

## **IP, the NAP, and Pre-Propertarian Liberty: New-Paradigm Libertarian Replies to some Rothbardian Criticisms**

**J C Lester**

### **The context**

Andy Curzon replied (often quoting from the opening sections of Lester 2014, chapter 10) in an on-going debate with Lee Waaks, which Mr Waaks forwarded (with approval) to the Libertarian Alliance Forum (27 February 2015). This response replies to the criticisms after directly quoting them (the indented text; except where Lester is occasionally quoted, as indicated). A few cuts have been made to avoid some repetition and irrelevance. However, just as Mr Curzon sometimes repeats his main points in slightly different ways and contexts in the hope that some of them might prove cogent, so this reply does the same. The dialogue-like result seems to engage more directly and completely than producing a new stand-alone exposition. And some new arguments are even developed in the process. But the full nature of many of the criticisms and replies often only becomes clear as the “dialogue” proceeds. An addendum then rebuts two further brief critical responses in the same manner.

### **Criticisms and replies**

... there is no more to say because you keep replying words to the effect of this quote from your sent reply

--- ‘Good ideas are scarce (i.e. limited) because if they were not, they would already exist.’ ---

The word ‘idea’ is ambiguous and too suggestive of a link to minds. Hence it seems preferable to adopt ‘meme’ to help mnemonicise Karl Popper’s three worlds (ontological categories) theory. World 1, Matter: all that is physical. World 2, Minds: all that is conscious. World 3, Memes: all materially encoded abstractions. To which, therefore, it seems necessary to add (as Popper appears not to have clearly seen, but David McDonagh has<sup>[1]</sup>) an immaterial and atemporal World 0, here called Modes: all abstractions. Not all memes are (or have been, or will ever be) ‘ideas’ in any mind. A book of computer-generated logarithms, or poetry, or patterns, etc., might contain materially encoded abstractions that have never been consciously perceived. Only an infinitely small fraction of W0 modes will ever be instantiated in W1 matter, or perceived in W2 minds, or recorded in W3 memes.

Scarcity relates to memes in, at least, these ways:

- 1) The number of (useful) memes is scarce (not infinite).
- 2) Each meme is about only one mode (abstraction or ‘intellectual object’).
- 3) Ownership (right of use and control) of any particular meme is itself scarce (like ownership of a particular piece of matter, such as land).
- 4) The production (via discovery, invention, or creation) of a meme requires the use of scarce resources (even if mainly thought and time).

That is missing the point of why scarcity is important [l]inked in with physical boundaries. Of course ideas are not limited, if the[y] are then SHOW ME THEIR LIMITS! Show me the limits of one single good idea.

The same meme (materially-encoded mode) might be expressed in many physical ways—each of them physically limited, of course. But the mode itself that the meme captures is an abstraction, and so does not have “physical boundaries”; it has abstract boundaries. Pythagoras’s theorem is not Pi, and it is easy to distinguish them.

...think about applying this to anything. It is ridiculous...the whole point of practical scarcity is that it DOES APPLY TO THINGS THAT EXIST.

Particular memes are often known (i.e., grasped by minds) to exist. Unknown modes are not (yet) known to exist but they already have abstract existence and objective qualities (such as a number that has never yet been thought of or written down but which is entailed by the existence of numbers). “Good ideas” are known useful memes. Scarcity relates to them in the senses already outlined. But they are collectively less scarce thanks to the incentive effects of intellectual property (IP)—although some people do not require that incentive, of course.

So I hear your song that you have ‘IP protected’ and then want to play it on my guitar but am estopped from this in law! What right does anyone have to stop me plucking whatever strings I choose to so long as it is my guitar?

They have a right because you thereby make use of someone else’s property, namely their intellectual property (although some personal uses are often not a practical concern). One may not use one’s property (of whatever type) to trespass on other people’s property (of whatever type). It’s not possible to refute intellectual property by simply presupposing that only physical property is ‘real’ property.

Liberty as in the ‘NAP’ (i.e. if the NAP is not broken in any way one has ‘liberty’, or ‘autonomy’)...

How does the NAP (non-aggression principle) relate to interpersonal liberty or autonomy? It doesn’t mention either.

...can only apply to physical goods because when I see/hear/use your idea you have not lost out

If the producers’ *claimed* ownership of intellectual products is not observed, then that is an immediate loss to the would-be owners (or they wouldn’t be “would-be owners”). Very soon, such uncivilised meme communism is a loss to everyone.

Imagine a world from 1,000 years ago where everyone’s ideas were ‘protected’! We would be centuries behind where we are now...innovation would be stifled!

This overlooks, or fails to grasp, 1) the new-paradigm’s proactive-imposition limit to intellectual-property duration: probable or actual independent production,<sup>[2]</sup> and 2) the incentive effect of allowing such IP.

Lester thinks ‘we must have a theory of liberty before a theory of property’

There are infinite possible property rules. Some property rules fit interpersonal liberty and most do not. Only a separate theory of liberty can distinguish the two categories. The basic libertarian conception of interpersonal liberty does not need to mention property: it is about people not being proactively constrained by each other (more than is unavoidable, at least).

but ‘liberty’ is a negative concept, not a positive concept, as agreed by both Lester and anti-IP people.

It seems as though a “negative concept” can often be reworded into a “positive concept”, so this does not appear to be a very substantive point.

One can not have liberty TO DO everything, otherwise that would extend to hurting other people and such.

In the Lockean sense, one can “have liberty TO DO everything” within one’s abilities, resources, etc. Proactively “hurting other people” is *licence* or power rather than liberty.

So what I mean by negative is that it is the freedom not to infringe on anyone else’s liberty.

That is an obscure sentence. Is it supposed to explain “negative” freedom? Or “negative” liberty? In one sense, everyone has the “freedom not to infringe on anyone else’s liberty”—but they sometimes do it anyway. In any case, freedom and liberty are synonyms in English and so they cannot usefully be contrasted or used to explain each other (if that is what is intended) except by stipulating a difference (e.g., Hobbesian physical freedom versus Lockean interpersonal, or social, liberty).

I have read everything Lester writes on this (I think)

Including the three books?

and he goes round in circles

Rothbardian (and Nozickian) libertarianism circles around various key ideas without ever clearly relating them to interpersonal liberty. By contrast, the new-paradigm libertarianism ultimately relates everything back to a theory of liberty.

So ‘libertarianism’, as far as the modern conception is concerned is the ‘NAP’ or ‘consent axiom’ (if both people consent to a physical act then it is legal).

This does not explain how interpersonal liberty, as such, relates to either the ‘NAP’ or the ‘consent axiom’. Abstractly theorised, interpersonal liberty can be interpreted as the absence of people’s proactive constraints on each other’s chosen goals (or preference-satisfactions). This abstract interpretation does not mention property or law. For it is a contingent matter whether property, and if so which forms, will best fit it. In the world we live in, it does indeed appear that self-ownership, (proactive-constraint-minimising) private property, voluntary transfers, consensual activities, contracts, etc., facilitate such liberty. But, in order to be philosophically clear, the contingent nature of these various practical connections needs to be acknowledged and explained.

Here I go back to the fact that no-one is losing out once an idea has been created [...] and as such it is not ‘aggressive’ for me to adapt your idea since you can still use the idea whether I do so or not. I really don’t see how this can be logically ignored.

Here is a relevant reply (now also in chapter 30, p.151) which is itself being ignored or overlooked:

Consider a physical analogy. Suppose I build a machine that can produce widgets using air and natural light. The machine is also powered by air and natural light and never needs repairing. I switch on the machine and in seconds I have a month’s supply of widgets to sell in the nearby market. When I am not around, you come along and use the machine to make the same number of widgets and you promptly go and sell them in the market yourself. Furthermore, you intend to continue repeating the procedure because I am, somehow, unable to guard the machine adequately and you can always, somehow, beat me to the market. You assert that I have lost nothing, because I still have access to my machine, and to the widgets I made, and to as many more widgets as I want. However, I didn’t produce the machine or the widgets for my personal use. I produced them solely in order to have something to sell. And now you have prevented that. Therefore, it is clearly false to claim that I have lost nothing and that my incentive to make such machines has not been undermined. And this appears to be sufficiently analogous with the position of many people who produce “ideal objects” with the intention of claiming them as IP.

Back to the criticisms:

So when you say [...]

--- [...] libertarians attempt to justify property rights by various arguments but they don’t have an explicit theory of liberty’ ---

this is hogwash since libertarians’ theory of liberty is precisely the freedom to use one’s body and property as one chooses. **THAT IS THE LIBERTY THEY EXPLAIN.**

So “liberty” is supposed to be “the freedom to use one’s body and property as one chooses”. As already mentioned, “liberty” and “freedom” are synonyms, so the latter cannot be used to explain the former. And this does not explain exactly how “to use one’s body and property as one chooses” is interpersonal liberty in itself. It looks far more like what usually fits *theoretical* liberty in *practice*. Theoretical liberty itself is, more like, the absence of interpersonal proactive constraints. Moreover, the offered “libertarians’ theory of liberty” is silent on which of the infinite possible property rules are meant (presumably, only the ones that fit liberty; but we are given no theoretical criterion for this). Therefore, there is no proper “libertarians’ theory of liberty” here; “It isn’t even wrong” (as Wolfgang Pauli used to hyperbolise about confused theories in physics). It conflates the practical and the theoretical by tacitly relying on intuitions about what is meant. It is the equivalent of a socialist purporting to give a theory of human ‘liberty’ in itself as ‘free access to the goods one needs’.

When he writes

--- 'How are the different kinds of property being distinguished as libertarian or not libertarian?' ---

no-one claims property itself as libertarian - that would be absurd!

Some types of property are usually libertarian in practice and some are not. Only a pre-propertyarian theory of liberty can distinguish them.

Libertarian is from the word liberty which means freedom.

'Liberty' means 'freedom' and vice versa. But what is interpersonal liberty or freedom?

So, when Lester says

--- 'But libertarians usually have no explicit theory of what such liberty is. So they must have a tacit theory of liberty' ---

he is plain wrong. The explicit theory of liberty is as stated: 'The allowance to use one's property (including one's own body) as far as one chooses, so long as it does not infringe on someone else's property'.

Three responses:

1) That so-called "explicit theory of liberty" is an interpretation of liberty in practice. There is no explanation relating this practice to a genuine theory, or concept, or even definition of interpersonal liberty in itself.

2) This does not explain which kind(s) of "one's property" (out of infinite possibilities) this applies to. Presumably, only property that fits interpersonal liberty. But which is that? Without a pre-propertyarian theory of liberty we cannot say.

3) As it stands, any kind of statist might agree with the account given. For instance, they might (and often do) say that once 'legitimate' taxation is due then one simply ceases to own that money.

Once again, as explained, of course one can not talk of liberty without talking of one's own body (property) or the other way round

Four responses:

1) Abstractly theorised, interpersonal liberty is people not proactively constraining each other. This would still be true if we were, somehow, minds without bodies.

2) Of course, we do have bodies. But one's body is not inherently "property" (as a legal institution); in a 'state of nature', for instance.

3) It is always a separate question whether, and which, and how, certain kinds of property fit interpersonal liberty.

4) As to "the other way round": clearly one can also talk of "one's own body" without talking of liberty or even implying anything about it (e.g., "My body is the phenotypical expression of particular genes").

Liberty and property are INEXTRICABLY linked.

Property is possible without (much) interpersonal liberty: in a totalitarian system for instance. And liberty is possible without any property: if a group of people were to live together without property but without interfering with each other or the things people are using, then they would all have (maximal) liberty.

There is no need for a 'tacit theory of liberty' when one has an explicit theory of it.

Quite right. But the alleged "explicit theory" is not even a real theory of liberty.

Imagine if you signed a contract and then someone challenged something you did that was not prohibited by the contract and claimed this to be 'tacit'!

In fact, contracts often (always?) have tacit or implied aspects. Sometimes a court case is required to determine what these are.

This is why contract[s] are so good, and can be applied even to [i]ntellectual endeavours.

It is difficult to impossible to write an exhaustive and completely unambiguous contract. Language is broad and relies on shared tacit understanding. But basic property (whether physical or intellectual) is not based on contract theory.

Now this is important [...] - something you may not have considered yet: One of the reasons I am against 'IP', as well as it making no sense, is that in law it is pointless. And it is pointless (or better 'superfluous') precisely because of EXPLICIT contracts. Now if I write a book and make people who buy them explicitly sign a contract not to use more than, say '100 words in a row from anywhere in the book in the publishing of any other writing', or something similar, then it is their choice, BEFORE THEY BUY OR READ THE BOOK (in the case of a book) and as such if they re-publish 100 words or more they are breaking EXPLICIT parts of the contract. Do you see? So what is the need for 'IP law' given this? There is none.

This does not deal with people who are not party to the contract: someone who finds a lost book, or overhears its being read, or photographs a page over someone's shoulder, etc. One might as well say that physical property can be based on contracts alone. It would be necessary, but completely impracticable, to have contracts with everyone—including future generations. As economists would say, transactions costs would be prohibitive.

The same can be applied to inventions or anything of an intellectual creation.

And the same answer applies.

So I make a new toy for children that I think is going to be 'big'. If I want to protect this properly, and as far as is fair (i.e. I don't own the money from selling my products until people have actually bought the product, so I can not lay claim to money I have not yet received), then it is up to me to write a contract for people to sign. This can even go so far as stipulating, EXPLICITLY, that this toy must not be copied within certain bounds by the buyer. But clearly this can not extend to people who have not signed the contract - that would be ridiculous. OK I think this is clear now.

Clear and clearly impractical. Any non-buyer who sees the toy can copy it.

Continuing on with Lester's quote, when he writes

--- 'Otherwise, we could not explain why one kind of property is compatible with liberty while another kind is not' ---

he is going down a stupid path because all 'property' (physical things that one can logically and practically own) IS within the remit of liberty.

It is philosophically naive to conflate liberty and property. And the mainstream libertarian position conflates liberty, property, and morals. But this is hidden by a delusion of being completely clear and simple.

if an idea can be copied, so long as there has been no theft of the idea, or fraud etc, then THE CREATOR DOES NOT LOSE THE USE OF THIS INTELLECTUAL IDEA.

He loses the use of it as property, which is often the main or even sole reason for his creating or discovering it in the first place.

... when Lester puts

--- 'it looks as though there must be a tacit theory of pre-propertarian liberty' ---

of course there need be no TACIT theory when we have a perfectly good EXPLICIT theory of liberty (NAP).

The NAP does not give an explicit explanation of interpersonal liberty; it doesn't even mention liberty.

This (something explicit) has the obvious added benefit of being clear and objective, whereas things that are 'tacit' have not been agreed upon explicitly, by definition.

The tacit theory that mainstream libertarianism presupposes has now been made explicit in the new paradigm. The truth of that explicit theory has nothing to do with anyone's agreement with it.

That sounds like a word-play but it is not. Really think about it. This is what is called the 'Hobbesian Myth'...i.e. - by living under the remit of a monopoly state we 'tacitly' agree to do whatever we are told by the monopoly state, under every circumstance. But no-one had agreed to this explicitly so how can it be so?!!!!

The falsity of Hobbes's tacit *political* contract theory is irrelevant to the assertion that mainstream libertarianism entails a tacit theory of liberty-in-itself that can be made explicit. In any case, there is a true tacit *social* contract theory: that people should associate without proactively imposing on each other. That is why people usually interact without fear and suspicion.

I need not point out the illogicality behind this statement

--- 'And if there is such a tacit theory, then it ought to be possible—and should be enlightening—to make this tacit theory explicit' ---

other than to just quote it. There is no sense to this. I have nothing to say on this other than it is ludicrous and like me calling an apple a pear or a square a duck. What is the point? Tacit is tacit and explicit is explicit.

Some things are tacit. And what is tacit can often be made explicit. This is not any kind of "illogicality". One might as well say that what is hidden cannot be revealed, because 'hidden is hidden and revealed is revealed'.

the key is ACTUAL EXPLICIT AGREEMENT by both sides, of course...the consent axiom again.

The key to what? A real theory of liberty? How?

Is this arbitrary, no! Otherwise, again, it could be claimed you 'tacitly' agreed to an[y] number of things under the sun.

It could. And some of them would be true and others false. People do tacitly agree to things. To go into a restaurant and order food (perhaps without even looking at the menu) is tacitly to agree to pay for it afterwards. The waiter never bothers to point this out. To offer something for sale, is tacitly to imply that it is yours to sell and fit for its apparent purpose. And so on.

For me, the heart of Lester's inanity lies here

--- '[...] they write about being against (initiated) coercion or aggression as the implied opposite of liberty, without explaining exactly how these are theoretically related to liberty.' --

-

There is no problem explicitly explaining the NAP at all. If there is one he should explain the problem.

It is explained. It ought to be clear enough, but let's try again. The *cited problem* is relating the allegedly "libertarian" NAP to liberty itself. The NAP holds that certain property rights are legitimate and then defines 'aggression' as the flouting of those property rights. At no point does the NAP even mention liberty, let alone explain how this account relates to liberty.

It is a negative rule - to have interpersonal liberty (liberty with more than one person on[] the planet)

This does not explain what liberty is.

one must put bounds on the ability to do what one wishes BECAUSE THINGS THAT EXIST ARE SCARCE.

This is often true. But how does this relate to liberty?

Circles circles circles.

As explained, the irony here is that it is Rothbardism that tries to explain itself by circling around non-aggression, explicit consent, legitimate property, self-ownership, scarcity, homesteading, etc., without at any time providing an explicit theory of interpersonal liberty or how these things relate to it. They do relate to liberty, but it is left tacit or unexplained. This is like a utilitarian explaining

consequentialism, the importance of maximising utility, the difference between act and rule utilitarianism, average versus total utility, and so on, without at any time explaining explicitly what *utility*, in itself, is. But utilitarians don't usually do this. They usually tell you what theory of utility they are using (whether some kind of happiness, or pleasure, or preference-satisfaction, etc.). There is an embarrassing hole at the heart of mainstream libertarianism: there is no explicit theory of interpersonal liberty in itself.

Liberty is freedom to do what one wishes..this is the base theory of liberty which I think no-one disagrees with.

There are two main theories of liberty in modern political philosophy. The egoistic, and materialistic, Hobbesian one is the absence of any constraints on a person. It is, roughly, the "freedom to do what one wishes". And that is, more or less, a zero-sum theory by which liberties conflict and one person's gain in liberty is often another's loss (but, strictly, Hobbes does not restrict it to other people as constraints). On this account, a slave-owner has more liberty at the expense of his slave's liberty. However, that is not "the base theory of liberty which ... no-one disagrees with." For there is also the social, or interpersonal, Lockean theory of liberty. That is, roughly, about people not being *proactively* constrained by each other. And in this sense people's liberties are not at each other's expense. For the slave-owner has proactive power over the slave, but no extra liberty thereby. Only some version of this Lockean sense of liberty is properly the libertarian one (although there are some Hobbesian libertarians, as we shall see).

But because resources and land and space are scarce, we caveat this with 'so long as it does not infringe on other people's property'.

Logically, there is no end of possible property rules. Under some of them chattel slavery is allowed. Hence the slave would be infringing on his master's property by running away. Therefore, the expression "so long as it does not infringe on other people's property" is tacitly assuming that such property is in accord with liberty—in some libertarian sense—rather than flouting it. But we have been offered no independent theory of liberty by which to judge this. There is only the circling around of the various mainstream concepts of self-ownership, homesteading, voluntarism, scarcity, etc.

His next paragraph on coercion is just irrelevant, if not a mild straw-man. No-one (I have heard of anyway) claims infringement on liberty is based on coercion.

Here is a handful of examples of some relatively well-known people using "coercion" to explain liberty (or freedom). This is not to imply that they always or only explain liberty in this way. In *The Ethics of Liberty*, here is Murray Rothbard approving of Hayek's definition of freedom:

... F.A. Hayek attempts to establish a systematic political philosophy on behalf of individual liberty. He begins very well, by defining freedom as the absence of coercion... (219)

In *Capitalism: The Unknown Ideal*, Ayn Rand writes,

...freedom, in a political context, has only one meaning: *the absence of physical coercion*. (Ch.3, 43; emphasis in the original)

In his *Capitalism and Freedom: Fortieth Anniversary Edition*, Milton Friedman asserts that

Political freedom means the absence of coercion of a man by his fellow man. (15)

In *The Philosophic Thought of Ayn Rand*, Douglas J. Den Uyl and Douglas B. Rasmussen say,

...liberty is by definition an absence of coercion... (212)

In *Classical Individualism: The Supreme Importance of Each Human Being*, Tibor Machan also says:

...liberty is by definition an absence of coercion... (184).

And if this use of "coercion" does not (or did not) happen relatively often with many libertarians, then why was this complaint made, on his blog, by Stephan Kinsella?:

I must confess that one of my nits is the use by libertarians of the word "coercion" to mean "aggression." (<http://www.stephankinsella.com/2009/08/the-problem-with-coercion/>)

Not that “aggression” is much clearer of course; not without a very charitable interpretation and a proper theory of liberty.

The criticisms continue:

He then tries to use this straw-man to talk of defense. Well defense is another matter.

As we have seen, it is not a straw man. And it is not “another matter” given that the relationship between coercion and defence is being discussed.

Of course if you steal from me and then you are punished this technically infringes on your property, but this is what we have the law for!

If someone steals, then it is not necessary within libertarian theory that he be “punished”. He needs to pay full restitution, assuming the victim or his assigns require it. However, that can include a risk-multiplier (relating to the chance of evading detection). And some of it might be taken in the form of retributive restitution. This is now covered in this book (Lester 2015, chapter 27) and Lester 2012 (chapter 3, 108-120). Neither does this entail that this “infringes on your property”. Because if restitution is due from someone, then it is not infringing on his property to take it: that property has been forfeit. It might well be that many such matters would be dealt with via libertarian law. But it should be noted that observing liberty objectively entails such restitution prior to any legal system or even property itself. All such precise philosophical distinctions are lost within the crude, conflationist, cult of mainstream libertarianism.

I am not claiming to have an exact position on the exact punishment for every aggressive action, neither is anybody theoretically,

In fact, the theory of restitution in the cited chapters of Lester do, in principle, claim “to have an exact position on the exact [restitution] for every [illiberal] action”. This is an example of the comprehensiveness, precision, and fecundity of the new paradigm.

And his point on fraud no[t] being coercive is irrelevant because of the tie to property. One can not engage in fraud without engaging in misrepresentation of property ... whether that be money, one’s person, or any object.

The *relevance* is that the *problem being discussed* was whether the absence of “coercion” is sufficient to characterise libertarianism. And in normal English such “misrepresentation” is neither an act of coercion (the use, or threat, of force to compel behaviour) nor aggression (the offensive use of force on a person).

Lester is then quoted (Lester 2014, chapter 10, p. 158-159):

--- ‘What about “aggression”? There seems to be no similar inherent problem with saying that libertarians are against aggression [...] The problem occurs when libertarians try to explain “aggression.” For they then typically do so in terms of acts that flout legitimate property rights. There are really four mistakes in one here. First, as it stands, this view is compatible with every system of property: they are all perceived as “legitimate” from within themselves. Second, to some extent it appears to be circular: to simplify somewhat, aggression is flouting legitimate property and legitimate property is what is acquired without using aggression (and throwing self-ownership, “homesteading,” and “labour-mingling” into the mix does not help). Third, there is a conflation of the factual and objective with the moral and legal: for it ought to be possible to say what libertarian liberty is—in theory and practice—without at the same time insisting that it is by its very nature “legitimate.” Fourth, there is no independent theory of libertarian liberty from which it is possible to deduce what kinds of property are libertarian (whether or not they are “legitimate”).’ ---

The following response is made:

I mean, really, is he joking? ‘throwing self-ownership, “homesteading,” and “labour-mingling” into the mix does not help’? Of course it does! These things are what allows for what property is!



This response does not relate to the *given discussion* of ‘liberty’ and ‘aggression’. It is also false. ‘Property’, in the sense being discussed, is something to which someone has legal title. This does not entail how that title arose. And property is logically possible without assuming “self-ownership, “homesteading,” and “labour-mingling”.

Admittedly they may or may not be the ‘best possible’ definition, but they are as logical and helpful as we have to this date.

They are not a “definition” of “property” at all. If applied, they give rise to a certain kind of property. How far that is libertarian is only possible to say with an independent theory of liberty. The way to refute a philosophical analysis is carefully to dissect it and show where the errors are. Instead, we are offered a reassertion of the very muddle that is being analysed.

When he says

--- ‘The fundamental sense of “liberty” (or “freedom”) that libertarianism implies is too abstract to be explained in terms of property—even self-ownership—first and foremost’ ---  
this is precisely wrong! He is literally saying that liberty can not be explained. So how would [h]e explain this ‘abstract’ thing?

There is an explanation in the opening sections of chapter 10 of Lester 2014, which is just what is supposedly being criticised here. But it is often useful to try again. In any case, there is a difference between a Hobbesianesque approach and a Lockeanesque approach that also needs to be explained (this is not about what Hobbes and Locke actually wrote, but it resembles their contrasting fundamental approaches to liberty: each took one of the two main concepts of human liberty). In both cases here, this is considering what interpersonal liberty is in theory and what it entails in normal practice as matters of fact. The moral status of liberty is an entirely separate question that is not discussed: for it is an error to conflate the factual and the moral issues.

#### *A pre-propertarian Hobbesianesque approach to interpersonal liberty*

As we have seen, in terms of human actions a Hobbesianesque approach to interpersonal liberty is more or less zero-sum: if you have more interpersonal liberty, then someone else has less. A slave-owner qua slave-owner has more liberty where, and to the extent that, his slaves have less: whatever he can enforce that the slaves cannot prevent. Such zero-sum interpersonal liberty of action cannot be maximised or protected, it can only be competed over or redistributed for some non-libertarian reason (such as utility or equality). Therefore, it cannot be the liberty that most libertarians intend.

However, if the subjective intensities of interpersonal constraints are taken into account, then this does seem to allow for a libertarian interpretation (these aren’t interpersonal intensities, beyond assuming that people are very broadly similar). For now interpersonal liberty can be interpreted as being free from all people-imposed constraints on our preference-satisfactions (that is, people don’t stop us from getting what we want). If no one is constraining us in this way, then we have full interpersonal liberty. But people’s preferences can clash. I might prefer to have you ultimately under my control; a ‘slave’, for short (although, strictly, slavery is a property concept). And you might prefer not to be my ‘slave’. In the event of such clashes, the most ‘libertarian’ (i.e., liberty-observing) approach is to have whichever option is the lesser constraint. Almost universally, it is a greater constraint on one’s preference-satisfactions to be someone’s ‘slave’ than it is to be denied the possession of a ‘slave’. If it were not, then people might take an evens gamble on being a ‘slave’ for the chance of having a ‘slave’. But very few people would think that to be a prudent bet. People typically think that being made into a ‘slave’ would be a disaster. And not having a ‘slave’ is, at most, a relatively minor constraint (especially as trade is far more productive than having slavery). Therefore, such liberty is maximally observed if people have ultimate control of their own bodies (and their bodies are, more or less, what they are). This factual consequence is before the legal institution of property needs to be assumed. However, an efficient way to protect this ultimate control of one’s body is then to assign property rights: to declare self-ownership.

A similar type of argument also applies to the control of all other resources. It is a greater constraint on our preference-satisfactions for other people to deny us ultimate control of resources we

objectively possess (but do not yet own) by use or by voluntary transfer, than it is to be denied free access to all resources (especially as that would result in an immediate tragedy of the commons). Again, this factual consequence is before the legal institution of property needs to be assumed. But in order to better protect this control of such resources, it is efficient to have property rights.

In short, we can derive both self-ownership and private property (roughly, by initial use and thereafter voluntary transfer) because, contingently (for we can imagine worlds where this is not so), they maximally observe such interpersonal liberty. They are not what liberty is in theory, but what maximum liberty entails in practice. And once self-ownership and such property are thus derived from observing liberty, we can use those as rules as to what is 'libertarian' (that is, factually liberty-instantiating). It is only necessary to go back to the abstract theory of interpersonal liberty to answer philosophical questions or in occasional problem cases.

It is now possible to make an additional and separate ideological observation: as (almost) everyone's "rational" (that is, prudent) preferences lead in this direction, this then allows for a libertarian social contract on Hobbesianesque assumptions (and this is, more or less, Jan Narveson's approach).

#### *A pre-propertarian Lockeanesque approach to interpersonal liberty*

Here interpersonal liberty is interpreted as being free from peoples' *proactively*-imposed constraints on our preference-satisfactions (that is, people don't initiate interferences—whether intentionally or not—in our getting what we want). If no one is proactively constraining us in this way, then we have full interpersonal liberty. Now, if someone 'enslaves' me (i.e., proactively imposes ultimate control on me), then that is a proactive constraint on me, on what I am. He is not thereby exercising his interpersonal liberty, as here conceived, but exercising power or license over another person. And if I manage to prevent my 'enslavement', I am not proactively imposing on my would-be 'slave-owner', but merely reactively defending myself (the body that I, more or less, am) from him. Hence, ultimate control of oneself follows from observing such liberty. This factual and contingent consequence is before needing to assume the legal institution of property. But in order to better protect this ultimate control of oneself, we can institute self-ownership.

When it comes to external resources, matters are also slightly different. Once we have begun to use a resource for some purpose, then it typically proactively constrains us significantly if someone attempts to seize that resource from us. By controlling it, we might proactively constrain him too, but—more or less—only to the extent of the unmodified resource's value to him. For to be denied a benefit that someone else has somehow produced, is not to be proactively constrained (to simplify matters, this ignores discussion of costs relating to envy, lost status, frustrated desire, etc.). Therefore, it is typically a lesser proactive constraint on people's preference-satisfactions to allow ultimate control to the initial user (and thereafter control by voluntary transfer), than it is to have common access to all resources (and the consequent tragedy of the commons). This means that it maximally observes liberty to allow such personal ultimate control of external resources. This factual and contingent consequence is before needing to assume the legal institution of property. But in order to better protect liberty, it is efficient to have property rights in such resources.

In short, we can again derive both self-ownership and private property (roughly, by initial use and thereafter voluntary transfer) because, contingently (for we can imagine worlds where this is not so), they maximally observe such interpersonal liberty. They are not what liberty is in theory, but what maximum liberty entails in practice. And once self-ownership and such property are thus derived from observing liberty, we can use those as rules as to what is 'libertarian' (that is, factually liberty-instantiating). It is only necessary to go back to the abstract theory of interpersonal liberty to answer philosophical questions or in occasional problem cases.

#### *Is one of these a better pre-propertarian approach to interpersonal liberty?*

In light of these two explanations of interpersonal liberty, two questions immediately arise. Are these two approaches fully equivalent in terms of what they entail in practice? And is one to be preferred to the other for some reason?

Both conceptions of interpersonal liberty appear—at least initially—to have the same practical results. And, thus, one could explain interpersonal liberty using either. With the Hobbesian approach, we still have to say that a slave-owner is having his liberty lessened if his slaves are freed; just not as much liberty as his slaves gain by being freed. Similarly, a would-be person-killer has less liberty if his target-person escapes; just not as much as his target-person preserves his liberty by escaping that killing. This seems to be a logically coherent individualistic and egoistic approach (thereby, very roughly in accord with Hobbes's outlook). However, it is not how people mainly think about interpersonal liberty—either as self-described libertarians or otherwise. People tend to think about interpersonal liberty in the more social Lockean way. They typically think that when someone escapes proactively-imposed control ('slavery'), he gains more liberty; but his previous controller ('master') has only lost his power or licence over him. And the would-be person-killer does not have his liberty lessened if his target-person escapes him; his target-person's liberty is simply preserved. Hence, it is closer to the main libertarian, and also more popular, approach to view liberty as the absence of people's proactively-imposed constraints on our preference-satisfactions (for short, no proactively-imposed costs). And where a complete absence is impossible (because there is a clash of proactive constraints: either you suffer the pollution of my fire, or I suffer having no warmth and no cooking) then liberty can only be maximised. It is very important not to misunderstand this final point. Dealing with clashes by *maximising* liberty might sound collectively consequentialist (at least, in some non-moral sense). However, that can't be right, for no one's liberty is curtailed in order to promote the maximum liberty of others in general. It's just that maximisation is all that is possible when specific liberties conflict.

All that said, we can now mention morals—but only to make a factual point. For the Lockean conception of liberty seems significantly more morally attractive to people, as a matter of fact. And that fact probably means that it is more stable and less costly to preserve. Hence, more liberty will result. So that is one important practical difference, after all.

Nevertheless, there are—as mentioned—some Hobbesian libertarians (although they would probably not give the same precise account as here). Jan Narveson and Hillel Steiner are contemporary examples. And there are also anti-libertarians that take a Hobbesian approach to liberty. The late G. A. Cohen appears to be an example. So it is useful to be able to explain these two approaches. Doubtless, this important distinction could be further clarified and corrected, especially in response to criticisms. It is also possible that one of these approaches is in some way not logically coherent. In which case, it is good to have the other to fall back on. But if they are both logically incoherent, then that would mean starting again. For a tacit pre-propertyarian conception of liberty seems necessary to distinguish forms of property that fit liberty from ones that don't. And so an explicit account should be possible.

### Recapitulated criticisms

I can not be more explicit than I have been [...] so as a recap to reply to in bullet points -

- one can not control what other people think and therefore

by Lester's own words 'To own an "ideal object" (or abstraction, or meme) is to have control over its use' this actually CAN NOT BE SATISFIED BECAUSE ONE DOES NOT HAVE CONTROL OVER WHAT OTHER PEOPLE THINK. I thought scarcity was what you were not understanding but now think it must be this. If you can refute this bullet-point please do, but at least directly address it. Tell me how you can stop me thinking something.

Strictly, Lester should have written "*legal right of control over its use*". And the flouting of a legal right does not mean that there is no legal right. Nevertheless, there are all sorts of practical limits on the protection of IP (as with physical property too: that cannot be perfectly protected either), but that does not undermine IP insofar as it is practical. Fortunately, it does not, in any case, appear to be a practical problem for IP that people merely think about someone's IP.

- A theory of property can not be created without the use of some concept of liberty

Property is a legal right of use and control of something. Liberty doesn't need to be mentioned.

and a theory of liberty can not be created without some use of the concept of property,

As we have seen at length, this is false.

at the very least the property of one's own body (as Lester admits).

This was explicitly denied. That each person must have ultimate control of his body is first derived as a practical consequence of observing theoretical interpersonal liberty. Institutionalising this in law as self-ownership, for better protection, is a separate and further practical step.

- The objective concept of property makes sense to apply in law because it is unequivocal in that it has physical boundaries.

Or intellectual boundaries, in the case of IP.

There is no argument about whether I have infringed on your property if I move your physical property, or use it,

Or use IP without the owner's consent.

- The subjective concept of 'proactive imposition' is impossible to determine since anyone can assert that any proactive action (any action at all) can impose on them under any circumstances.

For one thing, the concept of the reasonable person (as used in law) would need to be a practical limit on taking such assertions seriously. And so would the likely long-term consequences to liberty. However, the main answer is that—as has been explained—once certain types of property have been derived as practically instantiating theoretical liberty, then those types of property become libertarian rules. We would, at most, depart from them only if there were very strong evidence that liberty was not thereby being preserved. This can be understood as a sort of rule libertarianism as opposed to act libertarianism, but it is initially factual or positive (about what actually instantiates liberty) rather than moral or normative (an advocated principle). Apart from not being collectively consequentialist, it is analogous with the, well understood, distinction between rule utilitarianism and act utilitarianism.

## Conclusion

As the above exchanges illustrate, the fundamental philosophy involved with mainstream libertarianism is a refuted and degenerating research programme. And the philosophy involved with the new paradigm is an unrefuted and highly fruitful one. The primary difference concerns fundamental philosophical distinctions. Where mainstream libertarianism has omissions, conflation, and circularities, the new paradigm explicitly distinguishes the following things: 1) abstract/theoretical interpersonal-liberty-in-itself: a) the non-normative and pre-propertyarian absence of interpersonal proactive constraints on want-satisfaction, and b) that if clashes occur then such liberty can only be maximised, 2) practical/contingent derived applications of this: a) pre-propertyarian consequences, and only then (b) propertyarian institutions, and 3) moral/rights issues. But a secondary significant difference is that mainstream libertarianism attempts various supporting justifications, while the new paradigm accepts that it is logically impossible to transcend a conjectural framework (for all observations, explanations, arguments, and even inferences, necessarily rest on assumptions) and so it uses the critical rationalist epistemology. However, despite these radical and important differences, new-paradigm libertarianism is not fundamentally ideologically at odds with libertarianism itself (although that is often the mainstream misperception). Consequently, the new paradigm could take the path of first being ignored, then ridiculed, then seriously criticised, and only finally accepted as significant theoretical progress within libertarianism. The final stage, at least, might require a new generation of libertarians.

## Addendum: rebutting two further brief critical responses<sup>[3]</sup>

*Responses to Sophie R's comments on the video-lecture:*

Consider whilst watching if any of these questions were answered (which were Andy's key questions):

All of them were.

- A thought can not be practically scarce, or if so, how (other than it may only be thought of an amount of times equal to the number of people on the planet at any one given moment of time, which to me is hardly 'practically scarce')?

This isn't about thoughts; it's about abstractions. Each abstraction is one thing. Ownership of a particular abstraction is scarce, just as ownership of a particular piece of land is scarce.

- Why should the right (in legal terms) of the thinker, who has willingly allowed his thought into the public ear, trump that of the practical man innovating this idea, with his own hands and property?

Property rights strongly tend to internalise externalities, especially if they are premised on doing just that. The owner tends to bear the costs and enjoy the benefits. This promotes economic efficiency: the optimal allocation of resources. It also promotes liberty: people not proactively constraining each other. This applies to intellectual property just as much as to physical property. It is arbitrary to presuppose that only physical property can be real property. To expect a "thinker" to keep his abstract products hidden or lose any property claim to them, is analogous with expecting a "practical man" to keep his physical products hidden or lose any property claim to them.

- How can one define liberty

This isn't about a definition of the word 'liberty': how the word 'liberty' is used. It's about a theory of liberty: what interpersonal liberty is, both as an abstraction and what that abstraction entails when applied. Definitions are about the meanings of words; theories are about descriptions of the world. And the world includes the realm of all abstractions (which is also, incidentally, inhabited by all the entities of logic and mathematics). Philosophy cannot be done simply by looking in the dictionary, or providing a stipulative definition.

- without reference to property

Easily, apparently. There is no mention of property here, for instance: <http://dictionary.reference.com/browse/liberty?s=t> But the philosophical point is that it is coherent, and useful, to separate a theory of interpersonal liberty from any reference to property.

- without re-defining liberty as one could redefine any word? (Think Lenin and his 'first we confuse language' control technique.)

The irony here is that tendentious definitions are being used instead of answering philosophical arguments with philosophical arguments.

- When in some arguments one decides that one owns oneself (as seems to be one of the foundational results within the definition of the age-old common conception of 'property' itself)

This seems to be asserting that the very "definition" (or is it a "conception"?) of "property" entails self-ownership. It would be interesting to see the argument. It seems to imply that slavery is either impossible or incoherent.

- and in other arguments define property and liberty in such a way as to reveal a deeming of self-ownership as making no sense,

Has anyone ever done that?

- how can this incongruity be reconciled?

Perhaps it can't. Is that a relevant problem?

- Since 'ownership' of property - the thing that is protected by law - is that of having the ability to destroy that 'thing' (unless again we vastly redefine the English language),

Is there any dictionary that defines "'ownership' of property" to include "having the ability to destroy that 'thing'"? In any case, this would imply that no indestructible object could be owned.

how can one destroy what Jan calls an 'ideal object'?

So that was another tendentious definition presented as being part of "the English language". Abstractions cannot be destroyed, of course.

This also points to the term 'collective ownership' being an oxymoron to the point that one could own shares in something but no-one would have the right to destroy it.

It would depend on what any "collective ownership" contract said. Some destruction, under some circumstances, might even be obligatory.

I have admitted that one could form a new level of 'property' that could be collectively shared, but this would not be ownership, the item would not be 'owned' by anyone at all.

Ownership exists to the extent that one has legal rights of use and control. Any number of people might share these with respect to any object, physical or abstract. What is forbidden, allowed, or compulsory as regards any destruction—or any other aspect—could be explicit in the relevant contract (but it might also be unclear and require arbitration to decide).

- He keeps expressing how his thoughts are only theoretical and philosophical rather than practical and legal.

No. The theory of abstract interpersonal liberty is explicitly used to derive pre-propertarian practical implications and then propertarian legal ones. (A version of the text will appear in various places in due course.)

This seems odd to me for two reasons, the first at base logical and the second a conjecture in passing: any correct and complete theory will 'work' in practice,

If a true theory has practical applications, then they must "'work' in practice".

and is not the very use of both 'liberty' and 'property' in resultant concept deep-rootedly a practical matter?

Not all aspects of "'liberty' and 'property'" will involve a "practical matter". Not all philosophical aspects, for instance (such as thought experiments). But a large part of the purpose of moral, social, and political philosophy is to have practical implications.

And if not, which from some angles may indeed be the case, is one not in the realm of 'personal ethics' shall we call it, rather than 'co-operative morals'?

There is no moral advocacy in the philosophical derivation of practical and propertarian conclusions from the abstract theory of liberty. By ironic contrast, the idiosyncratic and tendentious definitions (presented as being part of the "English language") are themselves "in the realm of 'personal ethics'"—with impractical consequences as regards intellectual property.

*Responses to Andy Curzon's further comments:*

In response to this

--- 'To expect a "thinker" to keep his abstract products hidden or lose any property claim to them, is analogous with expecting a "practical man" to keep his physical products hidden or lose any property claim to them.' ---

it is not 'analogous' to any meaningful measure since abstractions are not practically scarce.

Each abstraction is only one abstract thing. The producer (discoverer/inventor/creator) of the abstraction can have one sole practical use for it (we may assume): to have a marketable property right in his product. That practical property-right use is scarce and rivalrous.

If I can employ my scarce resources to build the result of your idea (an invention for example) then you do not lose the ability to use the idea, but if you use my pencil I lose the control of that pencil.

I “lose the ability to use the idea” as marketable property: the sole use (we may assume) for which I produced it.

From my point of view an abstraction can not be controlled and as such may not be owned.

It is clearly possible to control the use of abstractions to a significant degree. That is what current IP law does now, albeit imperfectly with respect to a proper libertarian theory of liberty.

I think we shall have to agree to disagree on this one Jan! :)

“Thou know’st we work by wit and not by witchcraft,  
And wit depends on dilatory time.”

It also depends on seriously attempting to precisely fault any given arguments, rather than resorting to futile repetitions of the views that have been criticised. See what you think in a few years, Andy.

## Notes

[1] Various private communications in recent years.

[2] See, e.g., Lester 2012, 95-105. Nozick suggests the same criterion with respect to patents, but based on an interpretation of the “Lockean proviso” (as he calls it) and “an adequate theory of justice” rather than an explicit theory of liberty (Nozick 1974, pp. 178-82).

[3] Both below the talk on youtube.com: [https://www.youtube.com/watch?v=75gZBwx\\_AYY](https://www.youtube.com/watch?v=75gZBwx_AYY)

## Bibliography

Lester, J. C. [2011] 2015. *Arguments for Liberty: a Libertarian Miscellany*. Buckingham: The University of Buckingham Press. Second, revised and expanded, edition.

———. [2000] 2012. *Escape from Leviathan: Libertarianism without Justificationism*. Buckingham: The University of Buckingham Press.

———. 2014. *Explaining Libertarianism: Some Philosophical Arguments*. Buckingham: The University of Buckingham Press.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. Oxford: Basil Blackwell.