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## PROVIDING FOR RIGHTS

Hypothetical contractarians hold that justice is defined by a contract that would (rationally) be made in some specified situation. The characterization of this situation is a matter of great controversy. If it is taken to be our real-life situation, obvious counterexamples arise. Previous acts of predation may make rational an agreement that could hardly be called ‘just’. Various alternative characterizations have been offered with a variety of justifications. Still, this is a difficult point in contractarian theory.

In his recent book, *Morals by Agreement*,<sup>1</sup> David Gauthier finds footing for the contractarian in an unlikely place—natural rights theory. The initial bargaining situation is the situation that would occur if those bargaining had never violated each other’s rights. This restriction prevents the outcome of the bargain from being tainted by the effects of predation and freeloading. The obvious counterexamples are avoided and the resulting outline of a theory is highly attractive, blending the insights of Locke and Nozick with those of Hobbes and Gauthier.

There are those who would find fault with the footing, however, for the name of natural rights has too often been invoked in lieu of argument—as if to call something a natural right exempted it from further justification.

This is not always done, of course. Locke offers a lovely (though flawed) defense of property rights in external objects. Since it is an improved and extended version of this very argument that Gauthier offers as the foundation of natural rights, this is where we shall begin. In the following section, we present Gauthier’s justification of natural rights. In subsequent sections, we shall criticize it on several different grounds. Finally, we will consider the effects of these criticisms on Gauthier’s larger enterprise.

### I.

John Locke begins his defense of property rights by assuming that one has an exclusive right to one’s body and powers. He then argues that since one has a right to one’s labour, one acquires a right to that with which one has mixed one’s labour so long as there is “enough and as good left” for others. This condition is known as ‘the sufficiency condition’ or ‘the Lockean Proviso’. Robert Nozick correctly identifies the motivation for the Proviso: it “is meant to ensure that the situation of others is not worsened” by one’s acquisitions.<sup>2</sup> We shall henceforth refer to this underlying rationale as the Lockean Proviso. It states that “[a] process normally giving rise to a permanent bequeathable property right in a previously unowned thing will<sup>1</sup> not do so if the position of others no longer at liberty to use the thing is thereby worsened.”<sup>3</sup>

Gauthier defends a modified version of the Proviso and attempts to base all natural rights on it. The basic strategy is to assume that, in the absence of market or cooperative relations, one may permissibly do whatever one wills so long as it does not violate the Proviso. One then has a liberty right

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<sup>1</sup>Gauthier, David, *Morals by Agreement*, (Oxford: Clarendon Press, 1986).

<sup>2</sup>Nozick, Robert, *Anarchy, State, and Utopia*, (New York: Basic Books, 1974) p. 175. That this is what Locke has in mind seems clear from his comments in Section 33 of Locke’s *Second Treatise of Government* [Locke, John, *Two Treatises of Government* (New York: Mentor Books, 1963)].

<sup>3</sup>Nozick, Robert, *Anarchy, State and Utopia*, op. cit., p. 178.

to use something so long as such use is permissible. One has an exclusive right to use something when one's use is permissible and the use of the object by others is impermissible (because it violates the Proviso). To evaluate the plausibility of Gauthier's foundation for natural rights we must look first at the modification Gauthier makes to the Proviso and then at the way he extends the application of his modified version of the Proviso.

Gauthier is looking for a general constraint on action, not simply a constraint on acquisitive behaviour. He wants a version of the Proviso that will prohibit freeloading and parasitism. Nozick's version of the Proviso is too strong for Gauthier's purposes because of what it forces us to say in cases where someone's ass has to be gored and your only choice is whether it is yours or someone else's. According to one statement of Gauthier's modified version of the Proviso, it “prohibits worsening the situation of others except where this is necessary to avoid worsening one's own position.”<sup>4</sup>

In light of the sorts of cases he has in mind, Gauthier seems right in claiming that Nozick's version of the Proviso is too strong—at least as a general constraint on action.<sup>5</sup> But surely Gauthier's version is too weak. For in the sort of situations we are considering (let us call them ‘tough situations’), it allows us to worsen the position of others to an arbitrarily large degree to avoid worsening our own only slightly. We believe that an adequate statement of the Proviso would include some sort of proportionality requirement for tough situations but we shall not pursue this here.

Gauthier employs his version of the Proviso to a more ambitious end than either Locke or Nozick do theirs. Locke, of course, defends the assumption that people have property in their bodies and the labour of their bodies only by appeal to a theological argument. By invoking his version of the Proviso as a general constraint on action, Gauthier intends to place the assumption of firmer footing. That is, he will base all rights, including the right to one's body and one's powers, on the Proviso. Whatever natural rights theorists think of the contractarian aspects of Gauthier's theory, his defense of rights represents a significant contribution to natural rights theory.

Let us begin our discussion of Gauthier's theory by examining more closely what his version of the Proviso allows and what it prohibits, for the statement of it cited earlier is misleading in light of further comments Gauthier makes. Not all worsening of the positions of others is prohibited even where such worsening is not required to avoid worsening one's own position. Consider an example offered by Gauthier:

Suppose that we live as fisherfolk along the banks of a river . . . [I]f you, living upstream from me, . . . use the river for the disposal of your wastes, then even though you thereby kill many of the fish in my part of the stream, you do not violate the proviso.<sup>6</sup>

Such a claim might shock Locke, but Gauthier's real concern is not with getting Locke right but with explicating the notion of taking advantage of another. Gauthier's version of the Proviso is intended to ensure that people not take advantage. Since the upstream fisherman is no better off polluting the

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<sup>4</sup>Gauthier, David, *Morals by Agreement*, *op. cit.* p. 203. As one would expect given the deontological or side-constraint nature of the Proviso, Gauthier makes much of the distinction between actions and omissions—between worsening someone's position and allowing someone's position to be worsened. In light of this, his statement of the proviso may be stronger than he intends. For as stated, it only allows the worsening of the position of others to prevent *worsening* your situation. Gauthier may intend to allow worsening the position of others whenever it is necessary to prevent your situation from *being worsened*.

<sup>5</sup>It appears that Gauthier's weakening of the Proviso winds up permitting actions that fit his intuitive characterization of freeloading and parasitism. Such actions will be allowed by his Proviso when the only alternative requires worsening one's own position.

<sup>6</sup>Gauthier, David, *Morals by Agreement*, *op. cit.* p. 211.

stream in the presence of the downstream fisherman than in his absence, his pollution does not count as taking advantage.

Perhaps the clearest statement Gauthier offers of his version of the Proviso is this: “the proviso prohibits bettering one’s situation through interaction which worsens the situation of another.”<sup>7</sup> To give a fuller understanding of what Gauthier has in mind, we must look at his account of ‘bettering one’s situation through interaction which worsens the situation of another’. The notions of better and worse are taken to be unproblematic; they are defined in terms of an increase or decrease in one’s subjective expected utility. The problem then becomes one of determining how one’s actions affect oneself and others. Gauthier says, “the base point for determining how I affect you, in terms of bettering or worsening your situation, is determined by the outcome that you would expect in my absence.”<sup>8</sup> So, A’s doing  $x$  worsens  $B$ ’s position *iff*.  $B$  would be better off in  $A$ ’s absence than with  $A$ ’s doing  $x$ .<sup>9</sup>

Clearly, the notion of bettering (or worsening) one’s own position cannot be given a parallel treatment. (Whatever sense could be made of being better off in your own absence than you are given that you perform an action would be the wrong sense.) But since we are only interested in the notion of bettering (or worsening) oneself through interaction with another, we can use as a baseline the situation that would exist in the other’s absence.  $A$  better his position through interacting with  $B$  *iff*.  $A$  prefers the outcome he gets to what he would have gotten in  $B$ ’s absence.

In the fishing case, the upstream fisherman undeniably worsens the position of the downstream fisherman in the relevant sense, but he does not do so through interaction that better his own position. It is for this reason that Gauthier’s version of the Proviso does not rule out such behaviour.

We believe that these accounts of ‘bettering’ and ‘worsening’ are unsatisfactory in light of cases of causal (pseudo-)overdetermination. Typical cases of slavery are paradigmatic of the sort of parasitism that Gauthier wishes to rule out by the Proviso. But it is not clear that his account of ‘bettering’ and ‘worsening’ has this effect. Suppose that I am one of only two slave owners in an area. Though I am horribly cruel and abusive, the other slave owner is even worse. Suppose that, were I not around, all of my slaves would be owned by him. Now, though I better my own position through interaction with my slaves, it cannot, on Gauthier’s account, be said that I worsen their situation. For they are better off than

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<sup>7</sup>Gauthier, David, *Morals by Agreement*, op. cit. p. 205.

<sup>8</sup>Gauthier, David, *Morals by Agreement*, op. cit. p. 204.

<sup>9</sup>This account is problematic. It is unclear how long an absence we are to imagine when we determine whether  $B$  would be better off in  $A$ ’s absence. If we are to imagine that  $A$  never existed, parents would have to harm their children very badly before it would count as worsening the situation of the children. The father who gains momentary sexual gratification by raping his minor daughter and thereby causing her great psychological trauma is clearly worsening her position even if she would not be better off if she had never existed. (We assume that one would not exist if either of one’s parents did not exist.) And it seems that this bettering of his position through worsening hers is just the sort of thing Gauthier wants the Proviso to rule out. If, on the other hand, we imagine the absence to be only for the moment, then the Proviso seems to be too strong. Suppose that we have often acted so as to benefit each other in the past but on a particular occasion we find ourselves in competition over some object. It might well be true that the loser in this competition would have been better off in the absence of the winner and that the winner is better off than she would be in the absence of the loser. The reason the loser might be better off in the temporary absence of the winner is obvious--she would have obtained the object. And the winner might be better off by having bested the other in competition because of the effect on her self-esteem, her security or her reputation. As Hobbes notes, people are driven to competition not only for gain but for diffidence and glory. These later goals may be better attained by having beaten someone to achieve your goal than by having achieved it without competition.

they would be in my absence. Parasites who protect their hosts from worse parasites do not violate the proviso as stated.<sup>10</sup>

This problem is not unique to Gauthier (similar problems arise for Nozick) and it has little to do with the problems on which we shall focus. We will suppose that some adequate account of ‘bettering one’s situation through interaction which worsens the situation of another’ can be given. Even assuming that the Proviso can be strengthened so as to avoid this problem, we shall argue in Section II that it is unacceptable as a universal account of natural rights because it is already too strong in other respects. In Section III, we shall discuss and evaluate Gauthier’s attempt to base all rights, and in particular the right to one’s body and powers, on his version of the Proviso.

## II.

We have already criticized Gauthier’s Proviso for being too weak in two respects: first, in omitting a proportionality test; and, secondly, in allowing one to take advantage of another provided that had he not done so, someone else would have. Of course, many would take the fishing case presented by Gauthier to show that the proviso is too weak; though presumably Gauthier is not troubled by this case. (In Section III, we will discuss other respects in which the Proviso is too weak.) But Gauthier’s Proviso is also too strong, at least as a general constraint on action. It requires refraining from actions that are morally permissible and thus fails to justify all the rights one would have in a Lockean state of nature. Suppose that you are a bounty hunter, hired to find me by a party I have injured. By returning me to my victim for punishment, you violate the proviso. You have bettered your position over what it would have been in my absence, we may suppose, because your cost of finding and returning me was less than your fee. But you have worsened my position because, let us imagine, if you had not found me, no one would have. Yet, of course, your action seems perfectly permissible.

Consider another example. You seek to punish me for some grievous injury I have done you. Quite plausibly the harm legitimately inflicted on me as punishment will exceed the benefit I received, if any, from the injury I inflicted on you. So, we may suppose, your act of punishment worsens my position—I would have been better off had you not existed. It is not so clear that the punishment has bettered your position. Of course, if it has the effect of reducing the likelihood that I will wrong you in the future, you may be better off having punished me than you would had you not punished me for this injury. But this is not the appropriate baseline. The question is: How would you fare in my absence? (We shall interpret this to mean ‘had I never existed’.) Could the punishment you justifiably inflict on me make you better off than you would have been in my absence? Quite possibly. For it may be that by punishing me, you deter others from harming you—others who in the absence of evidence of your retaliatory dispositions might not have been deterred.

These counterexamples could be avoided by treating the Proviso as a portion of an ideal theory of justice—*i.e.*, a theory of what justice requires given that everyone complies with the theory. But then, of course, we cannot treat the Proviso as a general constraint on action in a state of nature, for it only applies in situations in which no injustice has been done. Nor can it serve as the basis for many of the rights that natural rights theorists proclaim. In particular, one cannot say that a person has a right of retribution for an injury only if such retribution does not violate the Proviso.

We assume that Gauthier means his Proviso to be a principle of an ideal theory of justice. Despite the fact that this limits its interest in other respects, such an interpretation is consistent with his

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<sup>10</sup>The issue raised here is the very difficult one of when an action can be justified by showing that if the agent were not performing the action someone else would be producing a similar effect.

ultimate theoretical goal—to define a suitable initial bargaining position for a hypothetical social contract theory. But even restricting the application of the Proviso to ideal theory, we do not avoid the problem of excessive strength. For as will become clear in the next section, the Proviso unjustifiably restricts a person’s bodily rights.

### III.

That one has a right to one’s body and one’s powers has, for many, been a starting point for a theory of justice in holdings. As starting points go, it’s not bad. It is at least nominally endorsed by theorists with otherwise antagonistic political views, and few feel an inclination to disagree with the abstract statement of the proposition when they are first asked to consider it.

Still, if one could show that this proposition can be justified by appeal to some more basic moral commitment we make, this would constitute a major theoretical achievement. Such a result would be of practical importance as well. If the justification were successful, not only in the sense that the more basic commitment entailed a right to one’s body and powers but also in the sense that we came to believe that this really was the foundation of our belief in such a right, significant progress could be made in clarifying the nature of that right. For while there is great agreement on the statement that one has a right to one’s body and powers, there is still significant disagreement on the implications of such a right.

Gauthier proposes to ground the exclusive right to one’s body and powers on his version of the Proviso. Doing so requires showing both that one has a right to the use of one’s body and powers and that others do not. Gauthier argues, then, that my use of my body and my powers does not violate the Proviso while someone else’s nonconsensual use of my body and powers does:

Each person, in the absence of his fellows, may expect to use his own powers but not theirs. . . . Continued use of one’s own powers in the presence of others does not in itself better one’s situation; use of their powers does better one’s own situation. Refraining from the use of one’s own powers worsens one’s situation; refraining from the use of others’ powers fails to better one’s situation but does not worsen it. Continued use of one’s own powers may fail to better the situation of others but does not in itself worsen their situation; use of others’ powers, in interfering with their own use, does worsen their situation. Thus the proviso . . . affords to each the exclusive use of his own [powers].<sup>11</sup>

The right to one’s body and powers is, then, based on the Proviso and a set of empirical facts including facts about one’s special connection to one’s body and powers. We could test the philosophical adequacy of Gauthier’s thesis by imagining outlandish empirical hypotheses and considering whether Gauthier’s thesis gives us the right answer about bodily rights in such situations. The problem with such an approach is that our moral ‘intuitions’ are often infused with empirical assumptions and they serve us ill when we apply them to situations that violate those assumptions. Because of this, we shall, while engaging in some modest science fiction, avoid truly bizarre situations. We believe that the cases we offer are ones about which we have pretty reliable convictions. And, in any event, we will progress from somewhat fanciful cases to completely commonplace ones so that, at least by the end, we will not have forced imagination to stretch beyond reasonable limits.

The defense of bodily rights Gauthier offers depends on the assumption which he makes explicit twice that my use of the body or powers of another must interfere with his own use of them. This certainly need not be so. Consider Dr. Demento, who has discovered a drug that will put people into a trance for eight hours and rejuvenate their bodies so that they need no sleep. The fiendish doctor realizes

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<sup>11</sup>Gauthier, David, *Morals by Agreement*, op. cit. p. 209.

that he has a way to use the bodies of others without making them any worse off than they would be in his absence. Demento is, as the reader will have guessed, demented. In addition to making his temporary zombies work in his lab at night, he engages in vile and disgusting sex acts with them which he videotapes. He then sells the tapes at great profit in foreign countries. He is becoming a wealthy and thoroughly satiated person. Clearly, he betters his position relative to what it would be in the absence of those whose services he enlists. But, a critic might claim, his action does not violate the proviso because he does not worsen the situation of others.

This last claim might sound outrageous. But, we must remember that, by assumption, the lives of Dr. Demento’s victims seem no different to them than the lives of the non-victims. They suffer no ill-effects on their health, have no painful memories, and never find out what has been done to them nor have any dealings with those who have viewed the videotapes. In this sense, their lives are not worsened.

However, as Nozick argues,<sup>12</sup> we care about things outside our experience. If this is so and utility is a measure of the subjective desirability of certain states of the world, then Gauthier would probably offer the following reply. Presumably Demento’s victims prefer that their bodies and powers not be used in this way. (If they do not, it is not so clear that Demento is doing anything wrong in using them in this way.) Thus, a situation in which their bodies and powers are used in this way has less utility for them than one in which no such use takes place. For the utility of an outcome for an individual need not depend on how that individual is affected by the outcome. But then Dr. Demento is violating the Proviso because he is making his victims worse-off than they would be in his absence.

This would seem to put the Demento case to rest. However, the bump appears elsewhere in the carpet. For if utility is simply a measure of the degree to which a person’s desires are satisfied, two problems arise. First, the manipulation of people’s preferences can lead to very counterintuitive consequences. Secondly, the existence of people with unusual desires can unjustifiably undermine one’s claim to one’s body as well as to external objects. The first problem suggests that the Proviso, so understood, is too weak; the second that it is too strong.

As an illustration of the first point, consider the following case. Imagine a father, let us call him Manny, who loves his children—after a fashion. At least, he would never do anything to make himself better off by making his children worse off. Of course, he understands ‘bettering’ and ‘worsening’ in terms of preference satisfaction. So, while he would never violate the Proviso with respect to his children, he sees nothing wrong with raising them like a gardener raises a Bonsai tree. While his children are young, he stunts their intellectual and social development and, using sophisticated psychological and neurophysiological techniques, he leads them to desire only to serve him. He leads a life of utter dependency, while his children play the willing role of slaves. With his death, they have nothing left to live for and pass away in ennui.

Manny’s manipulations do not violate the Proviso because though he is better off in his children’s presence than he would be in their absence, they are not worse off in his presence than they would be in his absence. This is because their preferences are more fully satisfied in his presence than in his absence. Despite the fact that Manny is not violating the Proviso, he certainly seems to be taking advantage of his children; he seems to be a parasite; and, we believe, he is violating the rights of his children and doing wrong. If we are correct, then this understanding of the Proviso is too weak because it treats the manipulating parasite as a symbiote.

As an example of the second problem, consider first the case of an external physical object. Suppose that I find a piece of obsidian that I wish to use for an arrow tip. I discover that there once existed a strange religious sect the members of which believed in the divinity of the magma of the Earth.

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<sup>12</sup>Nozick, Robert, *Anarchy, State, and Utopia*, op. cit., pp. 42-5.

As God’s expectorate, obsidian is sacred—never to be used to further the worldly ends of mortal men. Though there are now no adherents to this view, those who did exist strongly preferred that obsidian never be used as I propose to use it. I, being deeply sacrilegious, take great delight in flouting the religious customs of any sect—even a dead one. In making my arrow tip, I better myself through interaction with the members of the religious sect that worsens their position. Yet it does not seem wrong to make it.

One might be inclined to protest that there is no interaction here. The now dead members of the now defunct sect are not affected one way or another by my action. But this reply is not available if we follow Gauthier in defining ‘better’ and ‘worse’ in terms of subjective expected utility (at least if that phrase is given its usual meaning).<sup>13</sup> If we choose to give up this account and insist that what is relevant is how our actions affect the lives of others, then we seem stuck with the Dr. Demento case.

One initially attractive response to the problem raised by the obsidian arrow tip case would be to modify the Proviso so that one need consider only the utility of those alive when or after the act is performed. But such a restriction is inadequate to avoid other troublesome cases. (It may well be too strong in other respects—a possibility we do not explore.) We illustrate this with an example about bodily rights. Suppose that Ellen is toying with the idea of working out so that she can win female body building contests. She mentions this to her co-vivant, Todd, who disapproves of it in such strong terms and expresses such a proprietary attitude about her body that he quickly becomes an ex-co-vivant. After the separation, she finds that he still abhors the idea of her becoming a body builder, perhaps because he fears that others will think less of him for having been involved with a woman who would want to develop “that sort of body”. Ellen’s inclination to take up body building may have passed quickly had she not heard of Todd’s continued concern. Knowing of it, she has a strong preference to work out. Indeed, being somewhat spiteful, she looks forward to thwarting the desires of her former lover. She wants this even though she will not be able thereby to cause him any unhappiness, for, unfortunately, he has just taken off on Earth’s first interstellar probe (never to return) and the only messages that can be sent to him must concern official business.

Even if her motive is just to spite Todd and she gains utility from doing so, Ellen has a right to become a body builder if she chooses. This is so despite the fact that she achieves a higher utility for herself by decreasing Todd’s utility. (And of course, if Todd prefers that she not become a body builder, her doing so decreases his utility regardless of whether it affects him at all.) Perhaps we usually ought to seek to satisfy others’ preferences but, even when we ought to do so, we often have a right not to. This is especially clear in Ellen’s case.

Again, it appears that focusing on how an act affects others rather than on how it affects their subjective utility (*i.e.*, the satisfaction of their preferences) may avoid this problem case. But it is unclear how to avoid both this case and the case of Dr. Demento. Furthermore, this last case suggests ones that cannot be avoided even by shifting our focus to effects on persons.

Imagine two pioneer farmers: Old McDonald and Young McDougal. Old McDonald has been using his powers and abilities to work his end of a valley with great success for some time. Young

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<sup>13</sup>This problem is common to theories that take the satisfaction of preferences to be of intrinsic moral relevance without regard to when those preferences exist. Thus, utilitarian theories that take the *summum bonum* to be the satisfaction of any desires or preferences allow past desires a seemingly undeserved moral weight. If everyone who existed up until the mid-twentieth century had fervently desired that we never explore space, would that give us a weighty moral reason for not doing so? For Gauthier, preferences of others do not in themselves have moral weight, but if we better ourselves by thwarting such preferences we violate moral constraints (provided we are not in a “tough” situation).

McDougal moves into the other end of the valley to try his hand at farming. As it happens, he is not very good at it. So Old McDonald does well and Young McDougal does poorly, but it does not seem that McDonald is doing well at McDougal’s expense.

McDonald and McDougal are, though, very competitive. Each would prefer to be the best farmer in the valley by being better than others in the valley to being the best farmer in the valley because he is the only farmer in the valley. But each would prefer to be the only farmer in the valley to being shown up by another farmer. And, since each knows whether the other is there and how the two of them are faring, let us suppose that their well-being varies according to the degree to which their preferences are satisfied.

Now it appears that McDonald’s use of his powers and abilities to better himself violates the proviso. For he prefers the outcome he gets to that he would get in McDougal’s absence and McDougal prefers the outcome he would get in McDonald’s absence to that which he actually gets. Thus, McDonald’s use of his powers and abilities betters his own position and worsens the position of McDougal. Nor is the worsening of McDougal’s position incidental to the bettering of McDonald’s. We have chosen the correct baseline; McDonald is better off than he would be in McDougal’s absence.

Yet it seems that McDonald has a right to use his abilities to their fullest and his doing so certainly does not constitute taking advantage of McDougal. So something has gone awry—something quite independent of whether we concern ourselves with the effect of our actions on others or on their utility. The problem is that just as rights function as claims against general utility, so they function as claims against the Proviso; just as we sometimes have a right to advance our own interests even when this conflicts with promoting the general interest, so we sometimes have a right to increase our own utility by decreasing the utility of others.

One might object to any of these last three examples (as well as to ones yet to come) on the grounds that they depend crucially on individuals taking an interest in one another’s interest. The obsidian hunter delights in thwarting the desires of the dead religious sect as Ellen delights in thwarting those of Todd, and McDonald and McDougal are concerned with how they fare vis-à-vis each other. Gauthier specifically assumes that “the proviso is intended to apply to interaction under the assumptions of individual utility maximization and mutual unconcern.”<sup>14</sup> Thus, these examples are irrelevant.

Such a restrictive assumption as mutual unconcern, though, is both undesirable and unjustifiable. It is worth noting that such an assumption is certainly not in the spirit of Hobbes who tells us that there are three sources of conflict in the state of nature: competition, diffidence and glory.<sup>15</sup> To assume mutual unconcern is clearly to ignore diffidence, which depends typically on one’s relative power, and possibly glory. Of course, there are limits to Gauthier’s adherence to Hobbes; perhaps this is one of them.

But this is not a good place to depart from Hobbes, for if individuals in the state of nature are concerned with gain, they ought to be concerned with competitive advantage. Having more wealth, strength, or intelligence than others with whom you interact increases your probability of gain. A rational utility maximizer, concerned with his absolute share of non-positional goods, will be required to be concerned about his position vis-à-vis others.

Perhaps most importantly for Gauthier’s ultimate concern, insofar as he aims to “rationalizing” social institutions, it is a mistake to make artificial assumptions about people’s concerns. If people, in fact, are concerned that others fare well (or ill) or are concerned with how they fare vis-à-vis others and

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<sup>14</sup>Gauthier, David, *Morals by Agreement*, op. cit. p. 205.

<sup>15</sup>The version of this paper that was published in *Dialogue* mislabeled Hobbes’ three sources of conflict. We are indebted to Jan Narveson for pointing this out.

the initial bargaining point assumes this away, then it is unclear how the rationality of the bargain rationally justifies the outcome to the participants.<sup>16</sup>

#### IV.

The real test of Gauthier’s theory of natural rights is not whether it accounts for all of the rights that we believe ourselves to have. Many of those rights may be the result of market or cooperative structures and not be founded directly on the Proviso. In our examples, we have tried to appeal to convictions about what rights a person would have in the absence of such structures. Since we find the examples persuasive, we think that Gauthier’s Proviso will not serve as a foundation even for natural rights. But Gauthier is not a natural rights theorist, and his ultimate goal is not to provide a foundation for rights but a basis for bargaining. The question of whether the Proviso will serve this function remains open (temporarily). For all we have said above, it may still be that the agreement people would make from the situation they would be in were no one to violate the Proviso accurately and nonaccidentally captures the rules of justice. It is to this issue that we finally turn.<sup>17</sup>

Consider again the case of Old McDonald and Young McDougal. We have claimed that McDonald has a right to use his powers to their fullest and that such use does not constitute taking advantage of McDougal even if Gauthier’s Proviso is thereby violated. But suppose that McDonald refrains from violating the Proviso, believing himself to have a right only to those advantages he can secure without violating it. Hoping to do better through cooperation, McDonald opens negotiations with McDougal. Though both bargain rationally and in good faith, McDonald gets the short end of the stick. This is because in order to secure the right to use his powers fully, he must compensate McDougal. Such an agreement is, we assume, better for him than continuing to abide by the Proviso in McDougal’s presence or else McDonald would never have consented to it. But it is, we suppose, not as good for him as using his powers fully in McDougal’s presence. More troublingly, it may not be as good for him as using his powers fully in McDougal’s absence. If, as we believe, McDonald is within his rights to employ his powers to the fullest without compensation (in the scenario suggested), it is difficult to see why justice would require compensation from him. Adherence to the Proviso skews the outcome because it awards McDougal unwarranted bargaining power.

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<sup>16</sup>Thus, while we agree with Narveson (“Gauthier on Distributive Justice and the Natural Baseline”, section III of this volume) that Gauthier will have difficulty establishing his claims for the rationality of compliance with the bargain if he begins with unrealistic assumptions, we disagree with his claim that the vast majority of us are not concerned with positional goods.

<sup>17</sup>Our primary concern here is not with whether the proviso is rationally acceptable, nor with whether it is rational to comply with the terms of a bargain that would be made given strict compliance with the proviso. Rather, we engage in an exercise in reflective equilibrium. Does the agreement that rational agents would arrive at from the situation in which the proviso is satisfied necessarily coincide with our considered judgments concerning justice? (This project is very different, then, from those undertaken by Jan Narveson and Peter Danielson in their articles in this volume.) Gauthier, himself, may be tempted to dismiss the counterexamples offered, for he, “trusting theory rather than intuition” (p. 269), rejects appeals to moral intuitions as a test of moral theories. But we believe that these are the sort of counterexamples that should trouble Gauthier. We do not present instances in which Gauthier’s theory merely diverges from “the supposedly ‘plain duties’ of conventional morality” (p. 269), but instances that also cast doubt on the claim that rational individuals would bind themselves to the principles Gauthier’s theory endorses. This is the sort of criticism that he may escape but cannot reasonably ignore. In effect, we are suggesting that he has misunderstood (or not fully understood) the implications of his own position. And this is a form of criticism he explicitly allows (p. 269).

Some may disagree with our claim that the outcome of such a bargain is skewed inappropriately. In his fascinating and entertaining book, *Choosing the Right Pond*,<sup>18</sup> Robert Frank defends (among other things) the thesis that justice requires the transfer of wealth from the better-off to the worse-off because the latter provide a service to the former that is not reflected in the marketplace (*i.e.*, is a market externality). The service is the provision of someone to whom they can feel superior. One might argue, based on such a view that McDonald does owe McDougal a share of his wealth.

There are, though, problems with such an approach. In the first place, it has implications that would be difficult to accept. Frank supposes that we are especially concerned to “get position” with respect to those with whom we come into contact and deal with frequently. But, if true, this is surely not a necessary truth. To illustrate, let us consider an example used by Gauthier—the sixteen Robinson Crusoes.<sup>19</sup> Actually, we need consider only two. Imagine two strong, clever Robinson Crusoes living on well supplied islands. They differ only in this: one is energetic and the other is lazy. Suppose that, as in Gauthier’s case, they are able to communicate with each other but supplies can be sent only from the energetic Crusoe’s island to the lazy Crusoe’s island. We add to Gauthier’s example only the supposition that these two have the desire for positional advantage. Now the energetic Crusoe by using his abilities to the fullest makes himself better off than he would be in the lazy Crusoe’s absence and he makes that Crusoe worse off than he would be in the absence of the energetic Crusoe. The Proviso is violated and the hard working Crusoe is now justified in using his abilities to the fullest only if he compensates the other. But, absent our additional assumption, Gauthier does not believe that justice requires any such compensation. He says:

If . . . [the] Robinson Crusoes lived, each on a separate island, and if each used his capacities to provide for himself from the resources of the island, then the outcome, whatever it might be, could not be unjustified.<sup>20</sup>

It seems implausible that desire for positional advantage should alter the situation so drastically in the Robinson Crusoes case.

Now, of course, this case is just a variant of the McDonald/McDougal example. But perhaps the variation makes clear what is at issue. At least for many, the conviction that those with the positional advantages ought as a matter of justice to compensate those with less seems to depend on the existence of social relations. McDonald and McDougal were individuals set in a situation in which there typically is social interaction. Although we did not assume any such interaction, still one’s convictions about the case may be influenced by the setting. In the Robinson Crusoes example, such extraneous influences are not present.

The situation is worse if we remind ourselves that in order to avoid the problems with Dr. Demento, Gauthier must be concerned not with an action’s effect on people but with its effect on people’s utility. Given this, we can imagine that the two Robinson Crusoes lack the ability to communicate with each other and neither ever learns of the existence of the other. Let us suppose that their desires remain the same (*i.e.*, that each would prefer to be better off than someone else to being the lone person in existence and that each would prefer this latter situation to being worse off than someone else). It turns out that for the energetic Crusoe to use his abilities to the fullest is a violation of the Proviso (even in their ignorance of one another’s existence)—an excusable violation, no doubt, but a violation just the same. This seems wrong.

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<sup>18</sup>Frank, Robert, *Choosing the Right Pond*, (New York: Oxford University Press, 1985).

<sup>19</sup>Gauthier, David, *Morals by Agreement*, *op. cit.*, pp. 218ff.

<sup>20</sup>Gauthier, David, *Morals by Agreement*, *op. cit.* p. 221.

What these cases suggest is that the problem in Gauthier’s theory is not with the attempt to describe the initial situation for a contractarian theory of justice in terms of a state of nature in which there have been no rights violations. Indeed, while others have criticized this approach, we find it to be a major attraction of his theory.<sup>21</sup> The problem is that the even Gauthier’s version of the Proviso is not an adequate foundation for rights.<sup>22</sup>

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<sup>21</sup>See, for example, “The Lockean Proviso” by Peter Danielson and “Gauthier on Distributive Justice and the Natural Baseline” by Jan Narveson, both in this volume.

<sup>22</sup>We are indebted to Daniel Farrell, David Gauthier and an anonymous referee for *Dialogue* for providing helpful comments on an earlier draft of this paper.

### **ABSTRACT FOR PHILOSOPHER’S INDEX**

Gauthier’s version of the Lockean Proviso (in *Morals by Agreement*) is inappropriate as the foundation for moral rights he takes it to be for a number of reasons. It lacks any proportionality test thus allowing arbitrarily severe harms to others to prevent trivial harms to oneself. It allows one to inflict any harm on another provided that if one did not do so, someone else would. And, by interpreting the notion of bettering or worsening one’s position in terms of subjective expected utility, it allows immoral manipulation of others and imposes unwarranted restrictions based on preferences that should carry no moral weight

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