compensation where rights have been infringed upon. Eventually, through merger, acquisition, battles, competence, and an inability of weaker associations to properly protect their clients, a dominant protective agency will evolve in a territory.

The dominant protective agency is not a state for two reasons. Firstly, not all persons in a state are clients and so the state does not protect all persons. Secondly, individuals that are not members of the protective association can still use force in the ways they see fit so the dominant protective association does not have a monopoly over the use of force. In addition, Nozick recognizes that in commercial protective agencies individuals are afforded protection 'according to how much they pay.' This is important because a state, as well as protecting all individuals in its territory, must protect its citizens equally and provide the impartial judgement that is not present in the state of nature.

The next step for Nozick is a transition from a system of protective agencies to an ultraminimal state. Nozick believes that this 'will occur by an invisible-hand process in a morally permissible way that violates no one's rights.' The problem with some individuals not being members of the dominant protective agency is that, as stated above, this means that they enforce their rights against members of the dominant protective agency in partial and subjective ways. This, in turn, means that the state of nature fear of excessive use of force still exists to a degree even if one is a member of a dominant protective agency. Dominant protective agencies will seek to curtail unreliable and partial enforcement of rights against members by non-members. In seeking to do this, the dominant protection agency will prohibit non-members from enforcing rights in ways that the non-members see fit, ways that the dominant protective agency may deem unreliable or unfair. The dominant protective agency occupies 'a unique position by virtue of its power' and because of this the agency claims a *de facto* monopoly over the use of force in a territory. In so doing, the dominant protective agency forbids independents from acting in ways that the protective agency judges to be unfair or unreliable.

This means that the dominant protective agency comes one step closer to achieving statehood. The process is completed when it is recognized that it is unfair for the protective agency to protect its members against non-members and to forbid non-members from enforcing their rights, while not affording non-members the same protection and forcing them to lay down arms. As a result, a true state is established only when protection is afforded to all individuals within a territory even if they are unable to afford to pay for protective services. Nozick argues that the minimal state that evolves from a state of nature does so through a series of morally legitimate steps. As a result, and because all individuals will realise that the state as an impartial enforcer of rights is rationally superior to individuals enforcing rights in ways partial to themselves, Nozick argues that the progression from the anarchical state of nature to a state is justified.

However in Part II, *State*, Nozick argues that the state that evolves from his state of nature must be his minimal state because 'any state more extensive violates people's

rights.' In formulating the precise role of his minimal state, Nozick develops his entitlement theory of justice in holdings. The central idea of Nozick's theory is that the state cannot interfere in people's lives by taxing individuals' legitimate holdings in order to achieve some desired end state or to implement some distributive pattern. And so, in order to set the boundaries upon state action, it is necessary first to determine the manner by which entitlement to legitimate holdings is arrived at.

Firstly, Nozick attempts to develop a principle of justice in original acquisition which accounts for 'how unheld things may come to be held.' Secondly, Nozick seeks to establish a principle of justice in transfer which determines the means by which a person may legitimately acquire a holding from another person. The entitlement theory is historical in that one must assess past acquisitions and transfers in order to determine if holdings are justly held. There is, in addition, a principle of rectification which seeks to redress, by means of compensation, past injustice in holdings.

Justice in acquisition is derived from Locke's theory of acquisition. Nozick essentially agrees with Locke that there is something about mixing one's labour with an object (and adding value) that gives one entitlement to that object. However, Nozick believes that the Lockean proviso that limits appropriation by stating that acquirers leave 'enough and as good' for others is too stringent. Nozick believes that such a proviso excessively limits that which can be acquired and also inhibits the motivation that acquirers have to acquire. Nozick weakens Locke's proviso and argues that what is essential is that non-acquirers are left 'no worse off' following acquisition. So acquisition is justified, for Nozick, so long as one mixes one's labour to a certain degree with an object and thereby adds value to it in some way and so long as others are left no worse off once the acquisition has occurred. In addition, Nozick argues that there are positive 'social considerations' that add support to the establishment of a private property system, a system that can only come about if initial acquisition is justified.

Justice in transfer is founded upon voluntariness. So long as people are entitled to their holdings, they are free to dispose of them as they please. This includes giving them to



other people or exchanging them in return for some other holding. Nozick uses his Wilt Chamberlain argument in order to illustrate that there is nothing wrong with voluntary exchange – basketball fans voluntarily pay to see Chamberlain play. Nozick sees nothing wrong with such transfers and, as a result, he sees nothing wrong with the outcome (Chamberlain with more money than he had previously). He argues that people's voluntary disposal of resources upsets patterns. If, for example, a utility maximizing pattern was established in society before the basketball fans *chose* to pay to see Chamberlain play and it is no longer maximized following the transfers to Chamberlain, Nozick argues that it is unjust to try and forcibly revert to that pattern by means of state action. 'Liberty upsets patterns,' Nozick reasons, and it is unjust to try to reestablish a pattern when all that has happened is its destabilization due to voluntary transfer. What is important to Nozick is entitlement. So long as individuals receive holdings as a result of others voluntarily parting with holdings either because of charitable donations or in exchange for some good or service (seeing Chamberlain play, for example), then the person who receives those holdings is entitled to them because they are the result of a voluntary transfer. Likewise Nozick argues that free transfer will also upset any end-state theory, for example an equal share for all, because so long as people are free to transfer resources as they wish the end state will soon be disrupted. Again, seeking to forcibly reestablish that end state would constitute a violation of individual entitlement rights.

From here, Nozick argues that so long as people are entitled to their holdings in accordance with the principle of justice in original acquisition and the principle of justice in transfer, it is unjust for the state to take such holdings. Nozick's libertarianism is concerned with individual liberty. So there is an individual good. This individual good may be quite different from any good that a state would seek to implement. A state, by taxing an individual in order to fund some societal good, is taking away a portion of an individual's labour earnings. Nozick argues that by taking away a portion of a person's labour earnings, that portion of associated labour is 'on a par with forced labor.' And, by interfering in an individual's decisions and choices (by, in effect, forcing him to work more hours to earn the same amount of money), the government is encroaching upon the individual's ownership over himself. In addition, by taking away an individual's earnings

or entitlements by force or threat of force, a state that taxes to fund societal aims is violating Nozickian side constraints that express the inviolability of persons and strictly limit the ways in which people can be used. The basis for this concept is the Kantian injunction which states that individuals should not be used as means but treated as ends only. Nozick argues that if a state taxes an individual in order to fund some societal plan (a plan that that individual would not contribute to absent the threat of state force), then the state is using the individual as a means, a means to achieving that societal plan. Furthermore, Nozick believes that what distinguishes persons from animals, so that stringent side constraints apply only to persons, is the ability of persons to plan and strive for a meaningful life. The existence of changing and ever-present state taxation, Nozick contends, hinders individuals' ability to plan meaningful lives and fails to guarantee the respect that persons *qua* persons should be afforded.

So, the state that evolves from the state of nature is Nozick's minimal state with the sole purpose of protecting individuals' rights over their persons and their property. Any state that seeks to go beyond this narrow role by taxing to fund societal schemes (sustenance and opportunity, for example) fails to respect individual entitlement rights and is therefore unjustified.

In Part I, Nozick explains how a state evolves from his state of nature. In Part II, he explains the precise role of the state – it is a minimal state that protects its citizenry from force and theft but it does not have powers to justly tax in order to promote what it deems to be goods. This is not the end of the story. In Part III, *Utopia*, Nozick argues that the ability of individuals to form and voluntarily join diverse communities within the minimal state provides a framework for utopia. Individuals are very different, he reasons, and there is no one kind of community that best suits everyone. Instead, there will be many voluntary diverse meta-utopian communities (including redistributive communities) so long as members join willingly and are not forced to stay if they wish to leave.

In *Anarchy, State, and Utopia*, Nozick explains how the minimal state evolves from his anarchical state of nature without violating rights, he imposes strict limitations on the role of the minimal state that evolves from the state of nature, and he argues that his minimal state provides a framework for utopia because people are free to form diverse communities within the minimal state.

I will discuss most of the arguments that Nozick develops in Parts I, II, and III of *Anarchy, State, and Utopia* to differing degrees. In Chapter 1, I will assess Nozick's three underlying principles that justify acquisition, transfer, and the limited role of the minimal state – the Lockean proviso, the Wilt Chamberlain argument, and the Kantian injunction. I will discuss these key principles in the context of sustenance. Sustenance provision is not guaranteed in the minimal state but I will argue that it is not incompatible with a proper interpretation of Nozickean principles. I will also assess Nozick's conception of the meaningful life and argue that sustenance should be seen as a prerequisite for the forming of a meaningful life. In Chapter 2, I will discuss opportunity. Nozick does not guarantee opportunity or education. I will argue that this could bring about certain situations where the Kantian injunction could be violated. I will also reason that the failure to provide education, potentially for a large number of people, could lead to a situation where the efficient outcomes that Nozick sees as a by-product of his libertarianism may not come about. I will also return to Nozick's conception of the meaningful life. I will argue that barriers to progression, due to limited opportunity and unimpeachable unfair employment selection procedures, may constitute severe limitations on life plans for many people. In Chapter 3, I will argue that difficulties associated with Nozick's principles of rectification and compensation may mean that at least sustenance and opportunity should be afforded to all individuals. I will also state that the principle of rectification may lead to the swelling of the minimal state if all individuals are to be protected equally as this is one of the main reasons that minimal state makes its final step from the state of nature to statehood. In the final part of the chapter, I will not discuss in great detail the evolution of the minimal state from the state of nature. However, I will argue that the nuisance power of individuals may mean that they could bargain for more than the protection of the minimal state. I will also contend

that Nozick's thesis will not convince anarchists and that the legitimacy of a state must be judged not only by the way it evolved from the state of nature but must be judged by its actions. Finally, I will assert that, despite Nozick's belief that the minimal state is less susceptible to corruption than non-minimal states, that this is not true because the benefits from corrupting the minimal state are potentially substantial. In the concluding chapter, I will maintain that a reliance on charity to provide the provisions prescribed is unrealistic. I also put forward some arguments that favour the liberal state that I develop in this thesis above a Nozickean minimal state. This will include the important argument that people be treated as more than commodities that can be sold so long as voluntariness remains intact. I will also argue that the minimal state that I favour will have greater powers to promote efficiency and convenience and to limit dangerous practices. I will finish by concluding that Nozick's framework for utopia will not bring about the diversity and stability that he envisages and may be irrelevant to some people, especially the poor. In the course of developing my arguments I will draw extensively from all parts of *Anarchy, State, and Utopia*. In doing so, I will develop a framework for a liberal state that comes about by interpreting Nozick's principles in more reasonable ways and is more likely to bring about the positive side-effects that Nozick envisioned and offset negative side-effects that Nozick does not safeguard against.

### **0.3 Literature Overview**

#### ***0.3.1 Introduction***

In assessing Nozick's arguments, I will discuss some of the large amount of secondary literature relating to his libertarian theory. For the remainder of this introductory chapter I will introduce the main critics that I address and the ways in which they relate to Nozick's arguments. I will also briefly discuss some of the many critics that I do not directly address in the main body of the thesis. Certain critics' arguments will be seen to be largely complete for my purposes and, where they are, I will state this but situate them within my general argument. In other situations, writers' arguments will impact upon Nozick but I will develop them further for my purposes. A final group of critics may have

important and interesting criticisms of Nozick that I will accept but I will not accept their conclusions resulting from such criticisms. I will also account for some aspects of Nozick and related literature that I do not consider in detail. In Part II of *Anarchy, State, and Utopia*, for example, Nozick defends his minimal state by criticizing (John Rawls') egalitarian, utilitarian, and Marxist/socialist societies. I do not take up these criticisms in any direct fashion. This is because it would add a great deal of length to this thesis and it is not the purpose of the project that I have undertaken here. I will seek to develop the basis of a liberal state from (a) a correct interpretation of Nozick's principles, (b) a greater likelihood of achieving positive side-effects than from Nozick's libertarianism, and (c) building in safeguards to counter negative tendencies in Nozick's theory. On occasion my arguments may act to counter Nozick's criticism of third parties. This is merely coincidental but may form the basis of further study in the future.

Much of the secondary literature on Nozick falls into the following areas that I present here in a broad and brief manner – (1) criticism of his underlying principles and their ability to support his conclusions (the Lockean proviso and the Kantian injunction), (2) the fact that Nozick makes assumptions at crucial points (the adoption Lockean proviso and the principle of rectification), (3) certain arguments are not appealing unless one has Nozick's beliefs and intuitions (the Wilt Chamberlain argument), (4) certain interpretations of arguments are done so in too narrow a fashion to suit Nozick's position and other relevant considerations are not presented (the Kantian injunction, the meaningful life, and the ways in which they relate to sustenance and opportunity), (5) certain legitimate libertarian outcomes are unfair and unjust (discrimination, slavery), (6) the efficiency that Nozick sees as a by-product of his libertarianism may not materialize and efficiency may be more likely to come about under different theories of acquisition, ownership, and government (the Lockean proviso, opportunity, and the liberal state) (7) Nozick has failed to safeguard against corrupting tendencies (the principle of rectification and the minimal state itself), (8) Nozick's state may not convince those opposed to the existence of a state and a state must be justified by its actions and not only by the way in which it arose from the state of nature (the invisible hand process, anarchism, and other areas), (9) in the absence of compulsion individuals will not ensure that desirable

provisions are provided (reliance on charity), (10) Nozick's utopia may not be as stable and diverse as he envisions. I will discuss these broad criticisms and related arguments in differing degrees of detail in roughly the order presented here.

The first chapter will address the large amount of literature that underlies the foundations that Nozick uses in order to justify acquisition, transfer, and state non-interference, namely, the Lockean proviso, the Wilt Chamberlain argument, and the Kantian injunction. Assessment of the Lockean proviso is complex and important. If it is possible to rework Nozick's theory of entitlement before it really gets off the ground (because acquisition is the starting point for entitlement), then I contend that the likelihood of some (possibly many) going without the means of sustenance can be limited. This is an obvious starting point for much egalitarian analysis of Nozick. I will also consider criticisms that maintain that Nozick's acceptance of his reformulated Lockean proviso may be inconsistent with his general entitlement theory, may leave the door open for redistribution, and may fail to bring about the efficiency that he sees as a by-product of his libertarianism.

Assessment of the Wilt Chamberlain argument is, on the face of it, less complex. Nozick argues that one can accept any principles throughout and still find the argument intuitively appealing. I will agree with the criticism that one has to accept Nozick's position throughout in order to find the argument convincing. I will also state that I find arguments that seek to provide sustenance more appealing. I will not discuss in a direct, detailed manner the concept of self-ownership that underlies the Wilt Chamberlain argument and all of Nozick's foundational arguments. This is a task that has been undertaken extensively by G.A. Cohen. An analysis of Cohen's criticisms of Nozick and possible replies by Nozick would go beyond the bounds of this thesis. Nevertheless, and although I do not deal with the concept of self-ownership in a direct and extensive fashion, it will be apparent that it is related to most of the arguments in this thesis. In general, I will hold that even in Nozick's minimal state people are not full self-owners, that sustenance and education may be required before the concept of self-ownership becomes important to people, and that constraints upon the by-product of self-ownership

– total non-interference and free disposal of resources – may be necessary in order to curtail inefficient outcomes and to protect society in a broader way than Nozick is likely to sanction.

The common criticism of Nozick's construal of the Kantian injunction is that it is developed in too narrow a fashion in order to suit Nozick's libertarianism. I will go along with the analysis that contends that people can be used as means in ways other than Nozick's consideration of people being used as means in the context of taxation. I will also align myself with critics that believe that the effects of redistributive taxation are exaggerated by Nozick. As stated, Nozick uses the Kantian injunction in order to develop the concept of a meaningful life – if people are interfered with and treated as means in the form of taxation, they cannot plan meaningful lives. I will agree with analyses that correctly point out that sustenance (and perhaps more) may be needed in order to plan a truly meaningful life and that the freedom to plan meaningful lives will be vacuously unimportant to those without the means of sustenance.

Nozick does not deal with the concept of equal opportunity at length. Essentially, because it involves redistribution, it is the same for him as other redistributive programs – it is not allowed because it involves violating the rights of those who are entitled to their holdings by taxing a proportion of those holdings. Universal opportunity is a conception that is of importance to me because I believe that failure to provide opportunity has negative effects on those without opportunity and society as a whole. I will side with commentators that contend that Nozick's failure to provide education and opportunity (potentially for many) may lead to circumstances where the Kantian injunction can be contravened.

I will also agree with critics that argue that the paramount importance given to freedom in transfer and strong entitlement to holdings in Nozick may lead to the *de facto* legitimization of discrimination. This upshot of libertarianism will be seen to be unfair. Arguments that maintain that reliance on efficiency to counter discrimination is inadequate will be accepted. Indeed, I will argue that Nozick's failure to provide

universal opportunity will lead to inefficient outcomes in society. In later writings, Nozick came to accept that unlimited powers of bequest and inheritance create power relationships over time that are unfair. I will spell out the reasons for them being unfair, namely, a likely infringement of the Kantian injunction and possibly irremediable improper treatment of people. The conclusion of Chapter 2 will be that opportunity may be necessary in order to ensure that certain foundational principles that Nozick accepts come about and to ensure that efficiency is promoted.

In Chapter 3.1, I will accept criticism that Nozick's conception of a legal system, based on his principles of rectification and compensation, will be almost impossible to apply to real society without many imperfections. Given that this is the case, I will argue that people should not go without sustenance and education just because strong conclusions have been reached regarding entitlement. I will also agree with the assessment that the principles of rectification and compensation may lead to growth of the minimal state because all raised disputes must be heard if the universal protection that the minimal state must provide is to be properly provided. In addition, I will accept criticism that Nozick fails to establish justification of punishment beyond the payment of compensation and that he cannot consistently establish a fraud standard. The conclusion will be that a fair legal system will be able to address the issues that will be raised in this section. Admittedly, much more can be written in this area that has not received as much attention as other aspects of Nozick's libertarianism. The principle of rectification is vitally important for Nozick because it determines justice in holdings and addresses injustice in holdings. Nozick confesses that the principle is not fully formulated and this may account for the relatively small amount of criticism in this area. However, it will be obvious that there needs to be more to a legal system than Nozick's principles of rectification and compensation. In the future, I hope to assess the extent of what is needed in a legal system beyond Nozick's principles of rectification and compensation.<sup>2</sup>

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<sup>2</sup> I have just started law school in the U.S. and in the first weeks the shortcomings of Nozick's principles of rectification and compensation as the cornerstone of a legal system are apparent. I hope to write a paper at Temple University School of Law on this subject in the coming years.



In Chapter 3.2, I assess Nozick's minimal state. I agree with critics that argue that Nozick's minimal state will not convince those who are opposed to the very existence of a state, that a state must be justified by its actions and not only by the way in which it evolved from a state of nature, and that the nuisance powers of state of nature individuals may mean that they can bargain for more than protection from the minimal state so that they lay down their arms and do not enforce their rights from their point of view. I will not consider analysis of the legitimacy of each step between Nozick's state of nature and the foundation of the minimal state. Such analysis is interesting but would lead to a large expansion of the length of this thesis without adding a great deal to the main issues that I wish to discuss. To end 3.2, I will also accept a view put forward that money can seep across boundaries and affect institutions within states and, contrary to Nozick's assertions, the minimal state is not more immune than other states from such seepages.

In the concluding chapter, firstly I will assess charity as a means of ensuring the provisions that I wish to justify in this thesis. However, I will agree with criticism that argues that a reliance on charity places too much responsibility on individuals to contribute to possibly many programmes that need funding. I will accept the view that reliance upon charity to address societal concerns is antiquated and is unlikely to ensure that the provisions that I advocate are provided.

Secondly, I will align myself with the assessment that libertarianism sanctions the treatment of people in unjust ways that a liberal state, that I will endorse, cannot allow. This will include the voluntary selling of oneself into slavery. A liberal state cannot allow or enforce such a contract. I will also accept the formulation of a liberal state that is more adept than the minimal state at promoting efficiency and convenience and prohibiting dangerous acts.

Thirdly, criticism that alleges that Nozick's framework for utopia will not have the stability or diversity that he anticipates will be considered and accepted. Stability cannot be assumed because conflict will occur if meta-utopian communities hold views contrary to those of the minimal state. In addition unusual meta-utopias, including redistributionist

ones, are unlikely to last long because people can leave any community with their holdings at any time and because of the likelihood that successful communities will be homogeneous if they are to be successful.

Finally, I will briefly consider bargaining processes for roles of the state beyond those that I discuss in this thesis. In later writings, Nozick accepted such processes in the political system. I also consider the possibility of a theory of pragmatic egalitarianism based on Nozick's libertarianism and some other theorist.

The remainder of the introduction will assess key areas of criticism of Nozick in roughly the order that they are presented in the main body of the thesis.

### ***0.3.2 The Literature***

#### **The Lockean Proviso**

Starting at entitlement's beginning, initial acquisition is essential to Nozick's thesis: If there is no legitimate appropriation from nature, then ownership cannot come about. Without ownership, there can be no entitlement and no legitimate transfers because individuals cannot justly transfer things to which they are not entitled. Nozick does not accept any sort of initial common ownership and he does not accept any sort of bargaining process whereby unowned resources can enter into the private realm. On the other hand, he does not advocate a system that is fully a first grabber, first owner system. Initial acquisition is constrained, to a degree, by Nozick's interpretation of the Lockean proviso. Locke's proviso is essentially that individuals can come to own objects by mixing their labour with unowned objects so long as 'enough and as good [is] left...for others.' Nozick casts some doubt over Locke's idea of mixing labour resulting in ownership but he broadly accepts it so long as value is added in the labour mixing process.<sup>3</sup> But, what is really essential to Nozick, is not that individuals who do not

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<sup>3</sup> However, here, as in other parts of Nozick's theory, but particularly with regard to the Lockean proviso, Nozick does not commit fully to his viewpoint and leaves it to future study thereby avoiding potential

acquire are left with 'enough and as good' but that their 'situation...is not worsened.' Locke's stringent proviso is too strong for Nozick's purposes. But, Nozick's 'no worse off' weaker proviso sanctions appropriation with fewer hindrances although there are still some hindrances and Nozick says that a baseline as to what constitutes 'no worse off' 'needs more detailed investigation.' Nozick is unsure that a Lockean proviso can overcome the difficulties that he puts forward but, nevertheless, he *assumes* 'that any adequate theory of justice will contain a proviso similar to the weaker of the ones attributed...to Locke.'<sup>4</sup> Nozick's interpretation of the Lockean proviso is not fully complete and, for this reason, there is criticism of Nozick's construal of the proviso.<sup>5</sup> However, more interestingly, the implications of the acceptance of the proviso may result in unfavourable conclusions for Nozick that impact the whole of his libertarian theory. This is because just acquisition is of primary importance to Nozick because it influences the legitimacy of all holdings.

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cumbersome criticism which he himself recognizes. Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.175

<sup>4</sup> *ibid.* p.178

<sup>5</sup> For a discussion on the problems associated with Nozick's interpretation of the Lockean proviso, see Davis, Lawrence 'Nozick's Entitlement Theory' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.344-354. Davis argues that Nozick 'refutes them [Locke's remarks on initial acquisition], considers some revisions, and rejects these also' but, nevertheless, assumes that initial acquisition will be justified using some form of Lockean proviso and moves on, leaving the crucial subject undermined and undeveloped. It may well be the case that a Lockean proviso is unsalvageable following criticism levelled at it by Nozick and other critics. Perhaps it is necessary to justify ownership on the grounds that it enhances personal projects important to humans and a historically perfect theory of initial acquisition may be unable to do this. On this subject, see Sanders, John T. 'Projects and Property' in Schmidtz, David (ed.) *Robert Nozick*, Cambridge University Press, 2002, pp.34-55. Sanders argues that 'the famous Lockean proviso...is both conceptually incoherent and self-defeating' because 'it simply doesn't protect the interests of others in the way Locke intended. In fact, it aggravates the very problems of scarcity that Locke meant to ameliorate.' Nevertheless, Sanders concludes that 'the role of personal projects in human life...will play a central justificatory role in establishing whatever principle of first acquisition emerges...' Admittedly, by criticizing Nozick in the main body of the thesis and moving on without fully addressing initial acquisition, I will be, to a degree, guilty of criticism that I level at Nozick. I do think that original acquisition arguments are strange because for 'most of the property we care about, its acquisition is ancient history...and...myth.' Gaus, Gerald F. and Lomasky, Loren E. 'Are Property Rights Problematic?', *The Monist*, 73, 4, October 1990, p.496. I am not defending a conservative status quo position with regard to property in today's societies. On the contrary, I believe that a historical assessment of current properties may reveal much harm associated with accumulation. It may even be the case, as Bernard Williams contends, that 'it is 99 per cent certain that almost all of them [current holdings] are not [justly held].' Williams, Bernard 'The Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.35

Much of the liberal/egalitarian criticism of Nozick centres on his interpretation of the Lockean proviso.<sup>6</sup> As stated above, Nozick does not set a baseline standard as to what constitutes 'no worse off.' However, he does conclude that an individual who works for an employer and earns a certain income that can buy certain resources is no worse than she would have been if she had hunted and gathered for those resources in a non-property state of nature. For Nozick, these two situations are the same materially and so the labourer has no valid complaint regarding property ownership. In this context, Cheyney Ryan argues that there are spurious links between the association of liberty and private property and that there are important liberties that are lost following the appropriation of property that are not fully accounted for in the form of wage labour.<sup>7</sup> Entitlement does restrict liberty in obvious and important ways, as Ryan argues. Compensation that ensures individuals are no worse off *materially* following appropriation does not account for the likelihood that, in the state of nature, the material existence of a hunter/gatherer would likely be limited. Given the loss of other liberties, it may be the case that, even if one assumes that a system of private property is justified, more is owed to those who are unable to appropriate than the likely hand-to-mouth state of nature levels of material resources without all of the other freedoms (to roam, hunt,

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<sup>6</sup> Amongst others, see O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.305, 312, Kavka, Gregory S. 'An Internal Critique of Nozick's Entitlement Theory', *Pacific Philosophical Quarterly*, 63,4, October, 1982, pp.372-373, Brody, Baruch 'Redistribution Without Egalitarianism', *Social Philosophy and Policy*, 1,1, Autumn, 1983, p.79

<sup>7</sup> Ryan, Cheyney C. 'Yours, Mine, and Ours: Property Rights and Individual Liberty' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982. Jonathan Wolff makes a similar point to Ryan when he states that workers and non-owners have liberties restricted under Nozick and that 'the acquisition of land by one person appears to deprive others of liberty.' Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.97,98,101. Hugh La Follette argues in a similar vein when he states the emergence of a private property system 'limits my freedom, and my "happiness," without my consent.' La Follette, Hugh 'Why Libertarianism Is Mistaken' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.197. I am not putting forward these considerations to truly question the emergence from a pre-property state of nature. I am simply saying that a system of (extensive) private property limits natural freedoms and, given that these freedoms are lost, there may be more owed than the state of nature minimal levels of existence to those who do not or are unable to acquire. It will not do, as Nozick does, to simply assert that wage-labour can result in people having the same material existence as they had in the state of nature and so they have the same level of welfare. The end of state of nature freedoms - to hunt, gather, roam, and so on - can affect liberty generally and this may mean that, following acquisition, non-acquirers' welfare levels may be lowered even if their material existence is the same as it would have been in the state of nature. This, in turn, means that people may need more than protection and potentially minimal levels of material existence in order to be compelled to accept the legitimacy of a property minimal state where they give up many natural freedoms.

gather, cultivate) of the state of nature. This question is also considered in the left-libertarian position of Michael Otsuka (see below).

In another analysis of the Lockean proviso, David Lyons argues that, even for Nozick and because of the Lockean proviso, the property rights that Nozick asserts are inviolable and permanent are more 'flexible [and] variable' than he contends.<sup>8</sup> Lyons points out that Nozick accepts that the Lockean proviso has a 'historical shadow.' This historical shadow of the Lockean proviso means that a series of acquisitions of a certain resource (water, for example) could legitimately occur and, given an abundance of this resource, these acquisitions would not make others worse off. However, if there was more and more acquisition or if a natural disaster occurred limiting the supply of this resource, the historical shadow of the Lockean proviso, which accounts for people being 'no worse off,' comes into play. As a result, privately owned resources could no longer be deemed to be justly privately held if the Lockean proviso (that people are no worse off than they would have been in a pre-property state of nature) no longer holds.<sup>9</sup> Lyons' argument helps to illustrate that, even for Nozick and despite his strong conclusions, property rights are not permanent and inviolable. This lack of permanence and inviolability means that most people, including future generations, will most likely be assured baseline standards of living consistent with the Lockean proviso and a proper interpretation of the historical shadow of the proviso. This will allay some fears of mass starvation. However, it may also be that those who are unable to acquire may be owed more than what would be afforded to them by adherence to the Lockean proviso, where Lockean compensation may allow some to acquire extensively and only be obliged to minimally compensate those who are unable to appropriate because of the acquisition of others.

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<sup>8</sup> Lyons, David 'The New Indian Claims and Original Rights to Land' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982. Hillel Steiner similarly argues that the Lockean proviso does not establish permanent property rights. He reasons that this is because human society is constantly changing and this means that redistribution must also occur so that everyone is 'no worse off.' Steiner, Hillel 'Justice and Entitlement' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.382

<sup>9</sup> Steiner also argues that the 'shadow thrown by the compensation proviso so entirely envelopes such titles [appropriations] as to render them indiscernible.' This is because, according to Steiner, one must consider 'individuals who do not yet exist...' Steiner, Hillel 'The Natural Right to the Means of Production', *The Philosophical Quarterly*, 27,106, January, 1977, p.47-48

This leads directly to the consideration of another conventional libertarian, Eric Mack.<sup>10</sup> Mack, like many libertarians, attempts to establish property rights through a defence of robust rights of self-ownership. Mack criticizes Nozick by arguing that Nozick's fixation with a pre-property state of welfare is flawed and his proviso is weakened because attached to it is his principle of compensation which can be related to acquisition. This principle states that people must be compensated if they *are* worse off following acquisition than they would have been in the state of nature if acquisition had not occurred. It is not only difficult to establish the welfare equivalency of this state of nature no worse off standard but Mack also contends that Nozick's proviso sanctions almost any noninvasive action so long as compensation is paid. Indeed, the presence of the principle of compensation is likely to fail to genuinely respect rights because almost all rights violations can occur so long as compensation is paid after the occurrence of a rights violation. Mack's concerns have weight. Nozick's interpretation of the Lockean proviso may be seen to be inadequate because the compensation afforded to those who are unable to appropriate fails to consider their potentiality to accumulate if such opportunity were available to them, which it is unlikely to be if mass acquisition has already occurred. Mack resorts to a reliance upon the benefits of the market, as Nozick does, in order to pass over the concerns that he raises with regard to Nozick's proviso. This may be too quick a step and it may not be the case that the benefits for many are easily foreseeable. But the main point to be taken from Mack is that recourse to compensation consistent with welfare that is no worse than the state of nature is difficult to determine.<sup>11</sup> In addition, the proviso, coupled with the principle of compensation, may fail to adequately protect rights because they can be transgressed so long as compensation is paid following transgression.<sup>12</sup> Furthermore, no worse off compensation, consistent with Nozick's proviso, fails to consider the potentiality of non-acquirers who are likely to be

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<sup>10</sup> Mack, Eric 'The Self-Ownership Proviso: A New and Improved Lockean Proviso', *Social Philosophy and Policy*, 12,1, Winter, 1995, pp.186-218

<sup>11</sup> As stated, Nozick is unable to establish this welfare baseline himself.

<sup>12</sup> Jonathan Wolff makes a similar point to this when he argues that Nozick's compensation principle when applied to rights is a 'violate first, compensate later' principle. Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.59

compensated to minimal levels (and have liberties restricted) while acquirers can accumulate almost unbridled riches.<sup>13</sup>

A new form of libertarianism, labelled as left-libertarianism and exemplified by Michael Otsuka, has sought to address issues associated with Nozick's adoption of the Lockean proviso.<sup>14</sup> Otsuka argues that a proper interpretation of the Lockean proviso will result in a more egalitarian distribution than that which he envisages in Nozick's minimal state.<sup>15</sup> He believes that, given the mass accumulations that can be claimed by accumulators, non-accumulators should be afforded more than the no worse off proviso affords them – no worse off than what Otsuka believes are meagre state of nature levels of welfare. Otsuka argues that libertarianism is not necessarily inconsistent with more egalitarian outcomes than are associated with Nozick's libertarianism.<sup>16</sup> However, Otsuka is unlikely to convince non-left-libertarians such as Nozick. In addition, I believe that there is more

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<sup>13</sup> Related to this notion that Nozick's compensation may undervalue people's potentiality, is Hillel Steiner's notion that market compensation may be a form of inadequate redress for (unjust) appropriation. This is because certain individuals could have developed resources beyond market value if they had not suffered injustices. Steiner, Hillel 'The Natural Right to the Means of Production', *The Philosophical Quarterly*, 27,106, January, 1977, p.46

<sup>14</sup> Otsuka, Michael *Libertarianism Without Inequality*, Clarendon Press, Oxford, 2003. For a collection of writings by left-libertarians and related issues, see Vallentyne, Peter and Steiner, Hillel (eds.) *Left-Libertarianism and Its Critics: The Contemporary Debate*, Palgrave, Basingstoke, 2000

<sup>15</sup> Other critics of Nozick, besides Otsuka, argue that more is owed to non-acquirers than the 'no worse off' state of nature levels that Nozick affords them. For example, Gregory Kavka argues that Nozick's 'no worse off criterion' (or 'no net harm criterion') 'systematically understates the *amount* of compensation that morality requires' because Nozick's baseline only counts for material wealth and not other considerations that are not present in the state of nature (barriers, fences, guards). This is similar to the arguments of Cheyney Ryan, Jonathan Wolff, and Hugh la Follette (above). Kavka, Gregory S. 'An Internal Critique of Nozick's Entitlement Theory', *Pacific Philosophical Quarterly*, 63,4, October, 1982, pp.371-377. Baruch Brody contends that everyone in society deserves: (1) state of nature levels of subsistence, and, (2) more in wealthier countries where the benefits of the transition from the state of nature are more apparent and the poor should also be allowed to share in these benefits. Brody, Baruch 'Redistribution Without Egalitarianism', *Social Philosophy and Policy*, 1,1, Autumn, 1983, p.87

<sup>16</sup> Otsuka also reasons that the disabled can be provided for by taxing those who have been 'convicted of performing justifiably criminalized acts.' He sanctions taxation of 'the unjust.' Otsuka, Michael *Libertarianism Without Inequality*, Clarendon Press, Oxford, 2003, pp.41-50. I do not discuss this proposition in the thesis because my initial feelings are: (1) this may be a haphazard and unreliable way of generating public revenues, (2) much of what the unjust have may be owed to others who have been robbed, defrauded, burgled, and so on, and (3) sources of unjust money may be limited in a truly liberal society where certain revenue spinning criminal activities in normal society may not be criminalized. One can think of certain illegal drugs in this context although I do not wish to delve into that argument here. I am not really dealing fully with Otsuka's suggestion but much of the proceeds of unjust people do go into the public coffers today while inadequate outcomes for the poor and infirm persist. I realise that Otsuka could argue that under his system such proceeds would go straight to the disabled but this still does not get away from (1) to (3) in my opinion.

to distribution in society than a reliance upon a more egalitarian interpretation of the Lockean proviso and that Otsuka's libertarianism, like conventional forms of libertarianism, fails to fully consider important issues such as a true respect for persons and others factors essential to a fair and efficient society.

There are two further topics important to the analysis of Nozick's Lockean proviso. Firstly, Fred Miller maintains that Nozick has left the door open to redistribution and a large welfare state through his adoption of the proviso because any claims to acquired resources can be contested at any time by those that feel that they are below a certain unspecified baseline.<sup>17</sup> As Miller argues, claims that people are below state of nature levels involve a large amount of subjectivity but such claims must be heard if the legitimacy of the minimal state is to be accepted by its citizens. Such considerations are also alterable throughout time as levels of ownership and scarcity change because the historical shadow of Nozick's proviso can come into play.<sup>18</sup> Miller's contention that the Lockean proviso is Nozick's Achilles heel carries weight. This is because Nozick fails to set a baseline as to what constitutes 'no worse off' and because of the changing nature of the Lockean proviso due to changing circumstances. Contentious claims regarding entitlement stemming from initial acquisition must be assessed if the evolution from the state of nature to the minimal state is to be legitimate. As a result of such required assessment, the role of the state may be extensive and, where assessment leads to conclusions of injustice in holdings, redistributive state functions may also turn out to be extensive.

Secondly, the Lockean proviso can lead to potential market inefficient outcomes as envisioned by Israel Kirzner<sup>19</sup> and Hillel Steiner.<sup>20</sup> With regard to Kirzner, he argues that

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<sup>17</sup> Miller, Fred D. 'The Natural Right to Private Property' in Machan, Tibor (ed.), *The Libertarian Reader*, Rowman and Littlefield, Totowa, New Jersey, 1982, p.283

<sup>18</sup> A changing population through the human processes birth and death will also affect these considerations. See, Steiner, Hillel 'The Natural Right to the Means of Production', *The Philosophical Quarterly*, 27,106, January, 1977, p.47-48

<sup>19</sup> Kirzner, Israel M. 'Entrepreneurship, Entitlement, and Economic Justice' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.396-398

<sup>20</sup> Steiner, Hillel 'The Natural Right to the Means of Production', *The Philosophical Quarterly*, 27,106, January, 1977, p.47



Nozick fails to truly appreciate the role of a creator/acquirer from nature. Certain individuals may employ original, entrepreneurial techniques when acquiring from nature. If what they produce is in effect 'up for grabs' (because of the Lockean proviso and its historical shadow), this undermines and may act as a disincentive to genuine value-adding acts of entrepreneurial acquisition. In certain circumstances it may be the case that property rights stronger than those advocated by Nozick and immune from the effects of the Lockean proviso may be warranted if creativity, entrepreneurship, and associated efficiency are to be encouraged. In addition, Hillel Steiner argues that individuals must hold back resources in Nozick's minimal state, to a degree, because they may owe compensation at any time due to changing interpretations of the Lockean proviso and its historical shadow.<sup>21</sup> This could lead to inefficiencies because individuals may be deterred from investing in long-term projects where resources are not easily liquidated if they are aware that they may be forced to pay compensation so that the (changing) Lockean proviso is properly adhered to.

The criticism of Nozick's interpretation of the Lockean proviso leads to the conclusions that, amongst other matters, there are problems with the formulation of Nozick's proviso, that more may be owed to those unable to acquire than 'no worse off' state of nature levels of subsistence, and that Nozick's proviso may undermine the general conclusions of his entitlement theory and lead inefficient outcomes.

### The Wilt Chamberlain Argument

Whereas the Lockean proviso establishes just initial acquisition, Nozick's Wilt Chamberlain argument illustrates justice in voluntary transfer. It states that Chamberlain should be allowed to keep all of the income that he receives from basketball fans and

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<sup>21</sup> As with G.A. Cohen (see below) Steiner has written widely on Nozick. I do not discuss his broader arguments in the main body of the thesis because this would go beyond the remit of this project and because there is a certain overlap involved between Steiner and other critics that are discussed in more detail such as Michael Otsuka and Fred Miller. Nevertheless, the recurrence of Steiner's arguments in the footnotes to this introduction make his contributions to important areas on Nozick easily discernible.

results in a distribution shift in society from  $D_1$  to  $D_2$ . Onora O'Neill,<sup>22</sup> G.A. Cohen,<sup>23</sup> and others<sup>24</sup> argue that Nozick accepts his libertarianism at both  $D_1$  and  $D_2$  and that if one does not accept his libertarianism at  $D_1$ , as Nozick says we do not have to do, then one is not compelled to accept his conclusion at  $D_2$  (that Chamberlain and no-one else is entitled to what he has accumulated). These criticisms have legitimacy. Nozick grants that one can hold any distributive philosophy one wants at  $D_1$  and still be convinced that the transition to and outcomes at  $D_2$  are acceptable. But, this does not seem to be true because, for example, one could accept that there is nothing wrong with the transition from  $D_1$  to  $D_2$ , but argue, contrary to Nozick, that Chamberlain does not have inalienable rights to his new income and that a proportion of the new income can be legitimately taxed to contribute to important societal projects. In relation to this, Cohen also argues with reason that redistributive claims of third parties, especially the very poor, can legitimately change once there has been a change in the overall distribution in society because what third parties have depends on what others have and on the overall distribution in society.<sup>25</sup> This is also true and there may be many considerations once  $D_2$  is arrived at that can lead one to conclude that justified redistribution should occur to help impoverished groups.

It is also doubtful that the intuitive appeal that Nozick associates with the Wilt Chamberlain argument is universal. For many, myself included, there may be greater intuitive appeal towards arguments that seek to establish a basis for the provision of sustenance for those unable to provide for themselves rather than towards the intuitive

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<sup>22</sup> O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.308-309

<sup>23</sup> Cohen, G.A. 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.250

<sup>24</sup> For example, Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, p.127, Nagel, Thomas 'Libertarianism Without Foundations' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.192, 195

<sup>25</sup> Admittedly, I do a disservice to Cohen by citing him as little more than a brief rebutter of Nozick's arguments, even if his rebuttals are poignant. However, as stated, Cohen's writing on Nozick is extensive and a full consideration of Cohen and possible responses by Nozick goes beyond the bounds of this thesis. Jonathan Wolff also makes this point by referencing Cohen and argues further that money is power and third parties can be affected by the power of others. This is undoubtedly true and a major reason behind Nozick reconsidering unlimited bequest and inheritance in later writing (see below). Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.87

appeal of allowing Chamberlain to keep all of the money that results from voluntary transactions.<sup>26</sup>

Assessment of writing on Nozick's Wilt Chamberlain argument leads to the conclusion that it is not appealing unless one accepts Nozick's entitlement theory and moral intuitions throughout which Nozick says one does not have to do to find the argument plausible. If one does not accept Nozick's inalienable rights to property, it is reasonable to argue and have intuitions that taxation can legitimately occur to help the needy.

### The Kantian Injunction

Nozick's conception of the Kantian injunction – that people should be treated as ends and not means – is also assessed in detail in secondary literature on Nozick. The Kantian injunction is essential to Nozick's theory. It is the basis for formulating side-constraints which determine what cannot be done to persons. It is also the main reason for believing that taxation and redistribution are unjust because, by taxing and redistributing, a more-than-minimal state uses individuals as means to provide for state-determined ends. Taxation also infringes upon people's ability to plan meaningful lives, according to Nozick, because if resources are continually up for grabs due to taxation, people do not have the stability needed to plan meaningful lives. The common responses to Nozick's formulation of the Kantian injunction are: (1) people can be used as means in other ways beyond being used when taxed, (2) Nozick exaggerates the effects of taxation, and (3)

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<sup>26</sup> As stated succinctly by Thomas Scanlon, 'there is no strong intuitive ground for thinking that these rights [to the outcomes of transfers, for example] are absolute, and little ground for surprise at the suggestion that the pursuit of equality [or universal sustenance provision] might call for their infringement.' Scanlon, Thomas 'Nozick on Rights, Liberty, and Property' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.111. I do not go into moral intuitions in any great detail because it is likely to be near impossible to refute another's intuitions. Nevertheless, my moral intuitions are apparent with regard to Nozick's non-redistributionist stance especially in the context of sustenance for the needy who may have perished in the state of nature and therefore are 'no worse off' if allowed to perish in the minimal state. 'It is an extraordinary but apparent consequence of this [Nozick's] view that for a government to tax able-bodied citizens [such as Chamberlain] five dollars a year to support cripples and orphans would violate the rights of the able-bodied, and would be morally impermissible, whereas to refrain from taxation even if it meant allowing the cripples and orphans to starve to death would be the morally required governmental policy.' Scheffler, Samuel 'Natural Rights, Equality, and the Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.151

sustenance may be seen to be a prerequisite for the planning of a genuinely meaningful life.

The criticism that Nozick uses the Kantian injunction in too narrow a manner, in order to affirm that when people are taxed they are treated as means, is prevalent in many critiques.<sup>27</sup> John Exdell argues that, even in Nozick, people are forced to pay redistributive taxation in order to fund the protective apparatus of the minimal state. He also reasons that Nozick's use of Kant as a means to argue against redistribution is not proved to be a legitimate use of Kant's injunction.<sup>28</sup> It will not always be the case that people will be willing to contribute and will understand all protective schemes. In such circumstances, forced taxation for protective services amounts to the same effect as forced taxation to fund redistributive schemes. Nozick cannot consistently argue that non-voluntary taxation has such serious negative moral effects when that tax is used for a certain purpose but is totally acceptable when used for another purpose.

With regard to the treating of people as means, Hugh LaFollette believes that there are other important ways, besides taxation, in which people can be treated as means and not ends such as exploitative uses of labour in the productive process.<sup>29</sup> Nozick anticipates this critique and argues that so long as people voluntarily submit their labour power they are not used as means. La Follette's argument will be more appealing to many. The poor are treated as means in important moral ways and Nozick should have developed a more complex argument as to what constitutes voluntariness in this context.<sup>30</sup>

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<sup>27</sup> See, for example, Cohen, G.A. *Self-Ownership, Freedom, and Equality*, Cambridge University Press, Cambridge, 1995, p.239. '...Kant's principle does not entail the [Nozickian] thesis of self-ownership, and that thesis does not entail Kant's principle.'

<sup>28</sup> Exdell, John 'Distributive Justice: Nozick on Property Rights' *Ethics*, 87,2, January, 1977, p.143, 149

<sup>29</sup> La Follette, Hugh 'Why Libertarianism Is Mistaken' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.203

<sup>30</sup> Thomas Scanlon also questions Nozick's concept of voluntarism in this regard. 'The real question...is whether it is justifiable to allow wages [and working conditions] to be determined by bargaining under the conditions here envisioned... It raises the question whether this system of rights does not protect the liberties of some people in a way which gives them an unacceptable degree of power over others. This question cannot be met merely by reaffirming the rights [and voluntariness] in question...' Scanlon, Thomas 'Nozick on Rights, Liberty, and Property' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.116-122. Cohen argues, in a Marxist fashion, that most people 'are forced to work for some or other person or group.' Cohen, G.A. 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve

In the context of self-ownership derived from Kant, G.A. Cohen's broadly liberal (with some remaining Marxist undertones) position is relevant. Cohen critiques Nozick's conception of self-ownership, the effects of taxation, and taxation as a form of slavery.<sup>31</sup> Cohen's argument – that a limited amount of compulsory taxation is different from what Nozick characterizes as forced labour and slavery – will be appealing if Nozick's arguments and analogies are considered in a realistic manner. Cohen also argues in a similar way to Exdell that Nozick cannot consistently hold that taxation to fund protection has no negative moral effect, while taxation to fund redistributive programmes such as sustenance provision has a slew of negative effects. For these reasons, I believe that Nozick exaggerates the effects of taxation for redistributive schemes<sup>32</sup> and ignores the effect of taxation to fund protective schemes.

Finally, with regard to the Kantian injunction when considered in relation to sustenance, it may be that subsistence precedes the planning of a meaningful life. This argument is stated by Samuel Scheffler<sup>33</sup> and, more recently, observed to be not unreasonable by Simon Hailwood.<sup>34</sup> Scheffler correctly sees that Nozick's excessive consideration of the effects of taxation on the planning of a meaningful life may be of little relevance to potentially many people. For people living in harsh poverty what obviously constrains their planning of a meaningful life is unlikely to be taxation but limited resources. Both Scheffler and Hailwood make this point succinctly.<sup>35</sup> Universal sustenance, while not incompatible with aspects of Nozick, should be available to those unable to provide for

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Liberty' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.258

<sup>31</sup> Cohen, G.A. *Self-Ownership, Freedom, and Equality*, Cambridge University Press, Cambridge, 1995, p.231

<sup>32</sup> As stated, this point is common in the literature on Nozick. See also, Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.89, O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.320

<sup>33</sup> Scheffler, Samuel 'Natural Rights, Equality, and the Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.153

<sup>34</sup> Hailwood, Simon A. *Exploring Nozick: Beyond Anarchy, State and Utopia*, Avebury Press, Aldershot, 1996, p.53

<sup>35</sup> As does Samuel Freeman: 'Without sufficient income and wealth, one's liberties and opportunities are worth little...' Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, p.127. See also, Nagel, Thomas 'Libertarianism Without Foundations' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.117

themselves in a fair society so that the meaningful planning of meaningful lives can occur for people generally and not just for those with sufficient resources.

Thus, analysis of commentary on Nozick's formulation of the Kantian injunction will likely lead to the conclusions that people can be used as means in ways other than in the context of taxation, that Nozick exaggerates the effects of taxation, and that sustenance may be a prerequisite for the planning of a genuinely meaningful life.

### Opportunity

The concept of opportunity is common in the literature on Nozick. Nozick argues that redistribution to fund schemes that promote opportunity is unjustified if it involves the compulsory taxation of resources to which people are entitled.

Thomas Nagel contends that a state of affairs (consistent with Nozick's libertarianism) where some are born into a life of advantage and others born into a life of deprivation without any opportunity is unfair. This is because individuals from better-off classes will be able to afford extensive education and be able to develop talents that will make it much easier to succeed to desirable positions in society should they choose to do so.<sup>36</sup>

This could lead to a violation of the Kantian injunction, as Alan Goldman envisages, because over time the rich may come to see the poor as means and the poor may consider themselves as means that can be used to achieve rich people's ends.<sup>37</sup> It is not unreasonable to imagine that generations of poor may come to be treated as means and be viewed and view themselves as means. In later writings Nozick came to recognize the

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<sup>36</sup> Nagel, Thomas *Equality and Partiality*, Oxford University Press, Oxford, 1991, p.131. Similar arguments to Nagel's on opportunity and the unfairness of economic deprivation from birth can be found in Singer, Peter 'The Right to be Rich or Poor' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.41, Goldman, Alan H. 'The Entitlement Theory of Distributive Justice', *The Journal of Philosophy*, 73,21, December, 1976, p.95, Nielsen, Kai 'Radical Welfare Egalitarianism' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.206, extracts from his *Equality and Liberty: A Defense of Radical Egalitarianism*, Rowman and Littlefield, Totowa, New Jersey, 1985

<sup>37</sup> Goldman, Alan H. 'The Entitlement Theory of Distributive Justice', *The Journal of Philosophy*, 73,21, December, 1976, pp.829-831

power effects of unbridled bequest and inheritance but it is questionable as to whether he fully appreciated the extent of such power effects.<sup>38</sup> Criticism of Nozick's libertarian position with regard to the universal provision of education will be appealing if fairness, proper respect for people generally, and the Kantian injunction are taken seriously.

With regard to opportunity beyond the provision of universal education, the libertarian Nozick cannot consistently justify state interference that may be needed in order to guarantee opportunity at the level of selection and curtail discriminatory employment practices. This is one reason why libertarianism differs from standard conceptions of liberalism, as argued recently by Samuel Freeman.<sup>39</sup> Freeman points out that if one is the owner of something under libertarianism, one can do with it as one pleases. So, if one owns a business and has positions that need filling, one is in no way obliged to give people equal or any consideration. If one is bigoted and does not wish to employ Asians, Catholics, homosexuals, and so on, there is no justified state intervention that can compel one to consider individuals from groups that one is bigoted against. The voluntariness associated with transfer is likely to mean that the state cannot interfere in order to rule out discriminatory employment practices. This is unfair and may result in people being treated in ways that Nozick cannot condone but cannot consistently prevent. Nozick's

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<sup>38</sup> Nozick did accept that on-going chains of bequest and inheritance can create unfair power differentials. Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, p.30. However, it is noteworthy that, even in later writings, he did not fully appreciate power effects and unfairness. Nozick, Robert 'Why Do Intellectuals Oppose Capitalism?' *CATO Online Policy Report* XX,1, January/February, 1998, [http://cato.org/pubs/policy\\_report/cpr-20n1-1.html](http://cato.org/pubs/policy_report/cpr-20n1-1.html) For more on the power effects of concentrations of wealth and the unfairness of unlimited bequest and inheritance, see Nielsen, Kai 'Radical Welfare Egalitarianism' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.206, extracts from his *Equality and Liberty: A Defense of Radical Egalitarianism*, Rowman and Littlefield, Totowa, New Jersey, 1985, Cohen, G.A. 'Self-Ownership, World-Ownership, and Equality: Part I' in Lucash, F.S. (ed.) *Justice and Equality Here and Now*, Cornell University Press, Ithaca, New York, 1982, p.127, Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.88, Lyons, David 'The New Indian Claims and Original Rights to Land' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.364-365, Walzer, Michael 'Justice Here and Now' in Lucash, F.S. (ed.) *Justice and Equality Here and Now*, Cornell University Press, Ithaca, New York, 1982, p.144. Walzer argues that: 'Today's inequalities of opportunity derive from yesterday's victories and defeats; they are inherited from the past, carried not by genetic but by social structures, by organized power, wealth, and professional standing.' Hillel Steiner states: 'That an individual's deserts should be determined by reference to his ancestors' delinquencies is a proposition which doubtless enjoys a degree of biblical authority, but its grounding in any entitlement conception of justice [or any fair conception of justice] seems less obvious.' Steiner, Hillel 'Justice and Entitlement' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.382

<sup>39</sup> Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, pp.136-137

libertarianism may be unable to proscribe such unfair treatment of individuals but, as Freeman argues, a liberal theory can and should attempt to counter discriminatory practices. In addition, Nozick cannot ensure that efficiency will counter such discriminatory practices because in certain situations there may be a culture of discrimination. Freeman correctly states that this was historically the case in the American South. In addition, James Fishkin believes that, where a certain group is perceived to be better at a certain function, it may even be efficient to discriminate because this may forego costly testing procedures.<sup>40</sup> However, this is also unfair because it is unfair to treat an individual as part of a group because a certain group member's talents may exceed the general levels of a particular talent associated with a group.

There are critics, such as John Schaar, that argue that universal opportunity can have negative effects.<sup>41</sup> Schaar believes that a system of equal opportunity gives some false hope and creates a hierarchy based on talent. However, for many, arguments such as those of S.J.D. Green who sees equal opportunity as a 'better than' policy will be more appealing.<sup>42</sup> Green argues that equal opportunity gives people hope to pursue meaningful lives based on personal development.<sup>43</sup> In addition, there are considerations that support the position that universal opportunity provision is likely to result in a better, more efficient society than that which will likely come about under Nozick's libertarianism. Beyond this, it is also likely that a realistic person will recognize the legitimacy of Bernard Williams' argument when he states that sustenance must precede equal opportunity so that substantive equal opportunity can come about.<sup>44</sup>

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<sup>40</sup> Fishkin, James S. 'Liberty Versus Equal Opportunity' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.150

<sup>41</sup> Schaar, John H. 'Equality of Opportunity, and Beyond' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, pp.137-147

<sup>42</sup> Green, S.J.D. 'Competitive Equality of Opportunity: A Defense', *Ethics*, 100, October, 1989, pp.5-32

<sup>43</sup> This point is also accepted with some limitations by Galston, William 'A Liberal Defense of Equality of Opportunity' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.175

<sup>44</sup> A child that is very hungry because of poverty will not be able to properly avail of educational opportunity provision. Williams, Bernard 'The Idea of Equality' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.100



Contrary to Nozick's libertarian position, the endorsement of opportunity in the form of universal education and anti-discriminatory employment legislation is an important outcome of secondary literature on Nozick. Unbridled inheritance may lead to a situation where many may be disadvantaged from birth. Absence of state interference may lead to legitimized discriminatory employment practices. Both situations are unfair, may lead to a violation of the Kantian injunction, and may be inefficient.

### Law and State

Further to considerations of Nozick's underlying principles and his failure to sanction universal opportunity, there is a critical literature that assesses the legal and political processes in Nozick's minimal state.

The basis of the legal process in the minimal state is essentially encompassed within Nozick's principles of rectification and compensation. If an unjust act occurs (whether it be acquisition, transfer, or use of force), then the victim of the unjust act must be compensated to a level that would place her at the same material level where she would have been if the unjust act had not occurred.

With regard to the minimal state, Nozick believes that its purpose is limited to the protection against the use of force, enforcement of contracts, and so on. Nozick argues that the minimal state evolves from a state of nature without violating individuals' rights. It is rationally superior to anarchy but no more than the minimal state can evolve without violating rights. Nozick also contends that his minimal state is less susceptible to corruption than non-minimal states.

In the context of a legal system founded upon Nozick's principles of rectification, it is useful to consider a clever movie projection analogy formulated by Lawrence Davis.<sup>45</sup>

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<sup>45</sup> Davis, Lawrence 'Nozick's Entitlement Theory' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.348-349. Hal Varian also questions the workability of Nozick's theory where property rights must be justified by reference to initial appropriation. Varian, Hal R. 'Distributive Justice, Welfare Economics, and the Theory of Fairness', *Philosophy and Public Affairs*, 4,3, Spring, 1975, p.236. Robert

Davis says that we should imagine life as a movie in order to see what has to be done if an injustice occurs in that movie. Davis' analogy illustrates difficulties associated with the implementation of Nozick's principle of rectification. Basically, it is almost impossible to find all injustices and to properly compensate all injustices. It is feasible to develop Davis' analogy to show further complexities associated with the legal system of the minimal state. Given that it is almost certain that there will be imperfections, it is not unreasonable to suggest that at least sustenance and opportunity should be afforded to all in the minimal state. Failure to ensure sustenance in the minimal state will also likely mean that, for impoverished members of society, questions of entitlement are crucial and literally life and death questions. As a consequence of this, there may be an abundance of petty entitlement cases that must be heard if Nozick's formal principles of legal equality are to be substantively implemented. The likely outcome of consideration of such questions will be an ever-expanding minimal state needed to adjudicate petty claims.

Furthermore, Nozick does not account for the impact of flows of money on legal processes which may lead to holdings being unjustly held. Bernard Williams argues that in many societies formal legal equality is of limited importance where legal representation is needed to enforce such formal equality.<sup>46</sup> Williams' consideration may be applicable to Nozick's minimal state where the principle of rectification is not fully developed. In order to ensure substantive legal equality, Nozick may have to provide legal representation for the poor or limit representation expenditures for the rich. Both solutions seem to run contrary to the general conclusions of Nozick's entitlement theory. However, substantive legal inequality because of flows of money will likely result in the existence of uneven legal procedures and therefore unfairly resolved questions regarding entitlement. This, in turn, could result in a return to the individual enforcement of rights if

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Litan argues that, because one must establish a "personal link" with injustices, many past injustices would not be rectified. Litan, Robert E. 'On Rectification in Nozick's Minimal State', *Political Theory*, 5,2, May, 1977, p.131

<sup>46</sup> Williams, Bernard 'The Idea of Equality' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.98. There are common arguments as to how money can affect a formally equal legal system and make it practically unequal. See, for example, Nielsen, Kai 'Radical Welfare Egalitarianism' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.205. As Nielsen notes, formal equality is necessary for [legal] equality but 'not nearly sufficient.'

certain individuals believe the legal apparatus of the state to be unjust. The consequence of this will likely be state of nature-like violence and use of force reentering the minimal state.

With regard to the compensation principle, it may rule out punishment beyond the paying of compensation and therefore rule out imprisonment of dangerous persons. This is an argument formulated by Jeffrey Paul.<sup>47</sup> Paul argues that, according to Nozick's libertarianism, once an injustice has been rectified through proper compensation, it is unjust to exact further compensation and/or enforce further punishment. The likely consequence of this is that it will be unjustified to seek punitive measures beyond the payment of compensation and it will likely be unjustified to imprison dangerous persons.

In addition, James Child argues that the paramount importance of consensual transfer in Nozick will scupper efforts to establish a fraud standard.<sup>48</sup> Child contends that, even though one of the legitimate practices sanctioned by Nozick for his minimal state is fraud prevention, the paramount importance of individual voluntariness in transfer means that the establishment of a fraud standard is likely to be unviable. I believe that this will likely lead to the exploitation of certain individuals and market failures.

Turning to the legitimacy of the minimal state, Charles Sayward and Wayne Wasserman argue that Nozick will not convince someone who is opposed to the existence of a state that a state is justified.<sup>49</sup> Sayward and Wasserman correctly assert that Nozick's minimal state will be unappealing to an anarchist.<sup>50</sup> They contend that Nozick believes that his

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<sup>47</sup> Paul, Jeffrey 'Property, Entitlement, and Remedy', *The Monist*, 73, 4, October 1990, pp.572-576

<sup>48</sup> Child, James W. 'Can Libertarianism Sustain a Fraud Standard?', *Ethics*, 104,4, July, 1994, pp.722-738

<sup>49</sup> Sayward, Charles and Wasserman, Wayne 'Has Nozick Justified the State?' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, pp.266-267

<sup>50</sup> I do not develop any detailed arguments against Nozick from an anarchist point of view. This is mainly for the simple reason that I am not an anarchist (for mainly Hobbesian reasons). On the whole, I accept the evolution of Nozick's minimal state from his state of nature. However, it seems obvious that Nozick's invisible-hand explanation is dubious and will not convince most anarchists. Certain critics question the way in which the state can evolve without infringing on rights. Paul, Jeffrey 'The Withering of Nozick's Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, Williams, Bernard 'The Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.33, Holmes, Robert L. 'Nozick on Anarchism' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.61,64,66, Miller, David 'The Justification of Political Authority' in Schmidtz, David (ed.) *Robert Nozick*, Cambridge

state comes into being without violating rights but he does not go so far as to confirm that a state that comes into being without violating rights is itself just. In this context, it is also useful to consider Ellen Frankel Paul's argument that a state must be justified by its actions and not only by the method in which it came into being.<sup>51</sup> I believe that this is especially true because the state must interpret Nozick's formal rights in procedural ways and, as a result, the procedural interpretation of rights is just as important in justifying the legitimacy of the state as the means by which the state evolved from Nozick's state of nature.<sup>52</sup>

In a related context, David Wood argues that those who are forbidden from enforcing their natural rights to correct (perceived) injustices may bargain for more than the protection of the minimal state<sup>53</sup> because, in my opinion, protection is of little consequence to those who are unable to afford (more than) basic provisions. Just as the legitimacy of state can be questioned if its procedures are not just, the legitimacy of the state can be questioned by those who do not benefit from its existence. Such individuals may bargain for more than protection at the outset of the state but they may also be vociferous in demanding more than protection when such protection guarantees them vacuous rights but little in the way of material resources once the state is established.

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University Press, Cambridge, 2002, p.19. Miller argues that Nozick's 'invisible-hand explanation' for the development of a minimal state 'enjoys neither explanatory nor justificatory privilege.' Other commentators argue that the state itself, by monopolizing the use of force, is impermissible and a *de facto* 'protection racket,' is inconsistent with a natural rights theory such as Nozick's, and, as a monopoly, may be inefficient and charge excessively for its services. Young, Frederic C. 'Nozick and the Individualist Anarchist' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, p.275, Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.37, 57-58, Wolff, Robert Paul 'Robert Nozick's Derivation of the Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick* Blackwell, Oxford, 1982, p.93. A detailed discussion of anarchism and the ways in which the overriding importance of anarchistic autonomy will not lead to even the acceptance of the minimal state can be found in Part I of Wolff, Robert Paul *In Defense of Anarchism*, Harper Colophon, New York, 1976

<sup>51</sup> Paul, Ellen Frankel 'The Time-Frame Theory of Government Legitimacy' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.273-274

<sup>52</sup> On the subject of procedural rights and their impact on Nozick's theory, see Paul, Jeffrey 'The Withering of Nozick's Minimal State' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.71-74

<sup>53</sup> Wood, David 'Nozick's Justification of the Minimal State', *Ethics*, 88,3, April, 1978, 260-262

When considering political power in the minimal state, Michael Walzer's writing on this subject is relevant.<sup>54</sup> Walzer argues that political power is a means to power generally in all states. He also states that money can flow across boundaries and impact upon institutions including the institutions of the state. Nozick argues that people will have little motivation to try and corrupt the minimal state. This is untrue. Political power in the minimal state is vitally important and safeguards need to be implemented in order to thwart the plans of those that attempt to corrupt the political process to suit their own ends. Nozick ignores the need for such safeguards and, by doing so, jeopardizes the legitimacy of the minimal state and its enforcement of just procedures of acquisition, transfer, rectification, and compensation.

Criticism of the legal and political apparatuses of the minimal state leads to the conclusions that the principles of rectification and compensation may be difficult to assess in society, that punishment beyond compensation will be unjustifiable, and that legal systems must be protected from the effects of flows of money. States, including minimal states, are also not immune from the effects of flows of money and must be legitimized by their actions and not only by the way in which they evolved from the state of nature.

### Charity

Given that much of the literature on Nozick supports a greater role of the state beyond Nozick's minimal state, charity as a means of guaranteeing provisions and safeguards could be considered as an alternative to a greater than minimal state. Nozick does not decry charitable donation. So long as people give voluntarily, there is nothing wrong with philanthropic acts. And, Nozick argues, if people really want certain things such as universal sustenance and opportunity provision, they should not seek compulsory taxation but contribute voluntarily to schemes that guarantee such provisions. This is an important consideration because if individuals can voluntarily contribute and ensure the

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<sup>54</sup> Walzer, Michael 'Justice Here and Now' in Lucash, F.S. (ed.) *Justice and Equality Here and Now*, Cornell University Press, Ithaca, New York, 1982, pp.142-144, Walzer, Michael *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, p.15

outcomes that are often advocated, then there may be no need for the role of the state that critics generally envision.

However, a reliance on charity is unrealistic in many circumstances. In this context, it is useful to consider arguments of Thomas Nagel<sup>55</sup> and Jonathan Wolff.<sup>56</sup> Nagel argues that a reliance on individuals to give charitably places too much of a burden on individuals especially when they will be unsure if their donations will succeed in achieving the provisions that they are interested in or if they are put at a competitive disadvantage compared to non-givers. When there is an abundance of issues that need funding, it is unreasonable to expect individuals to contribute singularly to solve disparate issues. Charities do not have the resources or means to address many issues. In addition, the competitive disadvantage consideration of foregoing resources for charitable donation is relevant in Nozick's minimal state where the consequences of not having resources are particularly unappealing.

Wolff sees a barely regulated free market and a reliance on 'haphazard' charity to fund schemes as antiquated and more likely to be found in 'nineteenth century capitalism' rather than in modern society. This is true because, as stated, it is unrealistic to rely on charity to fund a variety of important issues and projects because charities, at least in today's world, do not have the resources or means to address major concerns.

Contrary to Nozick's assertions, it seems to me that charity is an infeasible way of raising funds to guarantee certain provisions. Relying on charity places unreasonable expectations on individuals and charities are unlikely to have the resources or means to deal with a wide variety of important issues. Indeed, it is reasonable to suggest that charitable donations will be less, rather than more, likely to occur in the minimal state because it is not shrewd to give away resources when the consequences of a future without resources for oneself or one's family are likely to be catastrophic.

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<sup>55</sup> Nagel, Thomas 'Libertarianism Without Foundations' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.199-200

<sup>56</sup> Wolff, Jonathan 'Robert Nozick, Libertarianism, and Utopia', Part of the "Critiques of Libertarianism" website, <http://world.std.com/~mhuben/libindex.html> Last Updated 10 November, 2004

### The Liberal State

There is also pertinent literature that distinguishes Nozick's minimal state from what can generally be referred to as the liberal state.

In this context, Samuel Freeman states that a liberal state, unlike a Nozickean minimal state, cannot sanction the ownership of people as commodities that can be subjected to unjust treatment unfit for humans.<sup>57</sup> There is more to rights than rights that can be voluntarily bought and sold. Certain rights, once established, cannot be sold and therefore the prospect of individuals selling themselves into slavery, which Nozick accepts, will not be allowed to come about in liberal states. Such a process would see people being treated in ways that a liberal state could not enforce or endorse irrespective of the voluntariness of such agreements. As a consequence of this, and as Freeman correctly argues, libertarianism cannot be seen to be the logical upshot of liberalism. It is a different theory. Liberalism generally seeks to establish liberal rights but libertarianism endorses inalienable property rights, including property rights in one's person. Inalienable property rights (including self-ownership) can lead to outcomes, such as voluntary slavery, that run contrary to liberal rights and cannot be recognized or enforced by a liberal state.

Freeman also argues that the libertarian minimal state has no power to deter noncompetitive practices by monopolies or to provide public goods and to promote efficiency generally.<sup>58</sup> The liberal state, unlike the minimal state, will not be constrained by inalienable property rights and will be able to take further considerations into account that benefit the common good. These considerations include, in my opinion, efficiency, convenience, safety, and liberty in a broader sense than that accounted for in Nozick's libertarianism.

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<sup>57</sup> Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, p.134

<sup>58</sup> *ibid.* pp.136-138

Thus, unlike Nozick's libertarianism, a liberal state will not allow or enforce certain outcomes, such as slavery, that are consistent with inalienable property rights. In addition, such a state will be able to promote broader considerations in the common good.

### A Framework for Utopia

Nozick believes that once the minimal has been established, individuals are free to develop communities within the minimal state that can have a vast array of moral principles. Nozick envisions a stable minimal state that provides an environment for diverse groups of meta-utopias within his state. He therefore believes that the minimal state is inspiring as well as right because it provides a framework for utopia comprised of many meta-utopias.

In the context of utopia, firstly, a position developed by Mark Fowler is worthy of consideration.<sup>59</sup> Fowler argues that Nozick's minimal state will not be as stable as he envisions because meta-utopias will try and enforce their beliefs against the minimal state if the minimal state tries to enforce rules that are consistent with the minimal state's framework but may be unacceptable to certain meta-utopian communities. In addition, I believe that the poor, who may be excluded from many of the most attractive meta-utopias, may use force against some meta-utopias, especially if they *feel* that their lot is unjust.<sup>60</sup>

Secondly, Peter Singer's position – that Nozick's anticipation of redistributionist meta-utopian communities is unlikely to materialize – seems more reasonable than Nozick's.<sup>61</sup> This is because communities must have resources to even exist, redistributionist communities will be oversubscribed by the poor, and the rich can leave at any time with all their possessions in order to join other communities that will have fewer burdens and

<sup>59</sup> Fowler, Mark 'Stability and Utopia; A Critique of Nozick's Framework Argument' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, p.254

<sup>60</sup> Fowler makes a similar argument to this when he states: 'Only the hopelessly quixotic would try to quiet the rebellious unemployed by appealing to the minimal state's utopian aspect...' *ibid.* p.255

<sup>61</sup> Singer, Peter 'The Right to be Rich or Poor' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.38



for most will be more alluring. Again, as with the planning of a meaningful life, it is reasonable to suggest that sustenance may be seen to be a prerequisite for the establishment of a framework for utopia.

Finally, because Nozick's entitlement theory thoroughly permeates his framework for utopia, considerations developed by Jonathan Wolff are relevant.<sup>62</sup> Wolff argues that the meta-utopian communities will not be as diverse as Nozick contends because people can come and go as they please with all their resources and because the laws of the minimal state always have trumping powers over the laws of meta-utopian communities. I agree with Wolff that, through an invisible hand market process, there will likely be homogeneity among utopian communities and that only occasionally will unusual communities last long. / 67

It is likely that certain provisions and safeguards that Nozick does not endorse will be needed to provide a genuine framework for utopia for all persons. However, even when there is a framework for utopia, bargaining processes, similar to that conceived of by Gilbert Harman, may be needed so that different roles of the state can be bargained for in a democratic system.<sup>63</sup> Harman argues that all moral and political rules are up for revision through bargaining processes. I would not go this far but bargaining seems to be acceptable once certain provisions and safeguards have been implemented. Indeed, the later Nozick accepted 'zigzag' bargaining associated with the political system that encompasses arguments for other roles of the state.<sup>64</sup> By doing this, Nozick accepted the legitimacy of the expansion of the minimal state.

The acceptance that his minimal state libertarianism is inadequate will likely involve the consideration of at least some of the points that I raise in the context of secondary

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<sup>62</sup> Wolff, Jonathan 'Robert Nozick, Libertarianism, and Utopia', Part of the "Critiques of Libertarianism" website, <http://world.std.com/~mhuben/libindex.html> Last Updated 10 November, 2004

<sup>63</sup> Harman, Gilbert 'Justice and Moral Bargaining', *Social Philosophy & Policy*, 1, Autumn, 1983, pp.114-131

<sup>64</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, pp.286-296. Simon Hailwood discusses some implications of Nozick's acceptance of the zigzag of politics. Hailwood, Simon A. *Exploring Nozick: Beyond Anarchy, State and Utopia*, Avebury Press, Aldershot, 1996, p.79

literature on Nozick. Namely, a broader consideration of Nozick's formulating arguments – the Lockean proviso, the Wilt Chamberlain argument, and the Kantian injunction – may lead one to conclude that (at least) sustenance should be provided for all people. A proper regard for how people should be fairly treated and for efficiency may result in a reasonable person accepting that opportunity in the form of education should be available for all and that state action can be sanctioned in order to counter discriminatory practices. It is also likely that, with due consideration, many will come to accept that the unbridled disposal of resources can allow some to corrupt the legal and political bodies of the state and that safeguards need to be put in place in order to hinder such corrupting tendencies and ensure that the state is legitimized by its actions and not only by the way in which it evolved from the state of nature. Finally, the literature considered leads one to question charity as a means of ensuring vital provisions and safeguards, the general fairness and efficiency of Nozick's minimal state when compared to a liberal state, and the practicality and nature of Nozick's framework for utopia. With further consideration, it may be possible to envision a liberal state that will learn from Nozick's libertarianism and the associated literature. This state can arise through a proper interpretation of Nozick's foundational principles, a reformulation of negative side-effects, and an appropriate contemplation of positive outcomes. This will be the task of the following thesis.

# 1. SUSTENANCE

For a large number of people in the world, the basic fact about food is how difficult, sometimes impossible, it is to come by. We should remember the biological and personal havoc this produces...<sup>65</sup>

Robert Nozick develops his entitlement theory of justice in holdings in *Anarchy, State, and Utopia*. Nozick believes that a minimal state evolves from a state of nature without violating individuals' rights. This minimal state is preferable to anarchy and is limited to protection, dispute arbitration, and the enforcement of contracts. A more extensive state than the minimal state is not justified. A more-than-minimal state taxes excessively, thereby infringes upon individuals' ownership rights, uses tax payers as means, and hinders their ability to plan meaningful lives. Individuals come to own objects either by acquiring from nature in accordance with the Lockean proviso or as a result of voluntary just transfer with another person who is entitled to a particular holding. There are principles of rectification and compensation that redress the problem of unjustly held holdings. Once the minimal state has been established, individuals are free to form groups with other like-minded individuals. This, according to Nozick, means that the minimal state is inspiring as well as right and provides a genuine framework for utopia.

Nozick argues for a historical system of justice and reasons that individuals are entitled to their holdings so long as they are held in accordance with the following principles:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>66</sup>

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<sup>65</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, p.56

<sup>66</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.151

In addition, there is a principle of rectification that I will summarize as:

4. Individuals are entitled to be compensated if they suffer as a result of others not acting in accordance with the above principles.

Critics have argued that Nozick develops his libertarian theory of justice without establishing foundations.<sup>67</sup> Nozick admits at key points in his theory that certain principles need further development. However, there are foundations that underlie his entitlement theory even if such foundations are not fully formulated. In this chapter, I will outline Nozick's underlying principles, assess these principles to see if they are consistent both internally and with regard to the philosophers from whom they have been derived, determine if they can be supplemented in order to offset shortcomings, and examine potential reworking or rejection of principles, if required, that will lead towards a more coherent theory of justice.

An initial reaction to Nozick's entitlement theory is that there is no provision of sustenance for the poor and no opportunity for personal development for those who are unable to afford to pay for the services required to fund opportunity. So long as people have acquired holdings in accordance with the principles of justice in holdings, they cannot be coerced into funding redistributive schemes such as the provision of sustenance and opportunity for others. While I appreciate that the literature related to these key areas is extensive with respect to Nozick, this does not undermine the importance of addressing these issues. I believe that the provision of sustenance and opportunity are essential to any legitimate theory of justice. For this reason, I will focus on these subjects in the first two chapters. I will assess Nozick's theories as well as criticism of Nozick in order to determine whether such provisions are warranted. The third chapter will, to a degree, deal with areas that are less common in the literature. However, throughout, I will examine Nozick's theories, mostly from *Anarchy, State, and Utopia*, as well as critics of Nozick in

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<sup>67</sup> See, for example, Nagel, Thomas 'Libertarianism Without Foundations' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, 191-205

order to provide key foundations for my own theory. I will deal with sustenance first because for many it is the most urgent issue and it may turn out that sustenance may be a prerequisite needed in order for formal rights to be considered truly meaningful.

### 1.1 Initial Acquisition and the Lockean Proviso

Locke argues that in a state of nature the world is 'given...to mankind in common,' that we have a God-given right to acquire natural resources so as to preserve humanity, and that we have a right to punish those who seek to offend our rights over our person and property (although it is likely that individuals will be partial 'to themselves and their friends' and this is a reason for the origins of civil government that is consented to). In addition, we may acquire rights to property because 'every man has a property in his own person' and from that 'the labour of his and the work of his hands...are properly his' so long as one does not seek to destroy or "waste" natural resources and in accordance with the Lockean proviso that there is 'enough and as good [left over] for others.'<sup>68</sup>

Unlike Locke, Nozick does not believe that the world is commonly owned, he does not endorse Locke's religious grounding, and people may do with their property as they please – "waste" it or destroy it. Nozick argues that it is not only mixing labour with an object that gives one ownership over it: 'Perhaps the idea...is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created.' However, like Locke, Nozick puts a constraint on appropriation albeit a weaker constraint than Locke's proviso. Nozick acknowledges a common criticism of Locke that the proviso may mean that 'no natural right to property can arise' because one cannot be sure if people have enough and as good following appropriation. Nozick argues that what is important is that non-appropriators are left 'no worse off' than they would have been in his state of nature following appropriations. This 'no worse off' proviso can change over time – so you may be allowed to appropriate a watering hole but that may change if all other watering holes dry up. Nozick concludes by stating that he

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<sup>68</sup> Locke, John *Two Treatises of Government*, Hafner Press, New York, 1947, *The Second Treatise*, chapters II and V

‘assume[s] that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke.’ Nozick argues that there should be a baseline set that will fix the standard of living commensurate with the ‘no worse off’ state of nature level of existence but he fails to do this. In the end, he modifies Locke slightly so as to likely allow more extensive acquisition with less consideration of the standard of living warranted for those who may find themselves worse off than they would have been in the state of nature following the acquisition of others.<sup>69</sup>

An advocate of sustenance provision for the poor may immediately jump on the Nozickean proviso and argue that those without the means to sustenance are obviously worse off than they would have been in a state of nature when they were free to appropriate. However, this may be too quick. Certain groups of individuals may have perished in the state of nature; one can think of the severely disabled, orphaned children, people with limited mental capacities, those who shun food in favour of mind-altering herbs, and perhaps others.

One problem with libertarians such as Nozick, as well as non-libertarians, is that they often assume different conditions or stress certain liberties in the state of nature that suit the needs of their own arguments. Libertarians believe that conditions in the state of nature would be harsh and that the transition to a property state would involve substantial material and welfare benefits for most, if not all. Non-libertarians, on the other hand, argue that Nozick’s conception of liberty, when he refers to increased liberty associated with a private property system, is too narrow and that the state of nature free reign over soil, water, and other commodities is unfairly restricted under a system of private property.<sup>70</sup> Nozick counters this argument both by reference to his proviso – individuals can seek employment and will therefore not be worse off than state of nature conditions – and by arguing that his system of libertarian rights will be efficient and bring about the ‘various social considerations favoring private property.’ I will return to the question of efficiency with regard to Nozick’s system of private property throughout this thesis. In

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<sup>69</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.174-182

<sup>70</sup> Ryan, Cheyney C. ‘Yours, Mine, and Ours: Property Rights and Individual Liberty’ in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.337-338

the later parts of this chapter I will examine common root principles used in political philosophy, namely, intuition, liberty and the Kantian injunction.

In this section, I will argue that Nozick's interpretation of the Lockean proviso is too strong to provide the inviolable property rights that he wishes to establish, is too weak in that the 'no net harm' or 'no worse off' criteria do not provide some with sufficient resources following acquisition by others, and that the system in reality may be extremely cumbersome, involve much state intervention to support it and may not bring about the various social considerations that Nozick believes favour a system of private property. I am not painting a picture of a rosy state of nature preferable to a private property system but arguing for a more realistic system of private property that may need a greater degree of permanency than even Nozick is able to establish but, because of benefits and imperfections (and true respect for humans, which will be argued for later), the provision of sustenance for those unable to provide for themselves may be an outcome that is justly unavoidable in a system of private property.

Firstly, as David Lyons argues, 'property rights...are thinner and much more flexible, or variable with circumstances' than the entitlement theorist Nozick allows. In addition, Nozick's theory of property is unlikely to achieve the degree of permanency that his conclusions regarding entitlement warrant. His own proviso is too strong due to the fact that it includes a 'historical shadow' that means his Lockean proviso can affect past appropriations given changing conditions in society thereby undermining entitlement and warranting certain redistributions. Nozick's Lockean proviso's 'historical shadow' means that acquisitions that are at one time just, because they leave others no worse off, may change if there are changing conditions of scarcity in society that could result because of disaster or extensive acquisition. This, in turn, means that property rights are not permanent and are subject to changing conditions that alter due to the conception of the Nozickean proviso.<sup>71</sup> Nozick accepts this when he discusses appropriation but this does

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<sup>71</sup> Lyons, David 'The New Indian Claims and Original Rights to Land' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.359, 368, 372, and 378. Lyons refers primarily to Nozick's paper 'Distributive Justice', *Philosophy and Public Affairs*, Fall 1973, 45-126 but this is largely the same as

not deter him from reaching strong conclusions regarding entitlement generally even though such conclusions may not be supportable given the changing and continuous reach of the Lockean proviso which must ensure that individuals are left no worse off than they would have been in the state of nature before acquisition. The proviso limits appropriation of scarce resources initially and as conditions of scarcity change and also limits owner-discoverer appropriation if discovery would have likely been achieved by others over time.

Secondly, with regard to the presence of the Nozickean principle of compensation (which states that individuals are due compensation if they are adversely affected because of libertarian rights transgressions) Eric Mack argues that the principle can be applied to Nozick's proviso. In effect, I believe this means that the proviso can be transgressed so long as compensation is paid with the result that this does not respect the inviolable rights that Nozick wishes to establish. According to Mack, Nozick's proviso turns out to be a kind of "welfare proviso" that means that anything can be done so long as compensation is paid later and those affected are no worse off than they would have been in the state of nature ('no worse off' criteria which, in turn, are misleading and difficult to identify in 'all subsequent stages of the property regime' following the 'pre-property state').<sup>72</sup>

Lyons' argument – that even on his own terms Nozick cannot defend rigid property rights – is crucial. It states that the 'historical shadow' of the Nozickean proviso means that the property rights that Nozick seeks to establish are not as inviolable and permanent as Nozick generally wishes them to be and is often criticized for wishing them to be. Indeed, it may be the case that, as resources become more scarce, property holders inviolability and permanence will have to be impeded upon because the 'no worse off' criteria may be violated if entitlement is upheld and individuals are, as a result, worse off than they would be in a state of nature. Nozick argues that, because of the Lockean proviso, there

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Chapter 7 of *Anarchy, State, and, Utopia* with the same title where the central discussion of Locke takes place.

<sup>72</sup> Mack, Eric 'The Self-Ownership Proviso: A New and Improved Lockean Proviso', *Social Philosophy and Policy*, 12,1, Winter, 1995, p.202, 212



are 'stringent limits' on what one may do with scarce resources that will result in individuals being worse off than they would have been in the state of nature:

Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights.<sup>73</sup>

This is important with regard to sustenance because it means that provided that there was even a degree of abundance in the state of nature for life-sustaining goods – food, drink, and shelter – the accumulation of private property cannot justifiably be so extensive as to mean that the majority of individuals are not provided with sustenance if they are unable to earn it. Therefore, we may be left with potentially very few people – most probably young orphaned children and the severely handicapped – who, due to Nozick's interpretation of the Lockean proviso, would not have claims to the means of sustenance. This small group may have perished in the state of nature and so, according to Nozick's proviso, can justifiably be allowed to perish in the minimal state because they are 'no worse off' than they would have been in the state of nature where, without assistance, they would have been unlikely to be able provide for themselves. While some may find this morally questionable, it is worth pointing out that the proviso will, I believe, at least ensure that most people will not want for sustenance (although, as stated, Nozick has not given a baseline for his state of nature 'no worse off' conditions). As a result of this, the scenario of a very wealthy few with a vast majority starving to death that some critics envisage in a Nozickean minimal state is unlikely to come about so long as his Lockean proviso is properly implemented. A further consequence is that Nozick's assertions regarding entitlement are likely to be weaker than he wants them to be and is accused of wanting them to be. The upshot of this is that, even on Nozick's terms, property rights are not permanent and inviolable.<sup>74</sup>

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<sup>73</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.180

<sup>74</sup> There are, in my opinion, other reasons for not wishing them to be such as efficiency (see following sections).

This result may fend off some of the hysterical criticism that has been directed at Nozick but it means that Nozick's theory of inviolable and permanent entitlement to property cannot be that – a system of inviolable and permanent entitlement – because if conditions of scarcity change over time, the Nozickean proviso must ensure sustenance (provided sustenance was available in the state of nature) for most people that were able to hunt and gather. Again, this does not ensure that those who were unable to provide sustenance for themselves in the state of nature will be provided with sustenance in the minimal state. It may also mean that there are a few very wealthy people in a society while many live on the breadline, if it is reasoned that breadline existence was all that was available to most in the state of nature. These two issues need to be addressed and they will be.

Returning to Eric Mack's argument that Nozick's proviso is a welfare proviso, Mack argues that due to Nozick's theory of compensation, which will be discussed in more detail in Chapter 3, Nozick's proviso 'would be a proviso according to which any noninvasive action is acceptable if and only if it yields as much welfare for its recipient as would have been enjoyed by her in the pre-property state.' As a result of this, individual acquisition rights are not adequately restrained for some and respected for others and 'the fate of persons as potentially productive, world-interactive agents is not addressed by a proviso which will allow severe diminutions of persons' world-interactive opportunities as long as the subject suffers no net loss of welfare.'<sup>75</sup> As such, Nozick's theory, I believe, fails to adequately curtail even unjust invasive acquisition because such acquisition can take place so long as people are compensated to a potentially meagre welfare standard and does not respect certain individuals' rights and potentiality with regard to acquisition. Nozick is also likely, in my opinion, to fail to adequately compensate certain individuals for infringements on their opportunity to acquire due to acquisition by others. So, Nozick's theory of acquisition may be too strong to suit his purposes because it is unlikely to result in permanent property rights and sanctions rights infringements so long as compensation is paid (compensation levels that are not

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<sup>75</sup> Mack, Eric 'The Self-Ownership Proviso: A New and Improved Lockean Proviso', *Social Philosophy and Policy*, 12,1, Winter, 1995, p.212

adequately defined, because he fails to set baselines for state of nature levels of welfare, and are likely to be minimal).

Now, a more common argument is that Nozick's proviso is ~~too~~ weak – not too strong in that it is likely to mean continued redistribution or because it allows unjust acquisition so long as compensation is paid – because, given the benefits that some can attain through mass accumulation, others may justifiably seek more than they would have had in the state of nature if they are unable to earn more than subsistence in the minimal state. While I have been guardedly optimistic regarding what can be salvaged as a result of the Nozickean proviso, it may still be the case that it 'serves as little more than a catastrophe clause appended to...unlimited right to profit from the private control of natural resources.'<sup>76</sup>

The near unlimited ability to acquire, even unjustly and without consent, so long as state of nature compensation is paid to non-accumulators seems to be unfair. Thus, Michael Otsuka broadly accepts libertarian rights but argues that a proper interpretation of the Lockean proviso will lead to more egalitarian outcomes than are likely to come about in a Nozickean minimal state because more should be afforded to those who do not gain from acquisition than the 'no worse off' levels afforded to them by Nozick given the potentially great benefits to those who are able to acquire:

As a means of ensuring that nobody is placed at a disadvantage, Nozick's version of the Lockean proviso is too weak since it allows a single individual in a state of nature to engage in an enriching acquisition of all the land there is if she compensates all others by hiring them and paying a wage that ensures that they end up no worse off than they would have been if they had continued to live the meagre hand-to-mouth existence of hunters and gatherers on non-private land... This acquisition is objectionable both because it condemns others to such a miserable existence and because it is manifestly unfair that a first grabber be allowed to monopolize all opportunities to improve one's lot through acquisition.<sup>77</sup>

<sup>76</sup> Exdell, John 'Distributive Justice: Nozick on Property Rights' *Ethics*, 87,2, January, 1977, p. 145. This was certainly a view that I took in previous writing on Nozick.

<sup>77</sup> Otsuka, Michael *Libertarianism Without Inequality*, Clarendon Press, Oxford, 2003, p.23

Otsuka and other left-libertarians<sup>78</sup> have tried to derive legitimate egalitarian outcomes from traditionally libertarian foundations such as self-ownership and property rights based on the Lockean proviso. While I agree with Otsuka and others that the Lockean proviso can be interpreted in more egalitarian ways and that Nozick's proviso has important repercussions for his own theory (see above), I tend to agree to a certain extent with Mathias Risse when he argues that 'Otsuka's left-libertarianism brings two views together [egalitarian ownership and libertarian self-ownership] that are compatible in the sense of being consistent, but are not compatible in the sense of being coherent...'<sup>79</sup> Locke's proviso is too weak to suit Nozick's purposes and this is the reason for him reformulating the proviso to establish property rights with fewer strings attached. No doubt the Lockean proviso can be interpreted in a way that allows for an egalitarian distribution of resources. Indeed, it is likely that Locke himself would have favoured a more egalitarian outcome because he was concerned with the preservation of humanity as a whole and not simply the welfare of acquirers – this is an important reason for the formulation of Locke's proviso. However, as Nozick argues, the insistence that 'enough and as good' be left over for others following acquisition puts too strong a limit on acquisition and Otsuka is likely to fall prey to the same criticism that Nozick levels against Locke. The crucial point here is that Otsuka is unlikely to convince the libertarian Nozick and other (right) libertarians that are committed to a weak proviso that restricts appropriation, if they are committed to any such proviso at all. And, while non-libertarians may be drawn to Otsuka's conclusions and be satisfied that libertarianism can lead to egalitarian outcomes, as I am, they will likely see further reasons for egalitarian redistribution than a reformulation of Locke's proviso. Nevertheless, Otsuka's thesis – that individuals excluded from appropriating either because they come too late or because they are unable to appropriate for other reasons will likely be owed more than 'no worse

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<sup>78</sup> See, for example, Vallentyne, Peter and Steiner, Hillel (eds.) *Left-Libertarianism and Its Critics: The Contemporary Debate*, Palgrave, Basingstoke, 2000 with particular reference to Vallentyne's introduction as well as Steiner, Hillel 'Original Rights and Just Distribution,' extracts from his *An Essay on Rights*, Blackwell, Cambridge, Massachusetts, 1994 and Van Parijs, Philippe 'Real-Libertarianism,' extracts from his *Real Freedom for All: What (if Anything) can Justify Capitalism?*, Oxford University Press, New York, 1995

<sup>79</sup> Risse, Mathias 'Does Left-Libertarianism Have Coherent Foundations?', John F. Kennedy School of Government, Harvard University website, April 19, 2004, p.2  
<http://ksghome.harvard.edu/~mrisse/Papers/Papers%20-%20Philosophy/OtsukaIII.pdf>

off' minimal provision associated with what they are able to hunt and forage for in a (long ago) state of nature – carries weight because it seems unfair that certain appropriators can enjoy extensive wealth and comforts while non-appropriators who do not consent to appropriations or come too late are afforded levels of welfare that are likely to be close to or on the breadline. They may have legitimate claims to, amongst other things, more than minimal levels of sustenance, education, opportunity, consideration for desirable positions in the workplace, legal and political equality (see following chapters).

Like Otsuka, I intend to learn from conventional libertarian principles but will not fully endorse reformulated libertarian principles, as he does, because although one can see where libertarian principles need to be egalitarian in order to be consistent, there is, I will argue, more to the puzzle. This will become apparent in the following sections but for now we can conclude thus far by stating that Nozick's proviso needs to be modified because it fails to establish the property rights that Nozick espouses as an entitlement conception of justice and because it is most likely insufficient in its scope to compensate those who lose out following acquisition.

Lastly, to turn to the final argument in this section, Nozick's theory of acquisition may lead to what for him are undesirable consequences – redistribution and inefficiency. I have argued that Nozick's interpretation of the Lockean proviso is too strong because it fails to generate the permanent, inviolable property rights that he seeks to establish. I have also asserted that it may also be too weak because individuals that are not able to appropriate due to others' unjust and just acquisitions may be owed more than the 'no worse off' state of nature compensation that is afforded to them. If both of these arguments are accepted, then sustenance (and perhaps more) should be provided for most and perhaps all individuals in the minimal state. Nozick could accept these conclusions but the acceptance of them would entail a reformulation of at least the spirit or rhetoric of his theories of appropriation and entitlement. I have touched on the final two topics throughout. Firstly, because of the 'historical shadow' of the Lockean proviso, Nozick's failure to set baselines for the worse-off state of nature standard of living, and the

historical nature of the entitlement theory, 'anyone's claim to any natural resources can be challenged at any time by the argument that the private possession of this resource places others below their (state of nature) base line. Thus, the proviso leaves the door open for a vast welfare state, supervising perpetual, extensive transfers of income and property...'<sup>80</sup> This is true for both original acquisitions themselves as well as the historical shadow of acquisitions being subject to differing interpretations in the present and in the future because, as conditions of scarcity in society change, the application of the Lockean proviso must also change. Such claims cannot be ignored because, for the needy, they could be potentially life and death claims and even the poor are redistributed to in order to provide them with the protection of the minimal state (this one of the main reasons for the dominant protective association moving by the 'invisible hand process' to the ultraminimal to the minimal state, see Chapter 3). If these claims are not addressed, then the whole question of justice in acquisition and therefore entitlement is undermined. A 'vast welfare state' is not guaranteed but there is likely to be a large degree of redistribution in order to provide minimal state protection for the poor (Nozick accepts this), to investigate claims that the Lockean proviso has not been properly adhered to (Nozick would have to accept this as part of the protective services afforded to all in his minimal state otherwise his formal rights to rectification are hollow), and in order to redistribute for initial claims and their effect both in themselves and given changing conditions of scarcity in society. On the final point, Nozick could accept this and argue that it is not redistribution but rectification in accordance with his Lockean proviso and theory of acquisition. He could do this but it is tantamount to the same thing – transfers from the wealthy to the needy if the Lockean proviso has not been properly adhered to with an extensive state needed to sanction and carry out such transfers.

In addition, Nozick cannot assume, as he does, that 'the various familiar social considerations favoring private property'<sup>81</sup> and associated with efficiency will be best achieved in his market system given his theory of acquisition. Nozick does not sanction a system for monopoly development restrictions; this means that monopolies and their

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<sup>80</sup> Miller, Fred D. 'The Natural Right to Private Property' in Machan, Tibor (ed.), *The Libertarian Reader*, Rowman and Littlefield, Totowa, New Jersey, 1982, p.283

<sup>81</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.177

inefficient and consumer unfriendly practices can come into being without restriction. Because of his concern with the 'no worse off condition' and 'historical shadow' of the Lockean proviso, Nozick fails to truly appreciate the value of what has been "created" from nature by a "creator"<sup>82</sup> because the Lockean proviso and its historical shadow means that holdings are, to a degree, up for grabs. This undermines the role of entrepreneurship and it may be the case that entitlement should be stronger for those who have truly added value to nature without having others always having claims to their holdings because of the Lockean proviso. Individuals can always argue that they could have done something given certain resources but such arguments undermine genuine creativity. Nozick's theory of acquisition may also undermine efficiency because a certain proportion of individuals' resources may be subject to seizure in accordance with the Lockean proviso and principle of rectification. This may undermine stability often seen as essential to investment and economic efficiency. Further to this, as Nozick himself acknowledges, 'the adoption of his proviso on appropriation must entail a restriction on the freedom of individuals to dispose of their holdings as they choose...since appropriators are required (may be justly forced) to surrender part of their holdings in compensation to others...'<sup>83</sup> This holding back of resources, either because of uncertainty regarding the legitimacy of initial acquisition or because of uncertainty regarding the 'historical shadow' of the Lockean proviso, may mean, I believe, that individuals are deterred from investing in high-risk, long-term projects where resources are not easily liquidated. Again, this has implications that are not consistent with an efficient market economy. I will return to the question of efficiency in later chapters.

Nozick's interpretation of the Lockean proviso has produced a large amount of criticism from both the 'left' and the 'right.' I think it is important to cover this topic because, contrary to what Nozick suggests may be possible – 'the operation of the system over time washes out any significant effects from the initial set of holdings'<sup>84</sup> – it is simply not

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<sup>82</sup> For a fuller discussion of this point and its effect on the Lockean proviso, see Kirzner, Israel M. 'Entrepreneurship, Entitlement, and Economic Justice' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.403-404

<sup>83</sup> Steiner, Hillel 'The Natural Right to the Means of Production', *The Philosophical Quarterly*, 27,106, January, 1977, p.47

<sup>84</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.158

acceptable for a historically-based entitlement theory to assert this because 'acquisition precedes transfer' and therefore the justice of the initial set of holdings will affect the justice of all subsequent holdings.<sup>85</sup> Indeed if one were to accept Nozick's suggestion, his whole Lockean project would seem to be futile – he argues for a theory of justice in acquisition where just acquisition turns out to be unimportant. However, for now, let us conclude by saying that if Nozick's interpretation of the Lockean proviso is properly implemented, it is likely to lead to at least sustenance for most people in the minimal state. Nozick could consistently accept this conclusion and may be forced to given his own principles but the consequences – impermanent and violable property rights and redistribution – are certainly not what his entitlement theory's rhetoric is usually interpreted as intending to convey.

## 1.2 Intuition and the Wilt Chamberlain Argument

Whereas the Lockean proviso is used by Nozick in order to justify acquisition, the Wilt Chamberlain argument is used to illustrate freedom of justice in transfer and support Nozick's second principle of justice. The argument is supposed to illustrate that voluntary transfers infringe upon nobody's rights and respect liberty. Nozick argues that patterned and end-state theories require forced redistribution. This redistribution may restore a pattern or reach some defined end-state but, by implementing such redistributive schemes, egalitarians and utilitarians infringe upon individuals' rights to their entitlements. However, Nozick argues, the restoration of a pattern or achievement of an end-state will be short lived in any case because, so long as individuals are free to dispose of their holdings as they choose, voluntary transfers will result in disruptions in patterns or end-states – 'liberty upsets patterns.' Not only do such schemes infringe upon individual entitlement rights, 'no-end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives.'<sup>86</sup> Here is Nozick's argument:

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<sup>85</sup> For a fuller discussion of this point see, O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, especially p.311-312 and 320

<sup>86</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.163



Let us suppose that it is your favorite one [distribution] and let us call this distribution  $D_1$ ; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction... He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him... The season starts and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it... Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger than anyone else has. Is he entitled to this income? Is this new distribution  $D_2$ , unjust? If so, why?<sup>87</sup>

The criticism of this argument is less sophisticated than that of the Lockean proviso so this section will be a little lighter than the previous section. I will state the basic critique of the Wilt Chamberlain argument, generally agree with it and stress why, in my view, the critique is important with respect to the issue of sustenance. Finally, I will account for the intuitive appeal of the argument but also stress the intuitive appeal of the argument for the provision of sustenance for those unable to provide for themselves.

The common critique of the Wilt Chamberlain argument goes something like this: Nozick accepts his entitlement theory throughout so he accepts it at  $D_1$  and  $D_2$ . Nozick grants that we can hold whatever theory we want at  $D_1$  (a patterned or an end-state theory, for example) but this does not mean that one must accept his theory (inviolable and permanent property rights) at  $D_2$ .<sup>88</sup> One could for example dismiss voluntary outcomes and believe that all of the contents of Chamberlain's special box should go straight to a benevolent dictator who will continue to maintain a patterned, end-state policy of full equality in society. More likely, given some sort of liberal set of beliefs and a less than fully-fledged belief in Nozick's entitlement theory, one could accept that there is nothing wrong with individual fans giving their twenty-five cents to Chamberlain but that the full

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<sup>87</sup> *ibid.* pp.160-161

<sup>88</sup> Amongst others, see O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.309, Wolff, Jonathan *Robert Nozick: Property, Justice and the Minimal State*, Blackwell, Oxford, 1996, p.87, Cohen, G.A. 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, pp.250-253, Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy and Public Affairs*, 30,2, Spring, 2001, p.127

entitlement property rights that Nozick espouses are not necessarily assignable to the resultant \$250,000 in Chamberlain's special box.

Following this critique is a related criticism of Nozick. Nozick argues that third parties are unaffected by what happens in the Wilt Chamberlain argument because their conditions remain unchanged and they are not involved in the voluntary transaction that occurs. However, third parties, especially the very poor, may well have claims under  $D_2$  that it may have been difficult for them to justify at  $D_1$  because what is available in society affects all and what is available for third parties and claims to resources may change for legitimate reasons once the distribution of resources has changed.<sup>89</sup> Let us alter the Wilt Chamberlain argument slightly but not hugely to see why third party claims may differ following the transition from  $D_1$  to  $D_2$ .

Let us suppose that there are three people in a given society and that each needs \$100 in order to provide the means of sustenance in order to survive. Let us suppose that any scheme of taxation and redistribution that takes place must tax all those who are taxed at the same level otherwise the tax system becomes too costly and all three persons fall below the \$100 sustenance level. Let us suppose  $A$  has nothing and is in imminent danger of starving to death, basketball fan  $B$  has \$175, and  $C$  (Chamberlain) has \$125.

In this situation,  $D_1$ ,  $A$  may have to accept his situation because no redistribution could occur that would save his life without sacrificing the lives of one of the other inhabitants. He needs \$100 but it cannot come directly from  $B$  or  $C$  without them falling below the \$100 sustenance level.

Now suppose  $C$ , a talented basketball player, decides to put on a basketball skills display involving dunking, fancy dribbling, and perimeter shooting.  $C$  decides to charge \$25 for

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<sup>89</sup> G.A. Cohen makes a similar point and argues that third parties do have interests in the context of the Wilt Chamberlain argument because what poor third parties have 'depends on what others have and on how what others have is distributed.' in his 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.252

those who wish to see his skills display. *A*, while almost too hungry to think, cannot afford to attend. *B*, a basketball fan, is willing to part with the \$25 fee and gladly watches *C*'s display. When it is all over there is a resulting  $D_2$  where *A* still has nothing but both *B* and *C* each have \$150. *A* hears about the result and realises that an efficient tax scheme can now be implemented in order to tax \$50 from both *B* and *C* and give *A* the \$100 needed to provide for his means of sustenance without meaning that either *B* or *C* perishes because they fall below the sustenance line. *B* and *C*, not being entitlement theorists, accept the taxation although *C* is a little confused with the taxation trap that saw his levels of taxation surpass his new earnings.<sup>90</sup>

Admittedly, as with most of these kinds of games, there is a degree of artificiality and the results are often easily derived from the suppositions once implemented but it illustrates circumstances whereby third party claims may reasonably alter once there has been a particular change in societal distribution from a  $D_1$  to a  $D_2$ . There may be many considerations at  $D_1$  that mean that the unfortunate may not have claims to certain levels of redistribution. I would imagine that these considerations could include entitlement but there may also be other considerations such as aggregate efficiency, merit, desert, taxation effects, and so on. But, all of these considerations may change when there is a move to  $D_2$  especially where that move involves a large transfer of wealth to a single individual. Third parties, especially the very needy, may have stronger claims to redistribution once Chamberlain receives the contents of his special box because what is available to them depends on what others have and the way in which resources in society are distributed.<sup>91</sup>

Let us now return to the question of why the Wilt Chamberlain argument is intuitively appealing. It is most likely appealing to people because of the voluntariness of the transfer that takes place; most people in the world see nothing wrong with spending their money if they wish to do so and, if many people want to spend twenty-five cents on Wilt

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<sup>90</sup> The idea for this society comes loosely from some of the scenarios in Frankfurt, Harry 'Equality as a Moral Ideal' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997

<sup>91</sup> Again, see footnote 89 (above) with reference to G.A. Cohen

Chamberlain, there doesn't seem to be too much wrong with that so there cannot be too much wrong with the outcome. It has intuitive appeal but the fact that there is now a very rich person and a different overall distribution may mean that redistribution to the very needy in society is warranted. There is not necessarily a strong intuitive appeal that Chamberlain should have permanent property rights over the contents of his box. Even in a Nozickean minimal state, he will have to use the contents to help fund the police, the army, the courts, and so on. The Wilt Chamberlain argument is intuitive and Nozick accepts that he 'feels the power' of intuitive arguments for redistribution just as he recognizes 'the biological and personal havoc' that lack of the means of sustenance can lead to. By recognizing such arguments that seek to ensure sustenance for the poor, Nozick is, in effect, recognizing their intuitive appeal. So, Nozick needs to explain why the intuitions associated with the Wilt Chamberlain argument supersede those that recognize the havoc caused by the lack of the means of sustenance and seek to posit arguments for redistribution in order to avoid such havoc. Nozick does not do this and therefore his intuitions are unconvincing to people (such as me) that have stronger intuitive feelings towards arguments that argue that the wealthy may be forced to contribute to the means of sustenance for the very poor.

The further intuitive appeal of the Wilt Chamberlain argument is that individuals should be allowed to keep what other individuals give to them. As stated above, this involves at least an implicit acceptance of some form of entitlement. It is also related to the concept of self-ownership that I will discuss in the following section. However, for now, I will finish this section by concluding that the Wilt Chamberlain argument is not fully convincing if one does not accept some form of entitlement theory at  $D_2$ , which one does not have to do, that third party claims (especially third party claims of the indignant) may justifiably change once there are major changes in distributions in a society, and that the intuitive appeal of the provision of sustenance for the very poor may outweigh the intuitive appeal of permanent property rights for the (very) wealthy.

### 1.3 The Kantian Injunction, Self-ownership, and Liberty

Both the Lockean proviso and the Wilt Chamberlain argument embody the concept of man having ownership over himself. In the case of the Lockean proviso, man owns himself and therefore when he mixes his labour with unowned objects he comes to own them as well so long as the proviso is adhered to. Although the Wilt Chamberlain argument is an intuitive argument, the intuitive appeal, if one finds it appealing, is based on self-ownership and the feeling that Chamberlain is entitled to his income (the fruits of his labour, similar to the Lockean concept). By implying that Chamberlain is entitled to the fruits of his labour, this also implies (for those who sympathize with Nozick's intuitions) that third parties do not have claims to Wilt's labour earnings.

The concept of self-ownership is another fundamental principle in libertarianism. Given that we are owners of ourselves, it is reasoned that we are also owners of our labour and of the fruits of our labour. From here, it is argued that if we are coerced into providing for redistributive schemes that we would not be voluntarily willing to give to, then we are not the full owners of our income, and therefore our labour, and therefore ourselves. Redistribution, it is argued, fails to respect individuals *qua* individuals with rights of self-ownership.

While the Lockean proviso and Wilt Chamberlain argument support this concept of self-ownership, there is a third argument derived from Kant and his second formulation of the categorical imperative which states:

*Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.*<sup>92</sup>

From this imperative, and given that persons are ends, it is argued that we should not 'use the person of others merely as a means' to achieving ends that they do not 'share' or are not interested in pursuing and achieving. Nozick argues that the imperative imposes 'side

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<sup>92</sup> Kant, Immanuel *Groundwork of the Metaphysics of Morals*, Harper & Row, New York, 1964, p.96

constraints' on action and what can be done to persons by other individuals and through the coercive power of the state because individuals are used as means if they are used to achieve an end that they do not share.<sup>93</sup> So, individuals that are forced to pay taxation in order to achieve redistributive ends (universal healthcare, universal schooling, the means of sustenance for those without such means, and so on) are treated as means if they are forced to contribute to schemes aiming at such ends and they would not otherwise have voluntarily done so absent to use of (or threat of the use of) coercive force.

In addition to this, Nozick argues that what makes humans special is an ability to form life plans that constitute, for the individual, a meaningful life. Thus, he states that a 'person's shaping his life in accordance with some plan is his way of giving meaning to his life'<sup>94</sup> and taxation to fund redistributive schemes hinders these plans because individual funds are always susceptible to change depending on the tax and spend plans of the government. So redistributive schemes not only infringe upon individual rights, they also interfere with the life plans that give individual lives meaning, and, in so doing, they infringe upon individual autonomy and restrict liberty. Furthermore, Nozick argues that the proportion of labour that individuals must work in order to pay compulsory taxation to fund redistributive schemes is a kind of forced labour. Given that individuals may not volunteer to work such labour, absent the presence of state coercion, Nozick argues that individuals that are forced to contribute to state redistributive schemes are not the full owners of their labour and, in effect, this is forced labour and a form of slavery. Nozick's argument can be spelt out in an uncontroversial way as follows:

1. As humans we should not be treated as means but as ends in ourselves.
2. A meaningful life constitutes being able to plan for future events.
3. Therefore enforced taxation to fund redistribution is impermissible because
  - (a) it treats some people as means - it is forced labour and *de facto* a form of slavery - because they are used to generate wealth that is taxed and redistributed in accordance with some overall societal good, a good that they

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<sup>93</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.33

<sup>94</sup> *ibid.* p.50

may not endorse, and, (b) individuals are not able to form stable, future, meaningful life plans if resources are continually alterable due to the forces of taxation and redistribution.

4. From here, Nozick asserts the inviolability of his libertarian rights because individuals are not treated as means and have the requisite liberty (non-interference) needed to make meaningful life plans.

I will argue that the conclusions reached in both 3(a) and 3(b) are not compelling and that Nozick himself fails to comply with 3(a) and 3(b) because he endorses redistributive taxation to pay for universal protection in his minimal state. The use of the Kantian injunction in order to arrive at 3(a) will be questioned as will the effect of taxation in 3(b). If 3(a) and (b) are not compelling, it may be possible to justify taxation in order to redistribute to provide sustenance for those unable to earn it. Undermining 3 also leads to the undermining of 4 which states that Nozick's libertarian rights are inviolable.

Firstly, it is arguable that redistributive taxation does not entail the treatment of individuals as means to an end and that redistributive taxation is not on a par with forced labour and (partial) ownership in others amounting to a form of slavery. In 3(a), there are already assumptions of legitimate permanent private property. As was seen earlier, with regard to the 'historical shadow' of the Lockean proviso, this may not be the case. So individuals may not be treated as means in this context, they may be treated as ends in themselves (outside of the context of private property) but their holdings may be forcibly removed, even for Nozick, to provide for redistribution so long as those holdings are not permanently theirs as, even for Nozick, they are not because of the Lockean proviso.<sup>95</sup> In addition, it is not proved by Nozick that treating people as means in the form of taxation is the only way worthy of consideration that people can be treated as means. Nozick could concede that people can be treated as means in other ways but if he does so he must explain the primary (and almost singular) importance that he associates with the

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<sup>95</sup> A similar argument to this can be found in Exdell, John 'Distributive Justice: Nozick on Property Rights' *Ethics*, 87,2, January, 1977, p.143, 149. Exdell argues that a proper interpretation of Kant does not necessarily lead to inviolable property rights and Nozick himself must sanction some enforced taxation in order to fund the minimal state that constitutes interference and undermines the inviolability of rights to resources.

treatment of individuals as means when they are compulsory tax payers. Nozick fails to do this. Thus, Hugh La Follette argues that people can be used as means in other significant ways that Nozick does not fully consider and asks with reason:

Why must we suppose...that the only way people are used as a means for others is if their libertarian rights [not to be taxed] are violated? Why, for example, isn't a poor worker being used by a rich factory owner as a means for his making a million dollars?<sup>96</sup>

Nozick anticipates this objection with regard to forced labour by arguing that an individual faced with the choice of working or starving still has choices because a 'person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary.'<sup>97</sup> In this case, Nozick would contend that the starving worker is not being used as a means (in the moral sense although most workers are used as means in the commercial sense) because they volunteer to take on work even if this choice is simply a choice between death and sustenance. Without a more complex argument as to what constitutes voluntariness and choice, it is trivial, in my opinion, to maintain that the choices of the very poor to work or die are still choices. The very poor in such positions can be (and are) treated in ways that do not afford them respect and they are used as means. Such treatment of individuals as means warrants as much consideration as the treatment of individuals as means when they are subjected to taxation.

In addition, I do not believe that it is defensible to equate taxation with forced labour if one accepts Nozick's conception of voluntariness just outlined. Most workers know before they work that they will be taxed and, as a result, the forced labour question does not arise because individuals have the same choices – they can choose to either work (with associated taxation) or not work and accept the associated consequences. And, even if one gives Nozick his claim that taxation is on a par with forced labour, 'a limited dose

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<sup>96</sup> La Follette, Hugh 'Why Libertarianism Is Mistaken' in Arthur, John and Shaw, William H. (eds.), *Justice and Economic Distribution*, Prentice-Hall, New Jersey, 1978, p.203

<sup>97</sup> Nozick, Robert *Anarchy, State and Utopia*, Basic Books, New York, 1974, pp.263-264



of forced labour is massively different, normatively, from the life-long forced labour that characterizes a slave.’<sup>98</sup>

Furthermore, Nozick accepts that redistribution and taxation can justifiably take place so that those who are unable to purchase protective services are afforded protective services – this is how his ultraminimal state becomes the minimal state (see Chapter 3, below) – and, as a consequence, he cannot consistently maintain that forced taxation to provide for protective services is legitimate and treats people as ends while forced taxation in order to provide the poor with the means of sustenance is illegitimate and treats people as means. As a result of this, it can be seen that Nozick violates 3(a) himself. But he is adamant that these conditions cannot be breached if the proceeds are used to supply the needy with sustenance rather than provide for protection of private property.<sup>99</sup>

Secondly, returning to 3(b), I believe that minimal levels of sustenance may be necessary before individuals can plan for meaningful lives and that the encroachment on individuals’ liberty due to the effects of taxation is exaggerated by Nozick. In some circumstances, the enforcement of Nozick’s libertarian rights may lead to a greater amount of interference in most people’s lives than in other conceivable states where taxation and redistribution occur.

If what makes human lives meaningful is an ability to make long-term plans, then it is reasonable to suggest that certain degrees of sustenance are required in order to do this. If one barely has the resources needed to survive, one cannot realistically form an ‘overall conception’ or plan of one’s life because the only plan is a plan to acquire the minimal resources needed in order to maintain life. Nozick may consider this a plan for life, as he considers labour for the very poor voluntary, but it is really just a continuous struggle and not what most people would consider truly meaningful.<sup>100</sup>

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<sup>98</sup> Cohen, G.A. *Self-Ownership, Freedom, and Equality*, Cambridge University Press, Cambridge, 1995, p.231

<sup>99</sup> This argument is common in the literature on Nozick. See, for example, Cohen, G.A. *Self-Ownership, Freedom, and Equality*, Cambridge University Press, Cambridge, 1995, p.235

<sup>100</sup> As Samuel Scheffler succinctly argues, one necessary condition for leading a meaningful life is to lead a life, in his ‘Natural Rights, Equality, and the Minimal State’ in Paul, Jeffrey (ed.) *Reading Nozick*,

It may also not be the case that taxation constitutes constant interference and upsets people's life plans to the extent that Nozick suggests it does. Taxation has existed throughout history and people have been able to incorporate its effects into their life plans. Indeed market regulation and taxation do not 'take away a liberty that we previously had in the state of nature,' they are (and always have been) a part of the market, and Nozick 'fails to recognize the nature of economic liberty as a legal creation' as the basis of a market that creates legal ownership as well as implements systems of taxation and regulation.<sup>101</sup> Nozick cannot admit that taxation to fund protective bodies results in continuous interference. If the wealthy accept the existence of the government for reasons of protection, they are likely to accept its existence as the provider of additional programmes because the existence of the government is what gives the wealthy their possessions and it will most likely be the case that, given some redistributive taxation, 'they are bound to the 'commonwealth' by chains of gold they should be happy to leave in place.'<sup>102</sup> It will also most likely be the case that the 'restoration of patterns...falls short of continuous interference'<sup>103</sup> and, even in a system of redistributive taxation for more than protective services, individuals will be able to make meaningful life plans consistent with 3(b).

Finally, returning to consideration of interference, Nozick cannot be certain that the levels of interference in people's lives commensurate with his minimal state may not exceed interference that occurs in a non-Nozickean state. For example, Gregory S. Kavka argues that if one considers Nozick's system of extensive private property where there are likely to be no public roads, waterways, parks, and so on 'the barriers to movement placed in one's way by the fences and guards protecting other's property, we see that

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Blackwell, Oxford, 1982, p.153. Simon Hailwood makes a similar point when he states that 'it is not obviously false that such "dignity in self shaping" only becomes possible above a certain level of material prosperity' in his *Exploring Nozick: Beyond Anarchy, State and Utopia*, Avebury Press, Aldershot, 1996, pp.53-54

<sup>101</sup> Ehman, Robert 'Rawls and Nozick; Justice Without Well-Being' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, pp.326-328

<sup>102</sup> Davis, Michael 'Nozick's Argument for the Legitimacy of the Welfare State' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, p.293

<sup>103</sup> O'Neill, Onora 'Nozick's Entitlements' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.310

there may be more direct physical interference involved in a private property system [of extensive, permanent property rights] than in a redistribution scheme.’<sup>104</sup> Added to this is the likelihood that there will be diverse distributions of holdings in Nozick’s minimal state with large concentrations of wealth (perhaps among a very few) and high levels of poverty (perhaps among many people). This, I believe, is likely to mean that the forces of the state will have to quell rebellion, forceful argument, and enforcement of Hobbesian state of nature rights that give people liberty to do as they see fit if their lives are in jeopardy. In such cases, the apparatus of the state will forcibly put down requests for levels of sustenance and this interference in people’s lives is just as important as considerations regarding the effects of taxation on the better off in society, which, in any case, Nozick accepts in certain circumstances because individuals are entitled to act against the unjust implementation of rights. Inevitably, Nozick stands too easily accused of respecting liberty in too narrow a manner and potentially for a very few people in society. If liberty, meaningful life plans, and respect for people as ends are concerns for us then ‘starvation, not taxation is our worthy foe.’<sup>105</sup>

## Conclusion

I have been critical of Nozick’s adaptation of Kant’s categorical imperative. Nevertheless, Nozick’s arguments carry some weight because there must come a point where high levels of taxation (or total taxation) will have the effects that Nozick anticipates – constant interference, incursions on people’s liberties and life plans, and perhaps the treatment of people of means, a form of forced labour and slavery. However, moderate levels of taxation, which Nozick accepts himself in certain circumstances, will not result in the dire consequences that he foresees if such taxation is used to fund subsistence for the very poor. I will return to the Kantian injunction and associated principles in the following chapter with regard to opportunity.

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<sup>104</sup> Kavka, Gregory S. ‘An Internal Critique of Nozick’s Entitlement Theory’, *Pacific Philosophical Quarterly*, 63,4, October, p.303

<sup>105</sup> Scheffler, Samuel ‘Natural Rights, Equality, and the Minimal State’ in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.159

However, for now, I can state some brief lessons that have been learnt from this first chapter. Firstly, the Lockean proviso as interpreted by Nozick may be too strong to meet his needs because it and its 'historical shadow' may mean that the provision of sustenance for most people is warranted and that property rights do not have the permanency that he seeks to establish. It may be too weak because state of nature compensation for those who are unable to acquire because others do so both justly and unjustly is not adequate. And, a proper implementation of Nozick's proviso may not rule out extensive redistribution and may not establish the efficiency that he sees as a by-product of his libertarian capitalism.

Secondly, with regard to the Wilt Chamberlain argument, Nozick assumes his libertarianism throughout so whereas he accepts permanent, inviolable property rights following the payments by fans to Wilt Chamberlain, everyone is not predisposed to accept libertarianism once there has been a move from  $D_1$  to  $D_2$ . Furthermore, it is not necessarily the case that third parties claims cannot change following the change in distributions because circumstances that affect redistributive claims may also change. And, while Nozick's Wilt Chamberlain argument has some intuitive appeal, arguments for the provision of sustenance to the very needy will have more intuitive appeal to many people, myself included.

Thirdly, Nozick's conception of Kant's second formulation of the categorical imperative is narrowly construed in order to meet his needs. There are circumstances where people can be treated as means in a system of libertarian capitalism and his acceptance of voluntariness in life or death circumstances fails to adequately address this issue. The provision of certain levels of sustenance may be seen as a prerequisite for planning a meaningful life and the taxation and redistribution needed for this provision need not have the negative effects on liberty, self-ownership, and the treatment of people as ends that Nozick anticipates.

This chapter has assessed Nozick's primary principles and, for someone who is supposed to have developed a political philosophy without principles, there has been a lot to

address both with regard to Nozick and a large amount of secondary literature. I have not rejected any of Nozick's arguments outright and I will return to the principles and other aspects of his theory in the following chapters. However, for the moment, I will conclude by stating that Nozick's principles by themselves do not rule out the provision of sustenance for most people and, properly interpreted, do not rule out the provision of sustenance for all.

## 2. OPPORTUNITY

Yet bequests that are received sometimes are passed on for generations to persons unknown to the original earner and donor, producing continuing inequalities of wealth and position... The resulting inequalities seem unfair.<sup>106</sup>

The previous chapter outlined arguments for the provision of sustenance based on Nozick's key principles, either used in the way that Nozick wanted them to be used or once interpreted in a different light given further consideration. The primary theme of the entitlement theory and libertarianism is that redistributive schemes are unwarranted because one should not consider the people who will benefit from redistribution but the people that are forced to fund that redistribution. So long as the latter group of people are entitled to their holdings in accordance with Nozick's principles of justice in holdings, then it is wrong for anyone or for the state to forcibly take those holdings to fund programmes that are deemed to be for the 'social good,' a social good that those who suffer redistribution may consider unnecessary, unwarranted, unhelpful, or wrong.

In this chapter, I will advance arguments that counter Nozick's libertarian position with regard to the provision of opportunity for all. Firstly, I will argue that unlimited powers of bequest resulting in unlimited inheritance are likely to lead to situations where some individuals enter the world with a lot of resources which can allow them to afford extensive education, training, advice, and consideration. This will most likely enable them a far greater opportunity to progress to desirable positions in society compared to those people who are born into the world with minimal resources and are unable to afford education needed to progress to desirable positions. I will argue that such circumstances, continued over time, may lead to a violation of the Kantian injunction where some individuals and groups of individuals come to be seen and used as means. I will note Nozick's (re)conversion to a more egalitarian point of view (see quotation above) but will also delve deeper into the reasons for this conversion and assess whether his solution to the outcomes associated with unlimited bequest and inheritance deal adequately with the

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<sup>106</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, p.30

issue of opportunity for all. Secondly, I will argue that, given the overriding importance associated with individual choice in libertarianism, the theory cannot justifiably counter the criticism that invidious discrimination is legitimate. Thirdly, I will argue that the lack of provision of opportunity for all, as well as subjecting groups of people to lives where they cannot develop their talents and succeed to desirable positions, is most likely to result in inefficient market outcomes so, as with certain implications of the Lockean proviso discussed in Chapter 1, the 'various social considerations that favor private property' may have difficulty materializing under Nozick's system of the free market. I will conclude this chapter by broadly accepting the concept of equality of opportunity as a policy goal and argue that the provision of at least some opportunity for all is preferable to a libertarian system that will likely result in certain individuals and groups of individuals having no opportunity whatsoever.

## 2.1 Inheritance

The libertarian Nozick argues that there are two ways to provide equal opportunity:

...by directly worsening the situation of those more favored with opportunity, or by improving the situation of those less well-favored. The latter requires the use of resources, and so it too involves worsening the situation of some: those from whom holdings are taken in order to improve the situation of others. But holdings to which these people are entitled may not be seized, even to provide equality of opportunity for others.<sup>107</sup>

So, as with many forms of redistribution, taxation is not justified in order to provide equal opportunity because it involves the enforced provision of resources from the better off to the worse off and, so long as the better off are entitled to their resources, therefore infringes upon the libertarian rights of the better off. Nozick, in addition, argues that 'life is not a race in which we all compete for a prize that someone has established' and so it is pointless to equalize opportunity towards the attainment of a single prize because, he reasons, there is no single prize. Furthermore, he gives his 'marriage analogy' where his wife chooses Nozick because he is intelligent and good-looking. He asks if other less

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<sup>107</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.235

intelligent and less good-looking suitors of his wife should have been given lessons, make-up, and so on so that they would have had an equal opportunity in winning the hand of Nozick's wife. He says that no such conclusions follow.<sup>108</sup>

While there may not be one individual prize in society and there may be a multitude of different races, in my view there are desirable positions in free market societies. These positions will either provide an individual with interesting, meaningful work that she enjoys or compensate her with many resources in exchange for her labour. In some circumstances individuals will be able to attain work that they enjoy and be compensated handsomely for their labour. The key to educational opportunity is that it gives people choices, choices that may even include a well-qualified person that could succeed to a desirable position choosing what is generally perceived to be an undesirable position because, for her, that position is desirable. Nozick treats choice as a value when he is dealing with the concept of transfer but neglects the concept when dealing with opportunity. Freedom to choose to do with one's resources as one pleases in the buying and selling processes is treated with overriding importance and interference in such processes is, for the most part, wrong, according to Nozick. However, the constraints put upon choice due to limited opportunity for some (and perhaps many) also has serious implications that impact forcibly on the range of choices available to those without opportunity. Failure to consider choice at this level fails to treat choice seriously and neglects the constraints that some individuals will have upon them from birth. The libertarian Nozick would likely respond that it is not the choice of those without entitlements that we should be overly concerned with – what is important is that individuals with holdings can choose to do with them as they please. However, Nozick later recognizes that such a state of unlimited bequest creates a power imbalance over time that is unfair and a primary reason for its being unfair, I suggest, is that those with resources have a plethora of choices available to them while those without resources have few, if any, choices of this sort (related to career development) available to them.

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<sup>108</sup> *ibid.* p.236-237



With regard to Nozick's marriage analogy, I am not suggesting that physical characteristics, organs, or body parts should be forcibly given or taken away. I accept this in the development of talents and I accept the marriage analogy so long as it is applied to marriage and not used to analogize the opportunity that I wish to prescribe in the realms of education and the labour market. I am not arguing for equal opportunity in the arena of romantic love and I do not believe that the analogy translates to the workplace provided that one properly understands the workplace and the opportunities that one is seeking to promote. In the labour market in a market economy, there is a connection between education, becoming a skilled worker, and succeeding to desirable positions. I wish to maintain that the opportunity to advance to such desirable positions should not be severely curtailed from birth for some groups of people while other groups are born with the necessary resources needed to provide the opportunities needed to succeed.

Nozick appreciates that inheritance is a contributing factor in determining wealth in society but underestimates its effect on demand for labour when he writes:

Apart from...inheritances...that occur in a free society, the market distributes to those who satisfy the perceived market-expressed demands of others, and how much it so distributes depends on how much is demanded and how great the alternative supply is.<sup>109</sup>

Nozick recognizes the effect that inherited wealth can have over wealth distribution in society but fails to appreciate that inherited wealth can also affect 'market-expressed demands' and 'alternative supply.' Where there is a large amount of poor people and fewer wealthy people, the wealthy can afford to pay for extensive education for their children so that they gain skills that comply with market-expressed demands and thereby find it much easier to succeed to desirable positions whereas, the children of the poor will not be afforded such opportunity and will form a large supply of unskilled workers that will almost always, in the absence of extreme natural talent, be only able to fill undesirable positions. So, inheritance has two effects that allow it to favour the wealthy – it means that they are better off in initial market distributions, as Nozick notes, as well as

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<sup>109</sup> Nozick, Robert 'Why Do Intellectuals Oppose Capitalism?' *CATO Online Policy Report* XX,1, January/February, 1998, [http://cato.org/pubs/policy\\_report/cpr-20n1-1.html](http://cato.org/pubs/policy_report/cpr-20n1-1.html)

allowing them to purchase education and develop skills that are highly demanded and in short supply so that they can further influence market distributions in their favour and have a far greater chance of succeeding to desirable positions.

This is the reason, I suggest, behind Nozick's assertion in *The Examined Life* that the effects of bequest and inheritance 'producing continuing inequalities of wealth and position...seem unfair' and an important reason for believing that his libertarian position is 'seriously inadequate.'<sup>110</sup>

I want to return to the Kantian injunction for the remainder of this section and start by considering the following quotation from Thomas Nagel:

...it is appalling that the most effective social systems we have been able to devise permit so many people to be born into conditions of harsh deprivation which crush their prospects for leading a decent life, while many others are well provided for from birth, come to control substantial resources, and are free to enjoy advantages vastly beyond the conditions of mere decency. The mutual perception of these material inequalities is part of a broader inequality of social status, personal freedom, and self-respect. Those with high income, extensive education, inherited wealth, family connections, and genteel employment are served and in many cultures treated deferentially by those who have none of those things.<sup>111</sup>

While I agree with Nagel that the empirical conditions of life-long deprivation for some people that exist in all societies are appalling and this is a primary reason for me holding that the provision of opportunity for all is important, I want to focus here on the 'mutual perception' that he discusses and not only the deferential treatment of the rich by the poor but the possible (maybe likely) differential treatment of the poor by the rich and the Kantian implications of such treatment.

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<sup>110</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, p.17, 30 Although note that the *CATO Report* was published nine years after *The Examined Life* so maybe the full effects of inheritance were never truly accepted. Nevertheless, there was a significant shift and a support of a degree of bequest limitation.

<sup>111</sup> Nagel, Thomas *Equality and Partiality*, Oxford University Press, Oxford, 1991, p.131

The entitlement theory that Nozick advocates in *Anarchy, State, and Utopia* provides no redistribution for education for the poor. In addition, there are unlimited powers of bequest and no taxation or cap on what can be inherited. It is possible to imagine a two-tier society emerging in Nozick's minimal state where the better off use their wealth to provide superior opportunities for their offspring while the less well off are unable to do this. From here, it is possible to imagine that a multi-generational class system will appear where there are two different classes – those with wealth and high levels of education that succeed to desirable positions in society and those without wealth and low levels of education (if any at all) that fill undesirable positions. There is no public education system and so only an extremely limited number of extremely talented individuals are able to leave the worse off group and only a very few extremely untalented and feckless individuals will join the worse off group from the better off group. Over generations, it is possible to imagine that there will be very little transition between groups and that, because of no opportunity for the worse off and inheritance for the better off, generations of people from the better off class will find themselves in a better position than those in the worse off group. Such a state of affairs is not difficult to imagine and is consistent with Nozick's entitlement theory.

It is possible to imagine that the less well off will work in jobs that are generally seen as undesirable and they will either work for people from the better off class or will obey orders from people in the better off class who fill supervisory rolls in corporations and other workplaces. Over time, perhaps many generations, the better off will come to believe that they and their ancestors will always remain as members of the better off class and they will see the worse off as a permanent class whose lineage will follow in their ancestors' path. The worse off may also have this view of themselves and a similar view of permanent advantage for the well off class.

As time continues and the less well off come to obey the orders of the better off and the better off come to see the less well off as individuals that follow instructions, it is possible that the formal injunction stating that individuals should act in '*a way that you always treat humanity, whether in your own person or in the person of any other, never*

*simply as a means*' will have little practical significance because the better off may, in reality, come to see the worse off as a subservient class that obeys orders and can be used as a means to achieve ends and people of the better off class may treat the worse off differentially when compared to members of their own class. It is possible to imagine that the poor themselves will take little heed of the injunction and may come to treat themselves in their own person as means for achieving the better off's ends; after all, this is the way that it has been as far back as they can remember and it will continue in the future for as long as they can imagine. It is possible to imagine that it may be easy for a person to quickly determine the class of another individual and afford him the treatment that one considers warranted – classes may be a different colour, they may speak with a different accent, and so on.

The point here is that individuals will be seen as means and treated as means and may come to see themselves as means and treat themselves as means. I believe that it is possible to imagine such a set of circumstances in the multi-generational two-tier class system conceived of above and that even in most societies today, where there is usually some state opportunity for all, the perception of the poor as means is commonplace. A reliance on the categorical imperative that people should not be treated as means does not alter the likelihood that, given certain conditions, people *are* treated as means. If the Kantian injunction is taken seriously, I believe that this issue deserves at least the consideration that Nozick affords to the consideration of people treated as means in a system of taxation.<sup>112</sup> No doubt libertarians and non-libertarians alike use the Kantian injunction, like the Lockean proviso, to suit their own ends. But, if a situation can arise in a society in which people are treated as means, that society should be examined and it will not do to simply state that it is an unimportant observation and reaffirm the formal injunction that people should not be treated as means. Just as Nozick cannot resort to repetition of

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<sup>112</sup> Alan Goldman puts forward a similar argument that a 'case could be made from...a society with a set of rules of acquisition and transfer in which some are in need and not helped violates the first formulation of [Kant's] principle in its rules [*Act only on that maxim through which you can at the same time will that it should become a universal law*'] and hence the second as well; that an economic system in which some prosper partly through the consumption and labor of those who, because of their initial positions (determined by the prior operation of the system), never have human needs filled, embodies rules that treat the latter merely as means.' Goldman, Alan H. 'The Entitlement Theory of Distributive Justice', *The Journal of Philosophy*, 73,21, December, 1976, p.831

the formal injunction if he believes that people are treated as means when they are taxed for redistributive ends, he cannot reaffirm the formal notion when people in this situation also come to be treated as means. This should be one of the reasons behind the later Nozick stating that bequest and inheritance 'producing continuing inequalities of wealth and position...seem unfair.'

In this section, I have argued that the libertarian Nozick's failure to provide opportunity for all as well as entitlement to unlimited bequest and inheritance can create conditions where those with wealth can develop skills and proceed to desirable positions. Those who do not have wealth are likely to be confined to undesirable positions because of lack of opportunity. This is unfair and the later Nozick comes to recognize this. In addition, no opportunity and extremely limited potential for the poor to rise out of their class may mean that they are perceived and treated as means both by themselves and by the better off. This has implications for the interpretation of the second formulation of Kant's categorical imperative and a reiteration of the formal imperative does not take these implications seriously.

In the next section, I will discuss the possibility of legitimate discrimination in a Nozickean state because of the all-important preeminence of individual choice and non-interference. In the final section, I will return to the concept of desirable positions and argue that inheritance, lack of opportunity, legitimized discrimination, and lax, if any, selection procedures will most likely result in inefficient filling of important and desirable positions. At the end of this chapter, I will advocate the concept of equality of opportunity as a policy goal.

## **2.2 Individual Choice and Legitimate Discrimination**

As well his principles of justice that are stated above, Nozick formulates a maxim for justice in transfer which states:

*From each as they choose, to each as they are chosen.*<sup>113</sup>

This libertarian maxim, coupled with the negative right to non-interference has serious implications with regard to opportunity because it amounts to the legitimization of discrimination. Jan Narveson, another libertarian, states that businesses are free to make choices in accordance with the above principle and do not have associated duties of equal consideration for candidates seeking employment in the workplace because, he reasons, 'if a business is really private, that means it is the property of its owners. They can do what they wish with it'<sup>114</sup> including choosing to employ only people of a certain race, sex, sexual-orientation, religion, social class, and so on. But if this is the case, as it is likely to be for Nozick as well as Narveson, then one cannot maintain that 'libertarianism may reasonably be characterized as the logically extreme upshot of liberalism'<sup>115</sup> because 'liberalism seeks to establish a broader concept of liberty, respect, and rights for individuals beyond freedom to choose to do what one pleases with one's resources including fulfillment of workplace positions. Discrimination is not unjust according to libertarianism [and] libertarian property rights then come to provide cover for bigotry and invidious discrimination against what liberals see as the basic interest [and rights] of citizens.'<sup>116</sup>

Returning to Nozick's 'marriage analogy,' Nozick's wife can choose him for many reasons that she is at liberty to use as reasons for choosing him as her husband. These reasons may include, as he states, the perception that he is good-looking and intelligent. But, if Nozick's wife were not his wife but a prospective employer, unconcerned with his good looks and non-job relevant intelligence, and she chooses him because he is white and has a Jewish background, then other candidates for the position that are equally or

<sup>113</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.160

<sup>114</sup> Narveson, Jan *The Libertarian Idea*, Temple University Press, Philadelphia, 1988, p.315

<sup>115</sup> Narveson, Jan 'Libertarianism Vs. Marxism: Reflections on G.A. Cohen's *Self-Ownership, Freedom, and Equality*', *The Journal of Ethics*, 2, 1998, p.4

<sup>116</sup> Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy and Public Affairs*, 30,2, Spring, 2001, p.136 I will return to this difference between libertarianism and the arguments that I develop in this thesis that, I believe, would be broadly viewed as liberal. Freeman's paper is definitely one of the better that I have read on the subject. He doesn't use a bunch of *Xs* and *Ys* or resort to desert island situations to defend his argument but his paper does serve as a robust defence of liberalism and rejection of libertarianism as well as serving to dispel the myth that libertarianism is the logical upshot of liberalism.

better qualified to fill the position but are not chosen because they are non-white or non-Jewish have a legitimate complaint. A liberal would view this as an act of discrimination and, while it may constitute liberty of choice for the employer, it does not encompass the broader conception of liberty, in the sense of respect for people and freedom against discrimination.

Nozick could respond that such employment practices are not efficient because, by deciding to fill positions by taking into account characteristics that are not relevant to the functioning of a certain role, an employer is not filling that role in an appropriate way and, as a result, will suffer inefficiencies. However, individual choice is of paramount importance to Nozick and not efficiency so he cannot guarantee that such a set of circumstances will not pertain. Nozick could counter this again by arguing that businesses that employ in a discriminatory fashion will fail because they will not be efficient compared to competitors. However, this may take a long time to come about and may not be of particular interest to a person seeking a job now and, in addition, this argument assumes that competitors are not practicing similar discriminatory procedures.<sup>117</sup> Furthermore, discrimination, in certain cases could be rational and efficient if 'members of a certain of given group generally perform badly, then firms may decide to forgo the decision costs of individual evaluation and substitute group membership as a fairly reliable proxy for whatever individual factors they would have tested. If they do, they will be right most of the time, but at the cost of...injustices...to some individuals [because they may not conform to their group stereotype and may be better than those from the other group if given consideration]. Discrimination can be economically rational. The self-interest of economic actors is not sufficient protection if nondiscrimination is an important goal.'<sup>118</sup> It is clear, in my opinion, that the trumping

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<sup>117</sup> *ibid.* p.135 In practice, where discrimination is commonplace, most companies in a society may be acting in a discriminatory fashion not because of law but because of culture and therefore the competition solution will not come about. As Freeman points out, 'Jim Crow laws were not the primary cause of segregation in the South. In many places few laws, if any, explicitly restricted blacks from entry into desirable social positions... Still, these events...occurred due to tacit (often explicit) agreement among whites.' Freeman refers the reader to Vann Woodward, C. *The Strange Career of Jim Crow*, Oxford University Press, Oxford, 1966

<sup>118</sup> Fishkin, James S. 'Liberty Versus Equal Opportunity' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.150

power of individual choice in Nozick's libertarianism rules out legitimate state interference that is likely to be needed in order to counter discrimination in the labour market. Reliance upon efficiency will not always counter such practices with the likely result of unfair employment practices beyond the remit of the minimal state.

Returning to the Kantian injunction and the concept of the meaningful life, a political system that sanctions discrimination due to the overriding powers of individual choice and non-interference, fails to give strength to the imperative that individuals should be treated as ends in themselves and not as part of a group that can be discriminated against. If an individual is judged solely by a characteristic associated with a group, then that individual is not treated as an end but is judged according to some particular group characteristic, a characteristic he may not possess. Added to this is the possibility that individuals may have irremovable barriers placed in front of them because of legitimate discrimination, which hinder meaningful life plans, an effect that for them may have much more serious consequences than the effects of taxation. Failure to respect the potentiality of individuals as ends with life plans by placing discriminatory barriers in their paths is unfair and, in effect, leads to a situation where individuals are treated in non-Kantian ways because they are not afforded the consideration that they are due as individuals with individual talents, goals, and life plans.

Further to this, is the potential for an additional obstacle for the progression of the worse off discussed in the previous section – even if they somehow manage to develop their talents and provide opportunity for themselves to succeed to desirable positions, there may be further barriers placed in their way at the level of job selection because the better off can make job selection decisions and are not in any way obliged to give members of the worse off group equal (or any) consideration.

I will return to the concept of efficiency in the following section and I will then make some remarks regarding equal opportunity to conclude this chapter. However, for now, it is worth concluding that Nozick's libertarianism does not provide opportunity at two levels – at the level of developing talents because some people may have insufficient



resources to develop talents needed to succeed to desirable positions and at the level of position selection because, given the trumping powers of individual choice and non-interference, he cannot prohibit discrimination in the work place. These implications mean that libertarianism cannot be said to be a form of hyper-liberalism that guarantees liberal rights and more because it does not guarantee liberal rights. The common criticism obviously has merit when it states that libertarianism does not safeguard liberty in the broader sense but liberty in a narrow sense – property rights over oneself and things in the world (including employment positions) and free reign and disposal over those rights (including the right to sell oneself into slavery, see concluding chapter). In addition, the barriers to entry associated with invidious discrimination may have greater implications with regard to the planning for the meaningful life (a very important concept for Nozick) than the effects of taxation.

### 2.3 Market Efficiency

Returning to the ‘various social considerations favoring private property,’ Nozick’s failure to provide even minimal levels of education, potentially for a large number of people, may lead to inefficient outcomes. Desirable and important positions may be filled by people that are not particularly talented, a great number of people in society may not have even basic levels of education, and this may have effects throughout an economy. In addition, there may be limited incentives or chances for many to compete, do well, and enhance their talents and, as a consequence, aggregate levels of efficiency may be limited because of the factors outlined in the previous two sections.

Firstly, with regard to desirable and important positions, the lack provision of even basic opportunity for many, as is likely to be the case in a Nozickean minimal state, means that desirable and important positions may only be filled by people from a small class of individuals that have sufficient resources needed to pay for education and develop skills that are needed to succeed to such positions. It is unreasonable to suggest that, *a priori*, children from a certain better off class are always better at performing certain tasks in society. So long as many people that are worse off people have inadequate education and

opportunity, the pool available for selection for jobs that require extensive training – one can think here of doctors, architects, engineers, physicists, chemists, biologists, teachers, lawyers, mathematicians, and many more occupations – may be extremely limited due the circumstances that provide little or no education for many individuals and extensive education for a few well-off individuals. This limited pool may mean that an economy has in the first place a limited quantity of well-educated and trained individuals and it may also mean that, because this group is small and because, *a priori*, no group can be assumed to be the best doctor, chemist, and so on that many more and greater talented people could have succeeded to these positions if they had had the required resources to do so. This is a question of efficiency and the implication is that without adequate levels of education for all, fewer and potentially less talented people will succeed to desirable and important positions in society with the result that the ‘various social considerations that favor private property’ may be better achieved through the provision of educational opportunity for all and not only for those who are lucky to be born into the world with better off parents. This ignores the moral effect that the lack of education and opportunity is likely to have on those from the worse off in society who are unable, for the most part, to develop (potentially great) talents, succeed to desirable and important positions, and have to work in positions that are far less desirable and important than their talents, given opportunity to develop, warrant. Nozick could argue that such a situation would not materialize because the talented poor could borrow to develop talent and succeed to desirable positions. It could be argued that my argument relating to market efficiency is not as clear as is suggested here and that under neo-classical economic hypotheses regarding perfect markets, the talented would invest in their human capital so as to be able to take up desirable jobs irrespective of how rich or poor they are.<sup>119</sup> It could be reasoned that the talented poor would be able to borrow money against future expected earnings. I accept this to a limited degree. It will be apparent that a certain limited number of individuals from worse off groups will have high levels of raw talent and loans will be made available to them so that they can develop talents and succeed to desirable positions in society. In certain cases such individuals with high levels of raw talent will even be given money in the form of scholarships, bursaries, and so on because of the

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<sup>119</sup> This point was raised in private correspondence with Richard Bradley at the LSE.

benefits that such talents can bring to certain institutions. However, I believe that my argument still holds especially in a Nozickean minimal state which does not guarantee even basic levels of education potentially for a great number of people making it difficult to adequately assess talent and potentiality and therefore resulting in the likelihood that for most people from the worse off groups funds will not be available to borrow to develop talents because lenders will find it difficult to determine those who are talented, will be more likely to succeed to desirable positions, and be able to pay back loans.

Secondly, extensive lack of education provision has negative implications throughout an economy that must be considered in a much broader context than just positions that require extensive education as outlined above. Even developing countries have some provision of public education that Nozick's minimal state does not provide for. It is likely that many people in Nozick's minimal state may only have state of nature levels of sustenance compatible with Nozick's interpretation of the Lockean proviso, that what resources they have will be spent on the means of sustenance, and that they will not be able to afford to provide for even minimal levels of education. It is not unreasonable to suggest that societies that implement a system of strict libertarian rights could have many people with little or no education and, as a result, literacy levels will fall. I have discussed positions that require extensive training but a society with high levels of illiteracy, a likely consequence of no public provision of education, makes what are considered to be day-to-day operations much more difficult to achieve – a lorry driver may not be able to read maps and road signs, a postman may have difficulty delivering letters, a policeman may have difficulty writing reports, and a whole range of tasks that are routine in a society of universal education provision may become more difficult to carry out. Jonathan Wolff argues that, because of Nozick's minimal state and reliance on charity, 'it is hard to see how we will avoid ending up with something like a barely regulated free market economy with rather haphazard voluntary philanthropy: nineteenth century capitalism.'<sup>120</sup> I will return to the question of charity as it relates to Nozick's minimal state but my point here is that failure to publicly guarantee even minimal levels of

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<sup>120</sup> Wolff, Jonathan 'Robert Nozick, Libertarianism, and Utopia', Part of the "Critiques of Libertarianism" website, <http://world.std.com/~mhuben/libindex.html> Last Updated 10 November, 2004, p.7

education is likely to mean that many people will go without and society could fall back into educational levels and literacy rates for many that were last seen long ago. While such a state of affairs is not incompatible with Nozick's libertarianism and may even be likely in his minimal state, it is unlikely to bring about the 'various social considerations' that favour modern society where the dictates of efficiency warrant an educated, technology-savvy workforce.

Thirdly, limited opportunity, minimal chances for progression, and potentially unfair selection procedures can have negative effects on motivation and this, in turn, can lead to inefficient consequences in society. Limited opportunity and education for many directly restricts competition for important positions and, as a result, less qualified people may succeed to important positions than if opportunity had been provided for all. As stated above, this has negative efficiency effects for society. Added to this is the likelihood that the failure to provide fair selection procedures may dissuade certain individuals or groups of individuals from trying to succeed to certain positions. Lack of opportunity and fair selection curtails competition in the workplace. Nozick not only fails to guarantee competition for the labour-force because of lack of education provision, he also fails to ensure competition at the selection level because libertarianism cannot sanction the interference needed to counter discriminatory practices. Both outcomes are inefficient and do not bring about 'various social considerations favoring private property.'

## **Conclusion**

As with sustenance, I believe that the provision of opportunity should form the basis of a fair political philosophy. In these first two chapters, I have attempted to show that the provision of sustenance and opportunity may, in certain circumstances, be compatible with Nozick's theory, may be necessitated by his core principles, may be fundamental in ensuring that the positive outcomes of his libertarianism that he envisages actually pertain, and may be the reason for him revising his libertarian views in later life. If I have been successful, I have shown that the provision of sustenance and opportunity are compatible with the underlying principles and/or desired outcomes of a theory that does

not usually endorse such provisions and, on occasion, lambastes them. I believe that the concept of equality of opportunity should be recommended as a policy goal that needs further assessment in theory and implementation that goes beyond the bounds of this essay. While the provision of equal opportunity may need development, I have shown that the provision of at least some opportunity for all is better than a situation where there is no such provision and the provision of opportunity is likely to counter certain tendencies where certain individuals and groups can be treated as means. Failure to provide any opportunity whatsoever for certain groups results in unfair power relationships, does not respect individuals as individuals with talents, and is likely to detract from efficiency in a society. For these reasons Nozick was correct to alter his libertarian theory.

John Schaar argues that equality of opportunity is not an attractive doctrine because it is really a doctrine that enables some to become unequal through the development of their talents. As a result, he argues that it is a conservative doctrine that opens more opportunities for individuals to strive towards goals that are already accepted in society and a further consequence is that it 'stirs[s] many men to excesses of hope for winning and despair at losing' and 'leads inevitably to hierarchy and oligarchy.'<sup>121</sup> This may not necessarily be the case because 'life is not a race' with a single goal, as Nozick informs us. People can choose to develop the talents that they wish to and strive to attain positions that they wish to fill. Furthermore, despair at what is perceived to be losing for some is preferable to a system, such as Nozick's, which may leave a great number in society without any opportunity whatsoever. Even if some continue to consider themselves as failing following being given opportunity to success, I believe that this is far superior to being given no education and opportunity.

I do not advocate any sort of handicapping for those born with talents, as Nozick accuses advocates of opportunity of sanctioning, or any sort of redistribution of organs, body parts, and so on in order to help those born with limited talents. Such interference would

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<sup>121</sup> Schaar, John H. 'Equality of Opportunity, and Beyond' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, pp.142-143

embody excessive and unwarranted interference in people that are owners of their own physical persons. I do espouse the provision of opportunity in the form of education so that individuals have the opportunity to progress to important and desirable positions in the labour market.

Equal opportunity may have theoretical and practical difficulties associated with its interpretation and there may be other considerations that cannot be overlooked in an attempt to achieve it such as family units. As stated, the concept needs further assessment at both theoretical and policy level that goes beyond the bounds of this thesis. As Bernard Williams argues, practical and not merely formal equality of opportunity presupposes sustenance<sup>122</sup> because the undernourished and physically weak cannot properly avail of education and other opportunity programmes and this is a primary reason for the order of the first two chapters in this thesis. Nozick does not advocate opportunity for potentially a great number of people. This means that some people may come to be treated as means, that there is a possibility of legitimized discrimination, that there are inefficiencies in society, and that inheritance has an unfair role in determining children's prospects from birth. Equality of opportunity may be a concept in need of further study but it 'is a "something better" policy [especially when compared with Nozick's libertarianism]. It is none the worse for that.'<sup>123</sup>

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<sup>122</sup> Williams, Bernard 'The Idea of Equality' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, p.100

<sup>123</sup> Green, S.J.D. 'Competitive Equality of Opportunity: A Defense', *Ethics*, 100, October, 1989, p.32

### 3. CIVIL EQUALITY

If the set of holdings is properly generated, there is no argument for a more extensive state based upon distributive justice... If, however, the principles are violated, the principle of rectification comes into play...<sup>124</sup>

In the first two chapters I discussed sustenance and opportunity and argued that a correct interpretation of Nozick's key principles and realization of anticipated positive outcomes is likely to involve the provision of sustenance and opportunity for those individuals unable to provide for themselves. In this final chapter, before I make some concluding remarks, I wish to discuss Nozick's principle of rectification that is designed to correct injustices in acquisition and transfer. In addition, I will assess the nature of politics in the minimal state. I will argue that flows of money will tend to upset the principle of rectification and the political structure in the minimal state and that Nozick has not built adequate safeguards into his theory in order to counter such tendencies.

With regard to rectification, the implementation of this principle is of paramount importance to Nozick because it determines the legitimacy of all holdings by assessing justice in initial acquisition, historical transfer, the Lockean 'historical shadow,' and levels of compensation to be afforded to victims if they are judged to have had injustices take place against them. The difficulties associated with the practical implementation of the principle of rectification and the lack of permanency associated with property rights because of the principle itself and the Lockean shadow, may warrant the provision of at least sustenance and opportunity for those unable to provide for themselves. In addition, a market for legal representation may allow flows of money to impact upon the legal system and have consequences for both civil cases as well as criminal cases. Furthermore, the nature of Nozick's theory, where almost any transgression warrants compensation only, fails to establish grounds for criminal law and non-compensatory punishment. Finally, the bipartisan nature of transfers makes the establishment of a fraud

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<sup>124</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.230

standard difficult to implement with the result that some may be taken advantage of and unscrupulous business practices may be allowed to flourish.

In the case of the minimal state and political power therein, I will argue that just because the minimal state comes into being through an 'invisible hand process' that does not infringe upon rights, that does not mean that that state, once established, does not violate rights. I will argue that political power in the minimal state is still important, contrary to Nozick's assertions, and that once again Nozick has not built safeguards into his theory in order to ensure that flows of money do not have a subversive effect on the political process, as well as the principle of rectification, and distributions across his minimal state framework for utopia.

### **3.1 Rectification, Compensation, and Legal Equality**

Nozick confesses that he does not 'know a thorough or theoretically sophisticated treatment of such issues' related to the principle of rectification. This is troublesome because without such a treatment there is no realistic way to establish historical entitlement. However, given what he does say as well as what he does not and the related implications of other parts of his theory, it is reasonable to assess tendencies and likely outcomes as they relate to legal disputes in the minimal state. 'Idealizing greatly,' Nozick supposes that a principle of rectification along following lines will be arrived at:

This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.<sup>125</sup>

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<sup>125</sup> *ibid.* pp.152-153



The implementation of such a principle over history is likely to be extremely complex because, in order to determine whether an acquisition or transfer is just, one must go back in history and examine it. If an acquisition or transfer is deemed to be unjust, then one must rectify to correct the unjust acquisition or transfer itself and the subsequent chain of transfers that were affected by the initial unjust acquisition or transfer. Once this is done, one must compensate the harmed party by giving him the resources that he would have accumulated had the injustice not occurred. Such compensation should be paid by the person that commits the unjust act. There are a number of immediate difficulties to consider – the person that committed the unjust act may have squandered resources needed to pay compensation, if one considers the accumulations of the guilty party adequate compensation this may be insufficient because the victim perhaps could have accumulated much more if he had not suffered an injustice in the first place, the ‘historical shadow’ of the Lockean proviso may come into effect thereby rendering initial just acquisitions unjust, and so on. The considerations are extensive and Nozick’s failure to consider them given the importance of rectification in determining justice in acquisition, transfer, and entitlement has serious implications for his theory of justice in holdings. In order to illustrate the difficulties inherent in Nozick’s principle of rectification, it is useful consider a movie analogy developed by Lawrence Davis:

Pretend that our lives are taking place in a movie projected on a screen with many, many projectors pointed at it. Project the movie we are in until a frame containing an injustice is projected. At that frame, turn off the present projector and turn on the projector containing the most likely movie of our lives up to this point with the injustice written out of the script. Run that projector, starting from the frame at which the first movie was stopped. Continue projecting until a frame containing an injustice is projected, or until a frame depicting the present is projected. If a frame containing an injustice is projected, stop the projector and turn on the projector containing the most likely movie of our lives up to that point, with the injustice written out of the script. Run this projector from the frame at which the other was stopped. Continue in this way until a frame depicting the present is projected. Stop the projector at that frame, make a list of who has what, and realize the distribution of goods in that list. Now a just distribution has been arrived at and the effects of all previous injustices have been wiped out.<sup>126</sup>

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<sup>126</sup> Davis, Lawrence ‘Nozick’s Entitlement Theory’ in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.348-349

Further implications of this analogy are that this process would have to start all over again if a new injustice occurred or if a frame depicting an injustice was overlooked. Furthermore, over time, some actors may not exist and may not come into existence and this adds complexity to the issues of who warrants compensation. The movie analogy provides an illustration of the difficulties in determining past injustices, the effects of past injustices, and the correct compensatory procedures for rectifying such injustices. No doubt reality with many actors, lengthy history, and complicated compensation solutions will involve much more complex required judgements than even the movie analogy can allow us to imagine. Given the likely imperfections associated with such a system, I believe that it may be necessary to provide all individuals with sustenance and opportunity because there are likely injustices that have occurred, that have not been recognized, as well as inadequate compensations that may have had effects not just on individuals, but even on large groups and potentially all of society. The implication is that, given an undeveloped and likely to be imperfect system of rectification that is needed to legitimize acquisition, transfer, and holdings, it is unwarranted to allow (perhaps many) individuals to go unnourished and uneducated just because generally strong conclusions have been made regarding historical entitlement without fully legitimizing the very principles on which entitlement is founded.<sup>127</sup>

Added to this difficulty is the likelihood that the legal system is susceptible to manipulation because, provided there is a market for legal representation, those with resources can (and potentially have great motivation to) purchase legal representation when confronted with accusations concerning the justice of their holdings. Central to the progression from the ultraminimal to the minimal state, for Nozick, is that all (including those unable to afford it) will be provided with the protective apparatus of the minimal state. This protection must encompass the ability of all, including the poor, to contest injustices and seek rectification. Such rectification and resultant compensation may be a

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<sup>127</sup> Nozick recognizes this problem, to a degree, and sanctions Rawlsian redistribution (see, Rawls, John *A Theory of Justice*, Oxford University Press, Oxford, 1972, p.83, 151, 285) when we 'are lacking much historical information' but there may be more than Rawlsian redistribution, which primarily helps the worse-off, warranted, and, even if there is historical information, effects of past injustices and remedial compensations may be very difficult to assess. Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.231

life and death matter for a poor person that does not have the means of sustenance. The ability of the rich to provide themselves with legal representation while the poor may be unable able to afford any representation means that, when there are rectification cases raised, the poor will be more likely to lose, provided that legal representation has an effect on the outcomes of legal cases. This is likely to result in non-rectified unjust acquisitions and transfers with the consequence that some wealthy people will be able to hold on to holdings that they are not entitled to while some poor people may be forced to perish, even though they were entitled to holdings, because they were unable to afford legal representation and the means of rectification.

Indeed some poor people may, in many cases, be deterred from seeking rectification because they will be aware that when they confront a wealthier person, with the ability to purchase legal representation, they will likely lose irrespective of the merits of their case. The undeveloped nature of the principle of rectification may allow Nozick to respond to this criticism by suggesting that the protection of the minimal state would ensure the provision of legal representation for the poor. This is a possibility but, given Nozick's insistence that individuals should be allowed to dispose of their resources as they please, he is likely to be unable to limit legal expenditure so the wealthy can always purchase more representation than the state allocates and therefore use their (possibly unjustly held) resources to tilt legal verdicts in their favour. This applies to both civil cases as well as criminal cases, which I will discuss below.

In addition, the rectification principle may lead to excessive legal claims in the minimal state. In the absence of any welfare system, the claims of the poor become, as stated above, potentially life and death matters and the minimal state cannot just dismiss claims for the sake of expediency if it is to provide the universal protection on which its very justification is based. So, legal questions that would be unlikely to come to court in most real-world courts may have to be considered, and considered immediately so people do not die, when individuals' entitlements to a loaf of bread, a pint of water, and so on are contested. The failure of the minimal state to address such claims is likely to lead to large amounts of lawlessness because the hungry have not only Hobbesian rights to protect

themselves against death, they have Nozickean state of nature rights to exact compensation if the minimal state fails them by affording them inadequate or unfair protection procedures.

I argued in the first chapter that the existence of compensation fails to respect rights in that it seems to warrant rights violations so long as compensation is paid to the person who has her rights violated. This also has implications with regard to punishment associated with criminal transgressions with the likely result that punishment, beyond the paying of compensation, is, in most cases in Nozick's state, unjustifiable. Once transgressions have been rectified, no grounds exist for depriving a person of his freedom and it is likely to be unjust to do so because 'criminal debt, on entitlement grounds, can only arise from the non-consensual taking or alteration by someone of an entitlement that is not his. Once that debt is discharged by the wrongdoer, any additional forcible taking of objects (including his physical person) owned by the wrongdoer constitutes the illicit seizure of an unencumbered entitlement and, hence, is itself a wrongdoing.'<sup>128</sup> As a consequence, rights to person and property may not be particularly stable – people can encroach upon such rights so long as they can pay compensation once deemed to have encroached unjustly – and punishment cannot be used as a deterrent or restraint because punishment, beyond the paying of compensation, is unlikely to be enforceable even for (potentially) very dangerous people.

Finally, for this section, the bipartisan nature of transfers in Nozick's minimal state is likely to rule out the existence of a universal, legal fraud standard because what is of paramount importance in transactions is mutual consent and so it would constitute excessive interference for the legal apparatus of the minimal state to deem a transaction fraudulent once that transaction has been agreed to by the individuals party to that transaction. This may require that individuals party to transfers have a level of 'general competence' before they can be truly said to have the voluntariness required to sanction legitimate transfer. The absence of such a criterion will lead to those without such

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<sup>128</sup> Paul, Jeffrey 'Property, Entitlement, and Remedy', *The Monist*, 73, 4, October 1990, p.573

competence being taking advantage of by those who are aware of such incompetence.<sup>129</sup> In reality, I do not believe that Nozick can sanction the state interference needed to determine fraud but this may lead to unscrupulous individuals taking advantage of children, the handicapped, and other vulnerable groups. Israel Kirzner argues that entrepreneurship encompasses exploitation because entrepreneurs benefit from imperfect information and disequilibrium.<sup>130</sup> While there is likely to be a thin line between entrepreneurship and fraud in some circumstances, it is unlikely that a libertarian, such as Nozick, can draw this line because of the overriding precedence given to voluntariness in transfer. The failure to draw this line, however, not only exposes the vulnerable to unscrupulousness, the prospect of 'wholesale fraud could cause some kinds of markets to fail, and a libertarian without market institutions is in a sad state.'<sup>131</sup>

To conclude this section: Nozick's principle of rectification and associated compensation if applied to historical acquisition and transfer is likely to be difficult to implement and imperfect. As a result, disadvantaged individuals may have a claim to at least sustenance and opportunity because the deprivation of these provisions is unlikely to be justifiable if the justice of holdings is potentially uncertain due to difficulties associated with (and likely imperfections in) the principle of rectification. Nozick has failed to safeguard the principle of rectification from the effects of flows of money and is unlikely to be justifiably able to curtail expenditure so that the better off cannot avail of better legal representation when the justice of their holdings is questioned. As a result, the minimal state may not adequately protect the poor. If the poor are to be protected, this will involve the minimal state considering the merits of all claims regarding injustices, no matter how small, and this could lead to a large expansion of the legal system and the minimal state. Failure to provide such consideration not only reflects a lack of true protection for the poor, it may also lead to high levels of lawlessness (or individual enforcement of rights) in the minimal state. In addition, the principle of compensation and the principle of rectification are likely to rule out punishment beyond the payment of compensation for

<sup>129</sup> Child, James W. 'Can Libertarianism Sustain a Fraud Standard?', *Ethics*, 104,4, July, 1994, p.729

<sup>130</sup> Kirzner, Israel M. 'Entrepreneurship, Entitlement, and Economic Justice' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.387

<sup>131</sup> Child, James W. 'Can Libertarianism Sustain a Fraud Standard?', *Ethics*, 104,4, July, 1994, p.738

rights transgressions. This could encourage rights transgressions because punishment cannot be a deterrent for would-be rights violators. Finally, libertarianism, because of the importance given to voluntary transfer, may be unable to institute a fraud standard and this may lead to the vulnerable in society being exploited and being used as means as well as inefficient market outcomes if wholesale fraud penetrates the market. Nozick could attempt to counter such conclusions by stating that his principle of rectification is not fully formed and so could be formulated in such a way as to rule out the above considerations. I do not think that he can do this without abandoning the basis of the principle that he outlines. If he were to try and modify the principle so as to accommodate the above conditions, it is likely that key aspects of his theory will also need remodelling – justice in acquisition and transfer and resulting permanent property rights, freedom to dispose of resources as one pleases, a minimal state without extensive legal claims for redistribution, the principle of compensation, and the bipartisan nature of voluntary transfer.

### **3.2 Political Power in the Minimal State**

In this final section, I will argue that in order for the minimal state to be considered non-rights violating, it must be judged by its present actions and not merely by the way in which it came into being. In addition, I will argue that political power is still important in Nozick's minimal state and that flows of money are likely to impact on the political system in corrupting ways, ways that Nozick should have noticed fully and safeguarded against.

Nozick argues that the minimal state comes about through an 'invisible hand process' that does not violate anyone's rights. The minimal state evolves through a multi-stage process. Firstly, in the state of nature individuals form 'mutual protective associations' in order to protect their rights because other people's judgements when disputes occur are biased in their favour and because individuals, by themselves, will lack power and be unable to enforce their rights when confronted with strong individuals that disagree with them. Secondly, because some people may not wish to take on the costs of protecting

others within their associations and because some are very good at protecting, entrepreneurs interested in, and good at, protecting people from 'commercial protection agencies.' Thirdly, there would be mergers, cooperation, and cost-saving agreements in geographic areas and this would result in the establishment of a dominant protection agency. Fourthly, because the dominant protective agency does not have a monopoly over the use of force and because it does not provide protection for all, it cannot be regarded as a state but, being wary of loners using force recklessly against its clients, the dominant protective agency prohibits such use of force, becomes an adjudicator in disputes, monopolizes the use of force, and, by so doing, becomes 'an ultra-minimal state.' Fifthly, by not allowing loners to enforce their rights, the ultra-minimal state infringes upon the rights of loners or people unwilling or unable to pay the protective fees of the ultra-minimal state and such people must be compensated for this rights infringement. This compensation comes in the form of protective services for those who do not pay for them and, as a result, the ultra-minimal state not only monopolizes the use of force but, in addition, provides protection for everyone and achieves Nozick's two conditions necessary for statehood (monopoly of force and universal protection) and, in so doing, becomes a minimal state.<sup>132</sup>

The outcome of this progression is that the anarchist cannot complain because the state has come about through an 'invisible hand process' that does not violate rights and will be seen as rationally superior to a situation where there is arbitrary, individual enforcement of rights. In addition, because the poor and loners are provided with redistributive protection, they are compensated, have their rights enforced and do not have further claims against the minimal state. Before continuing to the main issues of this section, I want to make two arguments against the claims that Nozick makes regarding his minimal state, arguments that Nozick cannot get away from.

Firstly, the fact that a state comes into being without violating rights does not compel someone (an anarchist) that is against the very existence of a state to accept the legitimacy of a state because 'central to much, if not all, anarchist thinking is the idea that

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<sup>132</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, pp.10-28

the state is an evil institution'<sup>133</sup> and this is likely to be the case irrespective of how the state comes into being. Nozick could argue that an evil entity cannot come into being if it does not violate rights but he does not do this, and as will be argued later, just because a state comes into being without violating rights does not, in itself, ensure that the state itself is not rights violating (and potentially evil). It is unlikely that most anarchists will be convinced by Nozick's transition from anarchy to state because by being proponents of the former they are almost by definition opponents of the latter.

Secondly, the compensation associated with the transition from the ultra-minimal state can be seen as buying off those people that cannot afford or do not want the protection of the minimal state. The poor and go-it-alone anarchists could argue that further compensation is due to them for laying down arms and not enforcing rights in a biased manner against members of the dominant protective agency. They may get more than just protection by enforcing rights in such a way and may not be compelled to accept only the protection of the minimal state; they may demand more with the consequence that the minimal state could become a more-than-minimal state. One can legitimately suggest that if loners and poor non-members 'have such nuisance power, why should they not bargain for more than protection?'<sup>134</sup>

Returning to the question of the legitimacy of the minimal state and related to the anarchist question above, the legitimacy of the minimal state cannot be determined, even for a libertarian, by the means by which it came about. The legitimacy of a state must be determined by not only its birth but by its actions once alive. Added to this is the fact that in the derivation of the minimal state Nozick raises the concept of 'procedural rights.' The acceptance of the existence and imperfections of procedures is the primary reason for the ultra-minimal state prohibiting independents from enforcing compensation against clients even if the ultra-minimal state is unsure that such enforcement is just. It is this prohibition that results in compensation in the form of protection for independents and the establishment of the minimal state. Given that the ultra-minimal state is uncertain as

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<sup>133</sup> Sayward, Charles and Wasserman, Wayne 'Has Nozick Justified the State?' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, p.267

<sup>134</sup> Wood, David 'Nozick's Justification of the Minimal State', *Ethics*, 88,3, April, 1978, p.262



to rights and procedures, it is likely that this will also be the case for the minimal state. So, the minimal state must not only be judged by the way it comes into being, as Nozick contests, it must also be judged by the manner in which it implements Nozick's system of rights, as Ellen Frankel Paul argues.<sup>135</sup> Furthermore, given that the minimal state is unlikely to determine perfect rights and procedures, it must be judged on its interpretation of procedural rights. This has the consequence that the principle of rectification must be fairly implemented and, as far as possible, be insusceptible to the unscrupulous effects of flows of money. In addition, the political processes of the minimal state must be judged on their own merit and not simply by the manner in which the state, regardless of its processes, came into being.

Nozick fails to adequately consider negative potential political outcomes in his minimal state. Although he recognizes such outcomes in nonminimal states, he does not safeguard against political manipulation resulting from flows of money and suggests that such concerns are minimized in his minimal state:

Since inequalities in economic position often have led to inequalities in political power, may not greater economic equality (and a more extensive state as a means of achieving it) be needed in order to avoid the political inequalities with which economic inequalities are often correlated? Economically well-off persons desire greater political power, in a nonminimal state, because they can use this power to give themselves differential economic benefits. Where a locus of such power exists, it is not surprising that people attempt to use it for their own ends. The illegitimate use of a state by economic interests for their own needs is based upon a preexisting illegitimate power of the state to enrich some persons at the expense of others. Eliminate *that* illegitimate power of giving differential economic benefits and you eliminate or drastically restrict the motive for wanting political influence... The minimal state best reduces the chances of such takeover or manipulation by persons desiring power or economic benefits...since it is the minimally desirable target for such takeover or manipulation. Nothing much is gained by doing so...<sup>136</sup>

Nozick cannot be certain that in his minimal state political power will not be sought by individuals for their own ends and to attain differential economic benefits. 'Politics is

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<sup>135</sup> Paul, Ellen Frankel 'The Time-Frame Theory of Government Legitimacy' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.272-273

<sup>136</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, pp.271-272

always the most direct path to dominance'<sup>137</sup> and I believe that this is likely to be as true in Nozick's minimal state as it has been throughout history because, contrary to his assertion that 'nothing much is to gained by so doing,' the manipulation of the political process by economic resources can have far reaching benefits to those who are able to accomplish this with the result that Nozick's entire theory of justice can be corrupted by failing to control flows of money. The political apparatus of the minimal state implements the principle of rectification and thereby must assess the practical assessment of justice in acquisition and transfer and adjudicate disputes and compensations. The minimal state must also assess the 'historical shadow' of the Lockean proviso, must implement laws in accordance with Nozick's principles of justice and associated rights, and, when such rights cannot be perfectly determined, it must adopt and interpret schemes that respect 'procedural rights.' The political structure of the minimal state must decide on protective expenditures and has a monopoly over the use of force. So, it is simply not true that political power is less important in Nozick's minimal state because it reigns over the legitimacy of entitlements and if one knows that one's holdings may be, or are, unjustly held, then the attainment of political authority and influence over the judiciary is likely to be the most effective way of ensuring that one retains ownership rights over those holdings.

Failure to build in safeguards to prevent likely corruption in the political system, has, like nefarious manipulation of the principle of rectification, implications that undermine Nozick's entire theory because such corruption may jeopardize the legitimacy of all acquisitions, transfers, and rectifications. The likely result of such corruption and failure to adequately control resources in a state of diverse resources is likely to be high levels of revolt and individual enforcement of rights because justice will be perceived to be improperly implemented. A further consequence is that even just holdings will be under threat because there will be a *de facto* return to state of nature biased enforcement and compensation. The corrupt minimal state may continue to shroud itself in Nozickean language of entitlement but the likely outcomes will be injustice in holdings, violence,

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<sup>137</sup> Walzer, Michael *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, p.15

and instability. Nozick could counter such tendencies but he would first have to recognize them, possibly limit expenditures so that such tendencies can be curtailed, or accept the expansion of the minimal state which, contrary to his assertions, may be more suited to controlling such corruption.

## **Conclusion**

Nozick does not fully appreciate the effects of flows of money and does not do enough to ensure that they do not impact negatively on the implementation of his principle of rectification and on the political processes of the minimal state.

With regard to the legal system that implements the principle of rectification, difficulties in perfectly implementing the principle may warrant at least sustenance and opportunity for those unable to purchase the means to their achievement. Flows of money and a market for legal representation are likely to result in legal advantage for those with access to such resources. In effect, this may mean that the poor may not be provided with the practical protection that should be afforded them in Nozick's minimal state and, as a result, this may undermine just entitlements to the resources resulting from acquisition and transfer. Nozick's theory of rights and associated principle of compensation fail to adequately protect rights because rights can often be transgressed so long as compensation is paid; he may be forced to rule out criminal punishment beyond compensation and this may mean that there are inadequate deterrents to and restraints upon (potential) rights violators. The priority given to voluntariness in bipartisan transfer is likely to result in the unfair exploitation of vulnerable groups and the absence of a fraud standard may result in inefficient market outcomes.

The political system is important in the minimal state as it is in any state. Nozick must justify the minimal state by assessing its actions and not simply the way in which it came into being. The 'invisible hand mechanism,' through which the state develops, will not justify the existence of the state for those who see the state as itself an embodiment of evil. The compensation that Nozick believes is needed to ensure that some accept the

authority of the minimal state may encompass more than merely the provision of protection with the result that the minimal state may expand and provide certain levels of welfare.

Political power is a means to affecting the key mechanisms of the minimal state – protection expenditures and the implementation of the principle of rectification. As a result and, contrary to Nozick's assertion, such power has an extensive impact on justice in acquisition and justice in transfer.

Failure to fully appreciate and prevent the likely effects of flows of resources is not only likely to undermine stability in the minimal state, it is also likely to undermine the legitimacy of all entitlements. A corruptible state is also unlikely to be unable provide universal protection, one of the key reasons for the minimal state coming into being.

## 4. CONCLUSIONS

In this concluding chapter I will reiterate the arguments outlined in the three previous chapters relating to sustenance, opportunity, legal equality, and the legitimacy of the state. In this context, I will assess areas where there have been lessons learnt from Nozick. I will also consider further aspects of Nozick's libertarianism that have been touched upon earlier. Firstly, I will look at charity as a potential alternative provider to the state of some of the provisions discussed above including the means of sustenance and education. I will accept that charity has a role to play but I will conclude that a reliance on charity is insufficient if key provisions are to be provided for those unable to provide them for themselves. I will also argue that charitable donations are likely to be less, rather than more, common in the Nozickean minimal state. Secondly, I will argue that there is more to the role of a state than the roles that are sanctioned by a libertarian minimal state. I will put forward some circumstances where the liberal state that I espouse could not legitimately enforce certain contracts that are legitimately entered into in a libertarian state because, despite being voluntary, these contracts run counter to principles upon which the liberal state is based. This would include selling oneself into slavery which the libertarian Nozick accepts as a legitimate voluntary transfer. The liberal state is also likely to take other factors into account such as positive rights, efficiency, liberty, and the public good. Thirdly, I will argue that if what has been learnt from and added to Nozick's thesis is accepted (state provision of sustenance and opportunity as well as a more developed legal system and a political system legitimized by its actions and largely immune from corruption), then we may be on our way towards a proper framework for utopia, a framework for utopia likely to be more appealing than the one that Nozick puts forward. Finally, I will round out this chapter with some further comments regarding what has been learnt from Nozick's libertarianism. I will accept that I have rejected parts of his 'young man's "libertarian position"' but, contrary to his assertion, I will not accept that I would 'prefer that no one had ever maintained it at all.' Nozick's arguments have helped refine my arguments as well as those of others that criticize him from a variety of different viewpoints. This is important and I am not

flattering him for the sake of justifying the enterprise that I have undertaken here. In the concluding section, I will also consider some areas that warrant further consideration. I will argue that differing interpretations of Locke and Kant that form the basis of most liberal and libertarian political philosophy, while important, are unlikely to convince people that approach political philosophy from different positions. It would be good if we could approach the subject with a clean set of views but few do that and, whilst some modify their views, it is rare for an individual to 'switch sides' completely (although Nozick himself is considered to have done this). I will briefly consider the potential for a theory of pragmatic egalitarianism based upon non-ideal principles that may include those of Nozick and potentially others.

#### 4.1 Charity

Unlike most forms of taxation, Nozick does not oppose the voluntary giving of charitable donations. This is worthy of consideration because if voluntary donations can provide such things as universal sustenance and education, then the need for state intervention and redistributive taxation may be unnecessary. Moreover, if people want to provide such things for others, why is there a need for taxation? If people believe that such provisions ought to be provided for those unable to provide them for themselves, why don't they just contribute voluntarily and not force others that are unwilling to contribute to contribute?

Nozick recognizes that individuals with benevolent sentiments may not be motivated to contribute voluntarily 'in the absence...of...other contributions' and because of a "free rider" problem where givers feel that they may be "suckers" or "saps" whereas non-givers are "getting away" without contributing. He argues that such considerations should not undermine benevolent persons' motivation to give and that they should not seek to implement compulsory taxation because once again 'it would violate moral constraints to compel people who are entitled to their holdings to contribute against their will, [instead] proponents of such compulsion should attempt to persuade people to ignore the relatively few [or relatively *many*] who don't go along with voluntary contributions.'<sup>138</sup>

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<sup>138</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, pp.265-268

Ignoring considerations outlined above that individuals may be entitled to sustenance, education, and real-world protection from the effects of money and power because such provisions may be warranted by the Lockean proviso, the Kantian injunction, and imperfections in Nozick's theory, reliance upon voluntary charity to help provide for sustenance and education is an inadequate viewpoint. Individuals may feel that it is hopeless to contribute if others do not because without others contributing a realization of sustenance and education may not be attainable. Contrary to what Nozick says, this is an important consideration and lack of will to contribute due to such considerations is justifiable even though one may be motivated to give if others also gave. Reliance upon the powers of persuasion is unlikely to solve a problem provided that, absent coercion, a few or many are unwilling to give. Forcing many or all to give is likely to be the only feasible way to ensure that certain provisions come about and charity, while it plays a role in society, is unlikely to ensure that important provisions come about because, without compulsion and given uncertainty regarding the success of provision, even the benevolent may think that giving is futile.<sup>139</sup>

Given that there will be a plethora of issues to consider at different times in society, it may be that if there is an absence of compulsion individuals may fulfill individual desires. Individuals have a multitude of private concerns and, in my opinion, it is unrealistic to expect them to have the time to consider a multitude of societal issues and contribute to each voluntarily especially when they are unsure if others will give (others that are needed to ensure the resources needed to address such issues are provided). Such

<sup>139</sup> Thomas Nagel makes this point forcefully when he writes: 'Most people are not generous when asked to give voluntarily, and it is unreasonable to ask that they should be... Sometimes it is proper to force people to do something even though it is not true that they should do it without being forced. It is acceptable to compel people to contribute to the support of the indigent by automatic taxation, but unreasonable to insist that in the absence of such a system they ought to contribute voluntarily. The latter is an excessively demanding moral position because it requires voluntary decisions that are quite difficult to make. Most people will tolerate a universal system of compulsory taxation without feeling entitled to complain, whereas they would feel justified in refusing an appeal that they contribute the same amount voluntarily. This is partly due to lack of assurance that others would do likewise and fear of relative disadvantage; but it is also a sensible rejection of excessive demands on the will, which can be more irksome than automatic demands on the purse.' Nagel, Thomas 'Libertarianism Without Foundations' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, pp.199-200

a voluntary form of fundraising will be inadequate when one considers programmes that Nozick espouses such as policing and defence and it is inadequate as a means of funding the programmes that I prescribe in this thesis.

It is also important to consider the concept of 'relative disadvantage' of givers and non-givers. If sustenance, education, and civil equality are not guaranteed in the minimal state, I believe that many would not be willing to contribute to charitable schemes that they believe worthy because by doing so one could possibly open oneself, one's children, and one's ancestors to a meagre, powerless existence because charitable donation forgoes savings and savings may be needed in harder times or when disaster strikes. Given that there is no safety net to ensure sustenance and education and few restrictions on the power effects of money, it may be only prudent to look after oneself and one's extended family because the consequences of failing to do so in the minimal state are dire. A libertarian could reply here that the minimal state facilitates voluntary, charitable donations because taxes are low, people have more disposable income, and can therefore give more. This has some appeal but again the question of voluntariness comes back and, given that holdings in the minimal state are shrouded in the language of entitlement, individuals may feel uncompelled to give. In addition, this retort does not get away from the consideration that I raised that giving may not be prudent in the minimal state where the dangers of not having resources are considerable.

In addition, a reliance on charity is also likely to be inadequate in certain circumstances. It may be that the minimal state will be required to hold back large sums of resources in order to provide for protection in a broader scope than Nozick is likely to sanction. It is unlikely that charities will have the means and resources to respond to certain situations because they certainly do not in today's world. Charities often raise funds after certain events have taken place and it is unrealistic to expect individuals to contribute, potentially vast sums of money, just in case something happens. It is useful here to think of the recent tsunami in South-East Asia and the hurricane that has affected New Orleans and the American Gulf Coast. Charities played a role but charities, in many circumstances, do not have the means or resources to deal with widespread devastation and reliance upon



charitable fundraising is unlikely to be an adequate response to the immediacy associated with certain situations. As I said, Nozick could allow the minimal state to tax and save under a broader concept of protection but he is unlikely to do this because the effects of taxation will be the same on those that do not wish to be taxed and because such collection of resources is likely to lead to the expansion of the minimal state.

Furthermore, as I was concerned with Nozick's failure to provide education resulting in a regression in society to earlier times, given a Nozickean minimal state and a reliance on charity as a means of funding important and essential public goods 'it is hard to see how we will avoid ending up with something like a barely regulated free market economy with rather haphazard voluntary philanthropy: nineteenth century capitalism.'<sup>140</sup> It is unreasonable to rely on charity to provide for sustenance, opportunity, and civil equality. Individuals may hold back resources if they think that contributions will not make a difference or if they are put at a potentially disastrous competitive disadvantage compared to non-givers. A reliance on individual, voluntary donation is unlikely to result in the funds and means to provide for societal goals and is unlikely to provide society with adequate protection in adverse conditions. Compulsory taxation is likely to be the only feasible way to achieve certain ends and provide public goods and such taxation is unlikely to be justifiable in a Nozickean minimal state but it may be required in a state that provides social goods and protects the rights and liberties of all citizens and not just those with property. This state is unlikely to view libertarianism as an upshot of liberalism because this state will not enforce certain contracts that the libertarian minimal state may enforce and this state is likely to enforce certain positive rights that the minimal state will not. This state will most likely be some form of liberal state.

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<sup>140</sup> Wolff, Jonathan 'Robert Nozick, Libertarianism, and Utopia', Part of the "Critiques of Libertarianism" website, <http://world.std.com/~mhuben/libindex.html> Last Updated 10 November, 2004, p.7

## 4.2 The Liberal State

In the first three chapters, I argued that Nozick's libertarianism was susceptible to criticism because it failed to fully live up to the principles on which it was founded, because it was unlikely to result in the positive outcomes that Nozick envisioned, and because it failed to justify the actions of the minimal state by safeguarding the state and its judiciary from the effects of flows of money. I argued for the provision of sustenance, opportunity, and civil equality for all citizens. In Chapter 1, I briefly considered the left-libertarian theory of Michael Otsuka and, while I agreed with Otsuka that a proper interpretation of the Lockean proviso may result in more egalitarian outcomes than are likely to come about in Nozick's minimal state, I concluded that his left-libertarian position, like other forms of libertarianism, was insufficient because it failed to consider the role of the state as more than a mechanism for sanctioning property rights. The state that will likely result from my criticism of Nozick will be concerned with liberty in a broader sense than libertarianism because, not only will it guarantee sustenance, opportunity, and substantive civil equality, it will also not be compelled to respect certain libertarian transfers irrespective of the voluntariness of parties involved in transfers. In addition, unlike the libertarian state, this state may be sanctioned to interfere to a greater degree, not only to ensure the provisions outlined in the first three chapters, but also to bring about the 'various social considerations favoring' an advanced free market economy such as anti-monopoly legislation, public goods, banning of production practices that produce negative externalities, sanctioning of eminent domain procedures, and so on. This state may still be considered to be a minimal state but it will be a state that provides citizens with sustenance, opportunity, and civil equality. In addition, it will be a state that will most likely respect human rights as more complex than property rights and it will provide a system of regulation that will lead to greater efficiency than libertarianism is likely to bring about. For expediency's sake, this state will be called the liberal state, a state that will respect liberty and market efficiency. The concept of the liberal state is common in political philosophy.<sup>141</sup> The liberal state that I envisage needs

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<sup>141</sup> Examples of generally liberal theories can, for example, be found in Rawls, John *A Theory of Justice*, Oxford University Press, Oxford, 1972, Nagel, Thomas *Equality and Partiality*, Oxford University Press,

further development that will go beyond the remit of this thesis but it will encompass the provisions, goals, and equality argued for in the first three chapters of this thesis. The liberal state that I espouse will differ from the Nozickean libertarian state in that certain liberal rights, once established, cannot be abandoned irrespective of the wishes of individuals that would voluntarily abandon them. In addition, the liberal state cannot respect and enforce illiberal agreements even if such agreements were entered into voluntarily. Furthermore, while respecting property generally, the liberal state that I wish to prescribe will have greater powers to interfere with property so as to achieve the provisions argued for in this thesis and to take other important considerations into account such as efficiency.<sup>142</sup> In the next section, I will argue that this state will provide a genuine framework for utopia but this will not be the end of the story.

In Chapter 1, I discussed Nozick's principles and the formulation of his rights. I also discussed the concept of voluntariness. One problem with Nozick's libertarianism is that the rights that he establishes are not inalienable because, due to the trumping power of voluntariness, one can contract out of entitlement to such rights and, provided that such contracting out is voluntary, Nozick's minimal state will have to enforce the consequences. Nozick states that his 'nonpaternalistic position holds that someone may choose (or permit another) to do to himself *anything*'<sup>143</sup> and, in addition, 'very extensive domination of some persons by others arises by a series of legitimate steps, via voluntary exchanges, from an initial situation that is not unjust, itself is not unjust'<sup>144</sup> leading to the conclusion regarding the 'question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would.'<sup>145</sup>

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Oxford, 1991, Dworkin, Ronald 'What is Equality? Part 2, Equality of Resources', *Philosophy and Public Affairs*, 10, 1981, 283-345, Walzer, Michael *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983

<sup>142</sup> Samuel Freeman excellently expounds the vital differences between liberalism and libertarianism in his 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, pp. 105-151

<sup>143</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.58

<sup>144</sup> *ibid.* p.283

<sup>145</sup> *ibid.* p.331

Just as the compensation principle does not value rights because rights can be infringed upon so long as compensation is paid, voluntariness in transfer, illustrated in the Wilt Chamberlain argument, also fails to adequately value rights because individuals can contract to sell those rights over their person as ends, even being able to go so far as to sell all their rights and sell themselves into slavery. And, being a voluntarily entered into contract that Nozick sanctions, this contract, along with the consequences, must be upheld by the minimal state which has as one of its primary purposes the 'enforcement of contracts.' Added to this is the fact that individuals can treat and dispose of their holdings as they please and so a legitimate slave-owner can do what he pleases with his slave. This could include torture, rape, and so on. Not only does the liberal view rights as more than property rights to one's goods and one's person, once established, rights are not for sale. They are, in this sense inalienable, and 'they are secured against the wants of those who would dispossess themselves of their basic rights and abandon their freedom and independence.'<sup>146</sup> The liberal state could not enforce rights infringements even if those rights were voluntarily given up by persons. The liberal state could not enforce a contractual agreement such as slavery irrespective of the voluntariness associated with that agreement. In addition, a liberal state could not stand idly by if one of its citizens was being tortured, subjugated to punishment, and abused. The torturer could maintain ownership rights over a slave in a minimal state and could use the apparatus of state to enforce that contract and, in addition, the torturer could complain about interference if the state sought to protect the victim of torture, irrespective of her complaints, because the torturer, as slave-owner, can do as he pleases with his goods. Once human rights are surrendered, humans become holdings and, as such, can be treated in any way their owner sees fit including, possibly, destruction. The liberal sees certain rights as inalienable and the liberal state, as an instrument of the public good and respecter of rights, cannot ignore the plight of persons that are being treated as objects and being subjected to torture, rape, and so on.

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<sup>146</sup> Freeman, Samuel 'Illiberal Libertarians: Why Libertarianism is Not a Liberal View', *Philosophy & Public Affairs*, 30, 2, Spring 2001, p.134

There are also efficiency concerns that cannot be addressed by the minimal state that may be addressed by the liberal state because, although private property will exist in the liberal state and is important to liberalism, it will not have the rigidity and inalienability associated with private property in the minimal state. As stated in Chapter 1, Nozick cannot restrict the emergence of monopolies (and cartels) that employ inefficient business practices and extract excessive profits from consumers. As discussed in Chapter 3, the libertarian inability to employ a fraud standard can have negative repercussions throughout a market economy because fraud produces negative stability effects in both the production and sales processes. Chapter 3 also assessed compensation and it was argued that compensation, by itself, failed to respect rights and provide adequate protection. This is true with regard to dangerous (criminal) acts but it also true, I believe, with dangerous actions associated with production that produce negative externalities. Reliance on compensation and the overriding importance given to freedom to dispose of holdings will make it very difficult for the minimal state to ban dangerous productive practices that could potentially have disastrous effects for society and the globe.<sup>147</sup> The liberal state, whilst respecting property, can sanction the requisite interference needed to ensure that certain productive practices can be prohibited and not just compensated for after the fact when such compensation may be a form of inadequate redress especially for those who have suffered greatly or perished as a result of dangerous productive processes.

Related to efficiency considerations are convenience considerations. An extensive system of private property, coupled with inviolable property rights and a minimal state, could make day-to-day tasks very complex. Not only would there be few public parks, libraries, and other places associated with leisure, there would be very few other public goods such as roads. One could imagine trying drive from London to Edinburgh and having to pass through various sorts of private property with various owners charging various tolls for the privilege of using their land. Some owners may not allow trespass and plant a series of land mines, others may charge exorbitant tolls for the use of the roads that they have

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<sup>147</sup> One can think here of certain productive practices that are likely to have direct negative effects or negative by-product (externality) effects on the environment.

built through their property, some may not have roads, there could be large diversions around certain counties, and so on. This has efficiency considerations when the logistics associated with the transportation of goods is considered but it also has costs associated with convenience. The liberal state will respect private property but will not hold it sacred and, when appropriate, it will consider eminent domain procedures and other factors that will compensate property owners if their land is needed to greatly benefit citizens of the liberal state. I do not rule out considerations of utility here but there are other considerations associated with efficiency, liberty, and freedom, a freedom that encompasses more than the negative freedom to be left alone and do what one please with one's property.

Nozick's libertarianism is not based on liberty but on the narrow freedom to own and dispose of property. No doubt the ownership of objects is important and is compatible with the liberal state. A state that seizes property and the fruits of individuals' labour constantly, haphazardly, and without compensation will not be a Nozickean minimal state but it will also not be the liberal state envisioned either. Nevertheless, the liberal state will have powers beyond the minimal state that can sanction interference where such interference can lead to the avoidance of disaster, the 'various social considerations favoring private property' associated with efficiency, and public goods such as roads that facilitate freedoms associated with convenience. In addition, the freedom associated with libertarianism is too narrow because freedom to own is of little meaning to those who do not own and are on the verge of starvation (Chapter 1) and fails to respect individuals with talents who, without educational resources, will not have the opportunity to develop talents and proceed to desirable position (Chapter 2). Nozick also fails to adequately address freedom when it is concerned with work relations, potential subjugation powers that owners may have over employees in his unregulated labour market, and the illiberal freedom associated with invidious discrimination that he cannot consistently counter. Certain positive rights may be seen as fundamental to the planning of a meaningful life rather than a reliance on the right to non-interference with respect to property. Furthermore, the overriding liberty to dispose of resources as one pleases has effects on the legal process, the political process, and civil equality (Chapter 3). The liberal state

will have powers to limit disposal of resources that will likely have dangerous effects or effects that undermine the institutions that the liberal state establishes to protect liberty in a broader fashion than merely the liberty to own and dispose of property.

The liberal state that I envision will provide sustenance for those unable to provide it for themselves. It will ensure opportunity for all citizens. It will implement adequate safeguards that will curtail expenditures designed to have a nefarious impact on legal and political bodies. These three considerations are fundamental and have formed the basis of the main three chapters of this thesis. The implication has been that a proper implementation of Nozick's core principles may, at times, warrant provisions that ensure that sustenance, opportunity, and civil equality pertain. Where Nozick's principles do not warrant such provisions or do not build in safeguards to certain liberties that have negative effects, I have explained why his theories need to be amended. Throughout the thesis and in this concluding chapter, I have gone beyond the three topics that have been deemed fundamental. These considerations concern, amongst other things, efficiency, liberty, and convenience. The liberal state, it has been argued, will not only ensure that sustenance, opportunity, and civil equality are realised, it will sanction interference and consider liberty in a broader context than the narrow liberty Nozick considers. It will also be able to bring about outcomes that are in the public good that the minimal state, coupled with inviolable property rights, cannot bring about. The minimal state may have to enforce immoral, dangerous, and potentially ludicrous practices and outcomes. The liberal state respects property but is not bound by inviolable property rights and so can avoid such practices and outcomes. The liberal state, the foundations of which have been developed here, can respect its citizenry in ways that ensure that they are not starving, are educated, and are considered equally in the legal and political processes. Such a liberal state will have a greater role in promoting the common good.

### **4.3 A Framework for Utopia**

Nozick argues that his minimal state is 'inspiring as well as right' because it provides for a framework for utopia. Individuals in his minimal state can form groups that can have

rules or agreements beyond the realm of the minimal state because individuals are free to found and voluntarily join groups of many different kinds. The likelihood of many diverse mini-utopias in the minimal state is small because Nozick's libertarian rights permeate all such utopias and individuals are free to leave at any time. I will argue that the provisions and safeguards espoused in Chapters 1, 2, and 3 will provide more stability and a better framework for utopia. However, this will not be an end-state utopia. It will be a utopia where there are bargaining processes that will be associated with a democratic political process.

Nozick foresees that his '[u]topia will consist of utopias, of many different and divergent communities in which people lead different kinds of lives under different institutions'<sup>148</sup> because it is false to assume 'that there is *one* kind of society best for everyone'<sup>149</sup> and so long as utopias are voluntary and not imperialistic 'any particular community may be established within the framework, it is compatible with all particular utopian visions [egalitarian included], while guaranteeing none.'<sup>150</sup>

It is questionable that the utopian society would lead to the stability that Nozick envisions because the rights and laws of the minimal state permeate all communities. There could be a community that rejects the Lockean proviso but once one of its members raises an objection to the minimal state regarding the Lockean proviso, the minimal state will wade in with the heavy hand of the law and the monopoly of the use of force. Such interference will disrupt stability and the utopias that develop.

Thus the familiar problems of classical liberal pluralism – divided loyalties, bitter power struggles, hostile factions, etc. – will plague the framework. It is to no avail to say that the minimal will leave these communities in peace so long as they do not use force to advance their ends. Usually they will see their schemes as the only just ones. Almost everybody, including Nozick, believes that force may be used on justice's behalf. Moreover, in the eyes of the communities the minimal state is forcing *its* ideals on them...

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<sup>148</sup> Nozick, Robert *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.312

<sup>149</sup> *ibid.* p.318

<sup>150</sup> *ibid.* p.320



But are these problems that we would expect in a setting for utopia? If not, it seems questionable whether the minimal state can base its stability on its claim to satisfy utopian dreams.<sup>151</sup>

Added to this stability issue is the question of the poor. As with Nozick's conception of the meaningful life, I believe that it is most likely that the means of sustenance, at least, will be seen as a prerequisite when a framework for utopia is considered. The failure to consider the impoverished may mean that there is lawlessness in society because the poor may use force either because they view their lot as unjust or because they may try to enforce Hobbesian rights to fight against death. Nozick could argue that the poor could join redistributionist communities but the likelihood of the existence of such groups is small because of the permeation of Nozick's entitlement rights and because wealthier people can come and go as they please. In reality, it is unlikely that redistributionist communities will exist to any great degree especially if one considers pertinent questions regarding such groups and their surroundings:

Could a community that wanted a lot of redistribution survive the departure of the wealthy members whose moral principles are weaker than their desire for wealth? Could it withstand the applications to join from the down-and-out left to starve in neighboring communities run by ruthless capitalists? Or, to take a different kind of objection, could a community maintain its dedication to an austere life of virtue if it were surrounded by the flashy temptations of American capitalism?<sup>152</sup>

The likely answer to all of these questions is no and that a redistributionist community is unlikely to survive long in Nozick's minimal state because entitlement rights seep into all communities and people are free to leave as they please and take their holdings with them. Indeed, in my opinion, Nozick's communities could legitimately go one step further and restrict membership to the poor either by asking to view income and wealth data as is done by country clubs or there may be other restrictions such as cost barriers to entry as is the case in most gated communities. As stated above, just as the pursuit of the meaningful life is of no real consequence to the poor, the existence of meta-utopian

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<sup>151</sup> Fowler, Mark 'Stability and Utopia; A Critique of Nozick's Framework Argument' in Corlett, J. Angelo (ed.) *Equality and Liberty: Analyzing Rawls and Nozick*, St. Martin's Press, New York, 1991, p.254

<sup>152</sup> Singer, Peter 'The Right to be Rich or Poor' in Paul, Jeffrey (ed.) *Reading Nozick*, Blackwell, Oxford, 1982, p.38

communities may be of little consequence especially when such communities are unlikely to provide them with their basic needs and may even ban them from entering. In addition, contrary to Nozick's vision of diverse communities and due to entitlement rights and the ability to leave communities at will with all one's possessions, it is most likely that there will be a large degree of similarity between the groups that evolve beyond the experimental phase and establish degrees of permanency. So

...we see now – despite Nozick's denial – the free market will entirely permeate the framework for utopia. To exist at all communities must own land and other property, whether as a voluntary collective or as individuals. Ownership will pass from person to person, and some will be tempted by offers from outsiders for their property. If a community's property is sold to an outsider then it is likely that the community will dissolve. Ultimately communities will compete for existence just as firms do in the market. Some will find a niche, but in general we can expect a law which favours the economically most fit: those with the most purchasing power. Just as many people now bemoan the fact that every city centre contains broadly the same types of shops and the same range of services, we are likely to see a drift towards homogeneity among communities within Nozick's framework for utopia. This need not be because anyone wants homogeneity: possibly no one does. The argument is that it is likely that some sort of 'invisible hand' will lead the framework in a single direction. There is absolutely no reason to believe that we will be able to retain a wide diversity of communities, and plenty of reason to think that successful market-based models will increase in size and power at the expense of those that try to embody alternative values.<sup>153</sup>

The conclusion of this section thus far is that Nozickean meta-utopias may undermine stability in the minimal state, are unlikely to be as diverse as Nozick envisions, and provide little hope for the poor because it is unlikely that redistributionist communities will prevail and wealthy communities may even prohibit their entry. For the remainder of this section, I will argue that the liberal state that I have formed the basis of in this thesis will provide a genuine framework for utopia.

Firstly, the universal provision of sustenance will ensure that every person in society will be able to make meaningful life plans and not have to be concerned solely with the only immediate concern that makes sense for the very poor which is the seeking of the means

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<sup>153</sup> Wolff, Jonathan 'Robert Nozick, Libertarianism, and Utopia', Part of the "Critiques of Libertarianism" website, <http://world.std.com/~mhuben/libindex.html> Last Updated 10 November, 2004, p.7

of sustenance. Such provision will lead to a liberal state where there is less rebellion and instability. There is strong intuitive appeal for believing that state provision of sustenance, for those unable to provide for themselves, is warranted. Such provision will likely be consistent with a non-Nozickean interpretation of the Lockean proviso and is most likely required in order to ensure that some people are not treated as means.

Secondly, the provision of education and opportunity for all ensures that individuals will be able to develop talents and strive towards desirable positions in society. This development is important for individuals and again may be seen to be fundamental with regard to the planning of a meaningful life. Failure to succeed to important and desirable positions, once fair developmental and procedural processes have been established, does not warrant lesser respect or consideration or lead to being treated as a means.

Thirdly, safeguarding the legal and political processes from the effects of flows of money will ensure that some individuals are not able to use such processes in their favour. Adequate safeguards will ensure substantive civil equality for all citizens.

Nozick went beyond the minimal state before his state had been properly formulated and the vision of diverse communities in his minimal state is unlikely to be realised because of the trumping powers of entitlement rights and the on-going importance of property. The liberal state that I espouse will not forbid the setting up of various communities within that state. On the contrary, individuals are free to form communities in the liberal state just as they are in the minimal state. However, should individuals wish to form communities, they will do so with important liberal provisions and safeguards in tact. The liberal state will not have to respect illiberal agreements that seek to bind unwilling individuals within communities and force them to do certain things even if those individuals joined those groups willingly. In addition, the liberal state may seek to disband such groups should they seek to undermine the state, attack other communities, or seek to undermine the rights of citizens in general.<sup>154</sup>

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<sup>154</sup> One can think here of hate groups and the like.

However, this goes beyond the state and, while there is nothing wrong with the establishment of communities within a state, the state itself is not an end state. Being a non-end state, the liberal state may consider other provisions and common goods that have been discussed above or go beyond what has been discussed above. One important consideration that I have focused upon is efficiency but there are many others. The poor, for example, may argue that they should get more than the provision of sustenance, education, and civil equality. Land owners may argue that they want lesser legislation and state interference. Once the key provisions and safeguards have been established, there will be a liberal, democratic process with political debate and a political system that is protected from those who wish to manipulate it in nefarious ways to suit their ends.

This process will likely involve a degree of moral bargaining where there is a plurality of considerations such as equality, liberty, utility, efficiency, convenience, and differing interpretations of these and other considerations will come into play. Self-interest will likely play an important role in this bargaining process but there will be other considerations and the bargaining process only comes into play once key provisions and safeguards have been secured.<sup>155</sup> Nozick himself confesses that the libertarianism he once advocated seems 'seriously inadequate' and accepts a zigzag process in politics which amounts to bargaining within the democratic process that can lead to an expansion of the role of the state beyond the role previously envisioned for the minimal state.<sup>156</sup> This admission means the abandonment of the minimal state. The minimal state is not 'inspiring as well as right' but the liberal state that has been presented here (with its provisions of sustenance and opportunity, safeguards against illegitimate corruption of its political and legal bodies, and ability to raise funds and not rely on charity) is on its way to providing a framework for utopia, a framework that considers the needs, rights, interests, and opinions of all citizens.

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<sup>155</sup> For a more detailed discussion of moral bargaining, see Harman, Gilbert 'Justice and Moral Bargaining', *Social Philosophy & Policy*, 1, Autumn, 1983, pp.114-131. Harman argues that all moral principles are based on bargaining and that prevalent moral principles are the result of bargaining and bargaining power. I do not go this far and the political bargaining process only begins once certain provisions and safeguards have been established.

<sup>156</sup> Nozick, Robert *The Examined Life*, Simon and Schuster, New York, 1989, pp.286-296

## Conclusion

To conclude, I will summarize the arguments in the preceding chapters, assess what has been learnt from Nozick, consider why this is important, and outline topics that are worthy of further study at both a theoretical and policy level.

In Chapter 1, firstly I examined Nozick's interpretation of the Lockean proviso. I argued that Nozick's proviso was too weak to suit his strong claims regarding permanent, inviolable entitlement and that his proviso, accompanied by its historical shadow would likely lead to the provision of sustenance for most people. I also argued that his reformulation of the proviso was too strong and that those without property following appropriation may be owed more than state of nature compensation. In addition, it was stated that Nozick's interpretation of the Lockean proviso may lead to inefficiencies because he cannot regulate to counter monopoly development and because the historical shadow of the proviso fails to adequately respect entrepreneurship, establish an environment of stability, and encourage investment. Secondly, I assessed Nozick's Wilt Chamberlain argument and concluded that it was only convincing if one accepts Nozick's entitlement theory throughout. The claims of third parties not involved in transactions may justifiably change once there have been distribution changes in society. While the Wilt Chamberlain argument has intuitive appeal, there is likely to be stronger intuitive appeal associated with arguments that seek to provide sustenance for the very needy. Thirdly, with relation to Nozick's interpretation of the Kantian injunction, I argued that moderate levels of redistributive taxation, which Nozick accepts in certain circumstances, do not violate the Kantian injunction to the degree that he believes once that redistribution is used to provide subsistence for the poor. Effects of taxation do not have to upset meaningful life plans to the extent that Nozick anticipates, taxation can be incorporated into life plans, and it is reasonable to suggest that sustenance should be seen as a prerequisite for the formulation of meaningful life plans. Furthermore, the interference associated with taxation may constitute lesser interference than levels of interference that may be necessitated by the implementation of a Nozickean minimal state. The conclusion of this chapter was that Nozick's principles, properly interpreted,

may necessitate the provision of sustenance for most of those unable to provide for themselves. With limited reformulation of his arguments and lack of compulsion towards the acceptance of his intuitions, the provision of sustenance for all can be legitimately achieved.

In Chapter 2, I argued, firstly, that unlimited bequest and inheritance and no universal provision of education means that those who inherit can develop skills and be much more likely to succeed to desirable positions, if they wish to. This is unfair. It also may lead to violation of the Kantian injunction because the uneducated poor may come to be viewed and treated as means. Nozick recognizes the problems associated with unlimited bequest in later writings and such recognition will likely be founded on some of the arguments that I have presented regarding his libertarianism. Secondly, the trumping power of individual choice for Nozick results in the legitimization of discrimination. Again, this is unfair and may hinder chances of individuals achieving meaningful lives. Thirdly, it was argued that the likely state that would evolve from Nozick's theory would be inefficient because much of the workforce will lack basic skills, because there will only be a small pool of candidates to fill important positions in society, and because motivation will likely be hindered due to lack of availability of education and unfair selection procedures. The implication was that a fair and efficient society would offer education for all and would not legitimize discrimination. Such outcomes are not inconsistent with a proper interpretation of Nozickean foundational principles and will possibly be acceptable to the later Nozick, who considered his libertarianism inadequate. I concluded by considering the concept of opportunity. I argued that it presupposes sustenance, that it should form the basis of policy goals, and that the effects of implementation need continuous study and assessment.

In Chapter 3, firstly I considered Nozick's principle of rectification and associated principle of compensation. I argued that difficulties related to the application of the principles may warrant universal provision of sustenance and opportunity. I also argued that the systems associated with the principle should be safeguarded from the effects of flows of money and that in the minimal state even very petty claims would have to be

considered because they are potentially extremely important for poor people. This may lead to a ballooning of the legal process and the Nozickean minimal state. The principle of compensation may also fail to safeguard rights because almost anything can be done so long as compensation is paid and punishment beyond compensation is unlikely to be justifiable in the minimal state resulting in a situation where incarceration as a deterrent or preventative measure may not be justifiable. In addition, the overriding power given to consent in transfers may mean that the establishment of a fraud standard will be impossible and, as a result, certain individuals may be exploited and certain markets may fail. Secondly, I argued that the justification of a state should not rest solely on the way in which a state came into being. Some individuals will not accept a state's legitimacy irrespective of how it came into being. In addition, those who are judged to be such a nuisance so as to be granted the free protection of the state may bargain for more than protection if they are to abandon their nuisance practices. Furthermore, Nozick should recognize that political power is still vitally important in his minimal state, as it is in all states, and safeguards should be put in place to ensure that the state cannot be corrupted. The conclusions reached in this chapter were that legal and political processes immune from the nefarious effects of flows of money must be established, that a just legal system will involve considerations beyond Nozick's principles of rectification and compensation, and that the legitimacy of a state should be determined by its actions and not solely by the way it came into being.

Finally, in this concluding chapter, I argued that a reliance on charity to provide social goods is inadequate because individuals cannot be expected to always give to a large variety of different schemes and that charities do not usually have the resources or means to carry out important schemes, including schemes that protect in a broader sense than Nozick considers. The liberal state, it was argued, could not enforce contracts that the minimal state will enforce because certain practices are seen to be objectionable by the liberal state. In addition, the liberal state can sanction interference that enhances efficiency, convenience, and the common good and, by doing so, can counter bizarre outcomes that are quite possible in the minimal state. The Nozickean framework for utopia was considered to be inadequate because, as with the meaningful life, certain

resources may be required before individuals can embark on a pathway towards utopia. The diverse communities that Nozick envisioned are unlikely to come about. I argued for a framework for utopia that started by providing sustenance, opportunity, and civil equality and then had political bargaining processes that considered, amongst other things, greater provisions for the poor, efficiency, property, liberty, and the common good.

The conclusions reached are important because they ensure fundamental provisions for citizens – sustenance, opportunity, and civil equality. The way in which the conclusions have been derived from the libertarian Nozick is also valuable because, if I have been successful, I have shown that certain egalitarian provisions may be compatible with the principles underlying a theory which, in its rhetoric at least, rebukes such provisions. Where Nozick's theory cannot realistically ensure egalitarian outcomes, I have sought to supplement and interpret his principles in ways that, given proper consideration, will be more appealing. Such supplementation and reinterpretation of key principles such as the Lockean proviso, the Kantian injunction, and appeal to intuition form the basis of much modern political philosophy but, alas, it is usually the case that advocates of liberal interpretations will not convince advocates of libertarian interpretations and vice versa. For this reason, I have sought to establish liberal conclusions using in many circumstances libertarian principles. Admittedly, some who favour more libertarian outcomes may not accept my interpretation and reformulation of libertarian principles. However, I believe that I have been fair to Nozick, have grounds for revising some of his theses (as he did himself), and have raised considerations that result in a more favourable free market than that which can be established from Nozickean libertarianism. In the future it may be possible, given further study and investigation, to formulate a pragmatic theory of liberal egalitarianism that respects a plurality of values and shows the negative effects of implementing a right-wing theory (Nozick, for example) and a left-wing theory (Marx, for example).<sup>157</sup> However, for now, I have formulated a theory that

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<sup>157</sup> As stated, this is simply an idea for future study so the exact nature of pragmatic egalitarianism is not formulated. I initially came across the idea of pragmatic egalitarianism in Pojman, Louis P. 'On Equal Human Worth: A Critique of Contemporary Egalitarianism' in Pojman, Louis P. and Westmoreland, Robert (eds.) *Equality: Selected Readings*, Oxford University Press, Oxford, 1997, pp.287-288. It also has



properly implements as well as modifies Nozickean principles and supplements them with other important considerations so as to form the basis of a liberal state that ensures sustenance, opportunity, and civil equality as well as a political process with the means to raise funds and a forum to consider other objectives compatible with the common good. This theory may not yet realise utopia but it provides a genuine framework, a framework for all.

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some appeal given the likely dangers of mass concentrations of wealth and poverty consistent with Nozick's libertarianism. The dangers for all due to the concentration and expansion of the deprived as well as the circumstances in which the deprived must live must be considered in a realistic political theory. As J.K. Galbraith argues, a divided class society can easily spread resulting in the spread of drugs, violence, lawlessness, and so on. Galbraith, John Kenneth *The Culture of Contentment*, Penguin Economics, London, 1993, pp.39-40. Such an egalitarian theory would not be without foundations and would consider many of the arguments presented in this thesis. I think a notable observation from this is that even if Nozick's entitlement theory can achieve theoretical acceptance, which I do not believe it can as it stands, the practical implementation may result in whole new set of difficulties.

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