LEFT LIBERTARIANISM FOR THE TWENTY-FIRST CENTURY

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Abstract

There are many different kinds of libertarianism. The first is right libertarianism, which received its most powerful expression in Robert Nozick's *Anarchy, State and Utopia* (1974), a book that still sets the baseline for discussions of libertarianism today. The second, I will call *faux* libertarianism. For reasons I will explain in this paper, most "man-on-the-street" libertarians and most politicians who claim to be libertarians are actually this kind of libertarian. And third, there is left libertarianism, which is what I shall spend most of this paper explicating. But I will not simply be surveying the views of those who identify themselves as left libertarians and putting this forth as if I were engaged in an exegetical exercise. Instead, what I shall set forth is a kind of manifesto, a statement of why I consider myself a left libertarian, one that takes left libertarianism well beyond where it was left around the end of the last century by the previous generation of left libertarians. My hope is to provide those who find certain left libertarian ideas attractive a guide by which they can explain and harmonize their own views, recognize left libertarianism as a distinct comprehensive political doctrine, and feel more open to identifying themselves as left libertarian too.

Keywords: labor theory of property, reciprocity, voluntariness, anticompetitive behavior, freedom of speech, liberty, toleration, and neutrality.

INTRODUCTION

There are many kinds of libertarians. Indeed, it may be the case that no two people who consider themselves libertarians hold exactly the same set of views. Nevertheless, libertarianism can still be usefully divided into three broad categories. The first is right libertarianism, which received its most powerful expression in Robert Nozick's *Anarchy, State and Utopia* (Nozick 1974). In that book, Nozick sought to distinguish libertarianism from anarchism, and argued that a minimal state, limited to the enforcement of contracts, the protection of property rights, and the prevention of fraud, theft, and violence, could arise

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without violating anyone's natural rights. He also set forth a libertarian conception of distributive justice, which—consistent with the role he assigned to the minimal state—provided a view of the extent to which government redistribution of income and wealth was a legitimate activity. Nozick famously did not think it was, except as a remedy for prior rights violations. Nozick's explanation of his position was intended to provide an alternative to the highly-influential liberal egalitarian view that had then only recently been proposed by John Rawls in *A Theory of Justice* (Rawls 1971). Now, almost 50 years on, I think it is fair to say that Rawls's book and Nozick's are widely viewed as the two most important works of political morality of the twentieth century, and they continue to frame the debate about these issues still.[1]

The second kind of libertarianism afoot today I call *faux* libertarianism. This term is my own invention, and as far as I am aware, no one else currently uses it. Most man-on-the-street libertarians, and most politicians who claim to be libertarians, are this kind of libertarian. And while these libertarians think of themselves (and, unfortunately, are thought of by others) as right libertarians, they are not, for they mistakenly think that right libertarianism is a consequentialist theory based on the idea that we should maximize what Isaiah Berlin called "negative liberty," our ability to do whatever we have the capacity to do free from interference by other human agents (Berlin 2002). Actually, right libertarianism, like left libertarianism, is a deontological theory based on the principle of self-ownership—the idea that we each own our selves fully and completely, so that no other person can have rights in our bodies and we can have no rights in the body of anyone else. (Nozick 1974; Reiff 2013, p. 285).[2] From the fundamental principle of self-ownership, both right and left libertarianism then derive various other principles, and I shall say more about these later. But for now I will merely note that right and left libertarians each conclude that many kinds of interference with negative liberty are indeed consistent with self-ownership and are therefore permissible, although some are not.

Faux libertarians, in contrast, simply condemn or support infringements of negative liberty according to their personal preferences. For example, *faux* libertarians object to the regulation of anti-competitive, discriminatory, or physically dangerous business activities, yet advocate limiting unionization and the distribution of information about contraception or the existence of racism and its effects. I shall say more about this later too, but for now I merely want to make clear that for purposes of definition, I am using the term *faux* libertarianism to refer to what is actually a common but unprincipled collection of biases and prejudices.

The third kind of libertarianism, and the one that I shall focus on in this paper, is left libertarianism. There are not nearly as many left libertarians as right libertarians today, but our numbers are growing, even though there is yet no widely-accepted definition of what, exactly, left libertarians are supposed to or even tend to believe. Indeed, the last attempt to set forth a comprehensive discussion of the history of left libertarianism and some of its contemporary expressions came around the close of the last century (see Vallentyne and Steiner 2000a and b). But the purpose of this paper is not to survey subsequent developments and put these forth as in some exegetical exercise. Rather, it is to expand the scope of current left libertarian thinking. What I will set forth is a kind of manifesto, a statement of why I consider myself a left libertarian. In doing this, I am not claiming that someone *must* believe these things in order to be a left libertarian. My objective is far more modest than this: to describe a set of ideas and explain why I think these ideas are left libertarian, even though they go well beyond where many left libertarians now stand.

Such a contemporary statement of left libertarianism is overdue, and not only because the literature currently provides no easily accessible statement of what left libertarianism might entail. It is also overdue because one of the criticisms that left libertarianism received when it last gathered some attention is that it was neither comprehensive nor distinctive enough to be treated as a separate theoretical categorization (see e.g. Fried 2004).[3] Indeed, until now, the

primary if not sole difference between left and right libertarians has been seen as the status each group assigns to unappropriated natural resources in the state of nature. Important and wide-ranging ramifications are claimed to flow from this, and I shall explain these in a moment, but I think it is fair to say that this distinction has proved too technical and uninspiring to support an independent political doctrine capable of capturing the public imagination. What I intend to offer in this paper, in contrast, is a much thicker, more nuanced, and multi-faceted way of understanding the difference between left, right, and *faux* libertarianism. I shall show that in its more developed form, left-libertarianism has important resources that can be used to advance currently stalled liberal egalitarian efforts to create a more just society, even though libertarianism has often been thought of as an enemy of such efforts.

One final introductory point: there are two main elements to libertarian political theory, and indeed, all forms of political theory. The first is about the organization of social cooperation, the role of the state, and what one individual can do to another. This element offers principles about the bounds and demands of liberty and the corresponding scope and nature of individual right. The second element is about distributive justice—how the benefits and burdens of social cooperation should be distributed within society. This is an account of the demands and limits of equality. Both areas of inquiry are of course related to one another, for redistributing the benefits and burdens of social cooperation, if it is going to be done, is probably going to have to be done by the state. But this is typically seen by right libertarians as an interference with liberty and/or a violation of individual right. On the other hand, left libertarians reject the view that there is often if not always a conflict between redistribution and liberty. Given the potential supportive relationship between these two areas of political thought for left libertarians, then, it might seem inconsistent for me to treat these two aspects of libertarian thought as separate and at least quasi-independent. But doing so will make the

structure of libertarian thought easier to understand. So at least initially, this is how I shall proceed in this paper.

In Part I, I shall focus on the libertarian concept of distributive justice, and show how right, left, and *faux* libertarians differ with regard to a variety of elements of this concept, not merely with regard to the status of unappropriated assets. In Part II, I shall move on to the differing libertarian perspectives on the role of government in developing and enforcing principles of social cooperation. In this part, I shall discuss the relationship between libertarianism and liberty, between libertarianism and economic liberalism, and how right and left libertarians differ with regard to their conception of the proper size of government. In Part III, I shall take up some questions of individual right, including whether anticompetitive conduct should be treated as a violation of individual right and therefore as something the minimal state would be expected to police. I shall also discuss the differing libertarian perspectives on freedom of association, free speech, and freedom of religion, and whether these freedoms can be used to limit rights based on a conception of equality. Finally, in Part IV, I shall return briefly to the issue of distributive justice and, using some additional insights from the discussion of libertarianism and liberty, say more about the relationship between left libertarianism and liberal egalitarianism.

I. LIBERTARIAN THOUGHT AND DISTRIBUTIVE JUSTICE

Nozick famously began his discussion of his libertarian theory of distributive justice by distinguishing it from Rawls's then already famous theory of distributive justice, which Rawls called "the difference principle." He characterized Rawls's theory and others like it as "end-state patterning theories" (Nozick 1974: 153-160). In other words, these theories, Nozick pointed out, were designed to look at the state of the world and ask whether the social and economic inequalities that then existed were just. The answer to this question, in turn, depended on whether the inequalities fit or departed from a particular pattern, which the relevant theory

defined as just. Nozick then contrasted this approach to the approach embodied by what he called "an historical entitlement theory" of distributive justice. Instead of looking at whether the existing pattern of distribution is just, historical entitlement theories ask how people had come to own things. If they had done this justly, then the distribution was necessarily just regardless of whatever pattern into which it now happened to fall. Accordingly, an historical entitlement theory of distributive justice had three principles:

1. A principle of just initial acquisition—an account of how people came to justly own things in the state of nature.
2. A principle of just transfer—an account of how things could be justly transferred from one owner to another.
3. A principle of rectification—a requirement that violations of either or both of the first two principles must be remedied if justice is to be preserved.

Nozick then went to on to supply his own version of each of these three principles, and these have remained the basis of right libertarian views on distributive justice ever since.

a. The Principle of Just Initial Acquisition

We start with the principle of just initial acquisition. To give content to his version of the principle, Nozick borrowed John Locke's labor theory of property, the idea that one appropriates natural resources and thereby makes them one's property by mixing one's labor with them. This fits nicely with the idea of self-ownership, you see, because if one owns one's person fully and completely, one also owns one's labor fully and completely, and it seems natural then to think of coming to own unowned natural resource by mixing one's labor with them. Nevertheless, Nozick begins by criticizing the labor theory, showing that there are all sorts of indeterminacies here. We only labor on discrete parts of a natural resource, so why would this give us ownership of the whole resource? Why does mixing your labor with property cause you to own the property rather than lose the labor? Is there some threshold that must be met in order to create ownership rights? Why are we focusing on ownership of the resource

rather than on who has the right to enjoy the added value our labor has created? Why does the ownership of property have to be as inviolable as self-ownership? Is there a difference between labor and consumption—if I dip my hand in a stream and drink from it, have I labored on the stream or merely consumed a handful of it? And so on (see Nozick 1974, 175). But then, despite having given the labor theory a severe drubbing, Nozick simply abandons these concerns and goes on to use the theory as if it were unproblematic. And right libertarians have continued to do so ever since.

In fairness, I acknowledge that most left libertarians are prepared to accept the labor theory of property too. But in contrast to right libertarians, they recognize the indeterminacy concern as a live issue and continue to work on ways to resolve it. One possibility, for example, might be to supplement Locke's labor theory of property with Hegel's theory of property as personality. For Hegel, acquiring a property interest in something required one to change it some way, to invest it with one's own identity, distinguishable from the identity of others (See Knowles 1950; Munzer 1990; Waldron 1990). It is not merely your labor that must be mixed with a natural resource to transform its status, but your personality. To the extent what your labor created was an expression of your personality, of your *self*, it became your property. To the extent it did not, no ownership rights would be created. If you build a sandcastle on the beach, you own the castle, but not the beach.

I should note here, however, that Nozick did not accept Locke's labor theory of property whole hog. Nozick criticized what has come to be called the Lockean proviso, under which mixing your labor with natural resources did *not* give you ownership rights unless there was "as much and as good" left for everyone else (Locke 1960). But Nozick worries that this means you cannot appropriate the last resource, because then there would not be as much and as good left for anyone else (Nozick 1974: 176). And if you cannot appropriate the last resource, then you cannot appropriate the next to last, or the resource before that, and so on (see Simmonds

2014:98-100). In other words, the proviso undermines the labor theory of property in its entirety, and effectively means that no one can appropriate anything. Nozick accordingly rejected Locke's proviso and offered a revised one in its place: appropriation is prohibited only if this would leave others worse off than they would be in a state of nature where no one could appropriate anything at all.

Nozick's revised proviso, however, has problems too. Where the Lockean version of the proviso was the exception that swallowed the rule, the Nozickian revision is completely toothless. It will almost never be the case that those with nothing left to appropriate would have been better off in a state of nature full of resources that no one could appropriate, for then they would not be able to enjoy the improved standard of living that appropriation of resources by others allows, even if they now have to work for others for a living (see Simmonds 2014:99-100). Accordingly, Nozick's revised proviso simply assumes the justness of the *laissez faire* state, rather than providing an argument for this.

Right libertarians seem to be unconcerned by this problem, but it is something that most left libertarians find troubling. My view is that what Locke was trying to get at here is indeed an important restriction on the scope of property rights, but it is something he expressed more coherently elsewhere as the principle of waste. Under that principle, one can lose one's property rights if one does not make productive use of the property one owns. For example, if you were to develop a cure for AIDS but keep the formula secret, refusing to make it available to those suffering from the disease at any price because you thought it mostly infected gay men and believed that gay men should be allowed to die as punishment for their "sins," you could lose your common law property right in the formula and thereby the ability to prohibit others from manufacturing it. Similarly, if one horded cash instead of putting it to productive use, as the rich often do and as they are currently doing in large amounts, one could lose any claim to

ownership of that cash. At least one would have no right to complain if these unproductive assets—assets that were going to waste—were subject to some sort of "idle wealth" tax.

Of course, there is much work to be done here to draw determinate and defensible lines—how productive does the use one makes of an asset have to be to avoid an idle wealth tax or the forfeiture of one's property right? What is meant by making an asset "productive" in the first place—should a subjective or an objective standard be applied? And I am not suggesting this is the only way to take a left libertarian position with regard to the content and reach of the proviso. I am merely illustrating how the left libertarian approach might lead us toward policies that have highly progressive effects.

But let us return to the pre-appropriation status of natural resources. Right libertarians believe that in the state of nature, unappropriated natural resources were unowned. But unappropriated natural resources could also be conceived of as jointly owned. Indeed, Locke himself initially describes natural resources as originally given to man by God *in common* (Locke 1960, sec 25). Later, Locke rejects this idea of common ownership because he thinks this would give each individual joint owner a veto over appropriation by others and thereby render self-ownership, which Locke sees as fundamental, merely formal and empty, for no one could mix their labor with natural resources and legitimately create things that improve on the state of nature. (Locke 1960, sec 29). Following Locke, then, Nozick also rejects the idea of common ownership (see Cohen 1995:14).

But Nozick does not take this attitude when he later argues that the state can prohibit risky behavior as long as it compensates those subject to such a prohibition for the possibility that they might never have violated anyone's rights (see Nozick 1974:78, 110-113). Indeed, this is the whole basis of his claim that the dominant protective association—his stand-in for what will become the minimal state—can compel independents (those who refuse to join the dominant protective association) to join the association and pay dues and, once they do, be

provided protective services in return. Many people have raised questions about this argument, but there are more defensible justifications for concluding the same thing (see Reiff 2020: 48-50). The important point, however, is that if Nozick does not see compulsion in this case as unjustified, then it is hard to see why a similar kind of compulsion (the forced forfeiture of non-appropriators' undivided property interests in jointly-owned natural resources) would not also be justified as long as compensation were paid to the non-appropriating joint owners. So even under the left libertarian view, people could still come to own things in the state of nature without first getting the consent of all other joint owners (see e.g. Brody 1983: 71-87).[4]

Whether the appropriate amount of compensation (or indeed any) has been paid, however, remains a live issue. Left libertarians argue that it has not, and there is accordingly a great deal of rectification to be done. By relying on the principle of rectification, left libertarians accordingly get to the same place that liberal egalitarians do by relying on end-state patterning theories of distributive justice. For reasons I will get to in a moment, however, right libertarians would end up at the same place too if they took the principle of rectification seriously, because even they concede that the principle of just initial acquisition was widely violated even if natural resources were initially unowned. The differences flowing from which status one assigns unappropriated natural resources in the state of nature does not therefore seem to be as consequential as the previous generation of left libertarians claimed.

b. The Principle of Just Transfer

There is another problem with making the status of unappropriated assets the key to left libertarianism as well. Injustices which occurred at the "dawn of history" are simply too stale and disconnected from our current lives to excite many people, even those who might be attracted to the potential results that rectification of these injustices might create. This is especially true if left libertarian proposals for rectification of unjust initial acquisition are seen to be based on what might be thought of as a technicality. Regardless of the presence of

injustice here, this type of wrong is going to be insufficiently motivating for the kind of dramatic redistribution that would be required to put things right. In short, the status of unappropriated assets feels like a thin foundation on which to build an entire political viewpoint.

But there is another way to understand the difference between left and right libertarians, one that does not simply focus on the status of unappropriated assets and the principle of just initial acquisition. This is to focus on the principle of just transfer. Remember, Nozick and his fellow right libertarians argue that voluntariness is the sole requirement of the principle of just transfer. Indeed, this idea is the whole basis of Nozick's attack on end-state patterning theories of justice. If a pattern of distribution starts out as just, and becomes different solely due to voluntary transfers, how can the resulting pattern be anything else but just, he asks? But as various critics of right libertarianism point out, the notion of voluntariness is notoriously indeterminate. Whether something is voluntary depends on the particular background system of rights already in place, for some kinds of coercion are deemed to be rights violations and some (economic competition, for example) are not (Fried 1981: 96-99). There is also a difference between acts of coercion that are unlawful and acts that are unjust, and the latter category is much larger. Nozick himself recognized this in his first published paper, which explored the concept of coercion (Nozick 1997). Again, he raises a large number of concerns about issues that arise when we attempt to define coercion, exactly as he does when he discusses the labor theory of property. And again, despite leaving these problems largely unresolved, he ultimately uses the concept of voluntariness as his sole criteria of justness in transfer. So, once again, there seems to be a lot of room for improvement here.

I do not reject the idea that voluntariness is an important criterion. I just reject the notion that it is the *only* important criterion. To eliminate some of the indeterminacies involved in the concept of voluntariness, I treat the voluntariness requirement simply as a statement of legal

voluntariness (Reiff 2013: 27). This does not mean that moral concerns have no place here—one can and indeed in many cases should contest whether the law has adequately recognized when someone has been impermissibly coerced. But if the law says a set of circumstances does not rise to level of unlawful coercion, then the voluntariness requirement should be treated as satisfied. To this requirement, however, I add the requirement of reciprocity—the idea that in any exchange transaction or portion thereof not intended as a gift, the respective value of whatever is exchanged must be equivalent in some meaningful sense if the transaction is to be considered just (Reiff 2013: 51).

This principle of reciprocity, like so many other things, has its roots in Aristotle, but I will not be able to restate the book-length argument for the application of this principle as a separate requirement for there to be justice in transfer. I will point out, however, that a breach of the principle of reciprocity will explain a great many of the cases where we have concerns that true moral voluntariness has not been met. Indeed, only where one party holds more market power, information, has more bargaining skill, or can endure more risk than the other, would the other party "voluntarily" agree to a lopsided exchange in terms of exchange value when that exchange was not intended as a gift. In this sense, then, a transaction that violates the principle of reciprocity necessarily violates the principle of moral if not legal voluntariness too. Or that is what left libertarians believe, at least if they embrace my version of the principle of transfer.

Now under my conception of the principle of reciprocity, value is determined by the cost of production, not by the market price. But one need not accept this cost of production version of the reciprocity requirement to be a left libertarian. Even if one accepted the market price version, as long as we also included a proviso under which the market price would not control if there had been some sort of market failure, as almost all advocates of the market price approach do (see Reiff 2013: 58, 60, 64, and 75), we would still have a left libertarian position.

For remember, economists tell us that in a perfectly competitive market, the market price *would be* the cost of production. So there are different ways one could cash out the reciprocity requirement and still be a left libertarian. The important point is to see reciprocity as an additional requirement and not simply rely on some conception of voluntariness as right libertarians do.

I also argue that libertarians can and indeed must accept the principle of toleration—the idea that a certain amount of injustice should be tolerated even if it would be possible and not counter-productive to do something about it (Reiff 2013). I shall more about this argument later in this paper, but for now, I merely want to note that under this qualification, an exchange need not strictly comply with the doctrine of the just price under a cost of production measure in order to be permitted. It may also include a reasonable profit. Exchanges that include a reasonable profit may be unjust, for in these cases the price charged exceeds the cost of production, but they are tolerably unjust. On the other hand, a price which includes an unreasonable amount of profit is intolerably unjust, and this makes it exploitive, not merely unjust. It is only exploitation that is a violation of right, because one party's labor has then been unreasonably appropriated without adequate compensation (see Reiff 2013). Some principled definition of the difference between reasonable and unreasonable profit is of course required, but one could reject this qualification and insist on strict adherence to the doctrine of the just price, as Canon law did for hundreds of years, and still be a left libertarian. The distinguishing factor here is not how the principle of reciprocity is cashed out, but whether one recognizes the requirement of reciprocity at all.

In rejecting the principle of reciprocity as part of the principle of just transfer, some libertarians rely on the argument that enforcing reciprocity is a violation of negative liberty. But here is where right libertarians and *faux* libertarians divide. Only *faux* libertarians believe that maximizing negative liberty is fundamental. Right libertarians believe in protecting self-

ownership, and this leads us in very different directions. Maximizing negative liberty leads to either anarchism or fascism, not libertarianism. It leads to anarchism if it means that no government restrictions on negative liberty are permissible; and it leads to fascism if it means that some individual restrictions are permissible (on what basis is unclear), but we otherwise want to maximize total negative liberty. This is because a pyramid structure in which those at one level could interfere with the negative liberty of those below them, but those below could not interfere with the negative liberty of those above, would arguably have more total negative liberty than a society in which everyone had equal negative liberty. At least, the total would not be less (see Steiner 1994: 52-54). And an approach that is as likely to lead to fascism as anything else is about as far away from what libertarians are supposed to value as one can get.

Even if we avoided this by claiming we were not interested in maximizing total negative liberty, but rather maximizing *equal* negative liberty, we would not be acting as genuine libertarians. Right libertarians often claim that the latter is what they are doing, and some left libertarians do too, but it is hard to see where this principle of equality is coming from. Remember, equality is not a fundamental principle for genuine libertarians—they are opposed to the idea that the principle of equality could override or even limit the application of the principle of liberty. So doing so is inconsistent with the fundamental idea of libertarianism itself. And even if we ignore this problem, we are still left with another. We could all have equal negative liberty even if no one had much negative liberty at all, as long as whatever restrictions existed applied equally to everyone. The principle of equality does not tell us where to start, and therefore it is of no help in ensuring that the amount of liberty anyone enjoys is meaningful. And while the introduction of the "maximizing" imperative does tells us what level of equal liberty to prefer, it does so by introducing a consequentialist criterion at the heart of what is supposed to be a deontological viewpoint. I shall say more about how we get a meaningful amount of negative liberty out of self-ownership alone in a moment, but for now I

merely want note that this is possible despite recognizing that restrictions on negative liberty are sometimes, even often, required.

c. The Principe of Rectification

I have already said a few things about the principle of rectification, but there are a couple of more points worth making here. While right libertarians have no problem with rectifying violations of individual right in the usual ways, they are not very comfortable rectifying violations of distributive justice, especially violations of the principle of just initial acquisition, despite the fact that these were clearly widespread as a matter of historical fact. Indeed, most natural resources were simply seized or stolen from those who initially mixed their labor with them. Nozick, in fact, acknowledged this, and did not have any problem with the idea that extensive rectification might therefore be required, perhaps even along the lines of what the Rawlsian difference principle required. (Nozick 1974:231). So there is no principled reason why right libertarians should resist this. But as a practical matter they do. Even Nozick, despite his express concession that there is a need for a lot of rectification, chose not to say any more about this, preferring to leave the problem hanging. And this is how right libertarians have proceeded ever since.

But if rectification is to be deemed tangential rather than essential to the right libertarians, then some principle must be articulated by right libertarians to defend this view. One possible argument is that even if initial acquisition were unjust, there would be no need for rectification unless someone presented a better claim to current ownership. But as a practical matter, no one can trace their claim back to initial acquisition. The current presentation of a senior claim is effectively impossible. This, of course, renders the whole point of having a principle of just initial acquisition meaningless, since nothing flows from violating it. And that undermines the whole basis of Nozick's argument, which is to prove that property rights could have arisen in modern society without anyone violating anyone else's rights.

Even if we were to accept this right libertarian work-around to the need to rectify unjust initial acquisition, however, that would not mean that there were no claims for rectification left to address. If one is to interpret the principle of transfer as requiring reciprocity and not merely voluntariness, as left libertarians who follow my approach do, then there is still a great deal of rectification to be done for violations of the principle of just transfer. How could the treaties that supposedly supervened on the violations of indigenous property rights be determinative if they failed to meet the principle of reciprocity, if not voluntariness as well? How could the labor of slaves who, despite their enslavement, were still self-owners under libertarian theory, confer ownership rights over natural resources on their owners through their labor and not on the laborers themselves? How could merely ceasing their enslavement constitute compensation for the period during which they were enslaved? And what about the crippling discriminatory treatment of former slaves and their descendants that continues even to this day? Similarly, how could the historical exploitation of workers not render the property rights held by the exploiters suspect and the successors-in-interest of the exploited not entitled to press claims for rectification? How could the interference with the right of women to acquire property for hundreds of years not require rectification? I am not saying that we need to unwind history and rebuild it in some counterfactual way, as those who embrace end-state patterning theories often seem to want to do. But it is not acceptable to simply ignore this issue and not articulate a principle for dealing with it, as right libertarians do, or to simply see the rectification of historic violations of the first two principles of libertarian justice as too diluted by the flood waters of history to have any call on us now for action, as *faux* libertarians do.

II. Libertarian Thought on the Role and Size of the State

a. Libertarianism and Liberty

Which brings us to a wider discussion of the relationship between libertarianism and liberty. As I have already noted, most ordinary people (that is, non-philosophers), whether they

consider themselves libertarians or not, think that libertarianism is all about maximizing negative liberty. But maximizing negative liberty is not a moral end for any political theory worthy of our respect. Indeed, negative liberty is not even a political theory. Political theories establish ultimate ends and set priorities among these ends when they happen to conflict. Negative liberty, in contrast, is an analytical theory. It claims that when human actions or omissions interfere with the capacity of other humans to do whatever they have the capacity to do, then this interference has to be justified. It says nothing about ends, for it does not state what counts as a justification or how strong that justification has to be. It is political only in the weakest sense in that it identifies a certain kind of interference as morally significant and sets non-interference as the default position. To determine whether any particular interference with negative liberty is justified, some other theory—one that does set ends and priorities between them—must be consulted. Obviously, a great deal of interference with negative liberty can be justified by reference to such substantive, political theories, for both government and private parties permissibly interfere with our negative liberty in a massive number of ways every day. Only *faux* libertarians believe that the only possible justification for an infringement of negative liberty is the prevention of an even greater infringement of negative liberty itself.

Even if one were to embrace maximizing negative liberty and the heavily consequentialist way of operationalizing libertarianism that such an approach would represent, however, how would that principle be applied? We would have to have some way of quantifying negative liberty, or a way of ranking one kind of negative liberty, or one person's negative liberty, against another. The former seems hopeless, at least in the fine-tuned everyday cases of balancing one package of negative liberties against another that would be common if one were to make this a centerpiece of a program of political morality (see Reiff 2020: 104-05). And the latter requires, once again, the application of some other political principle to

provide the ranking criteria, which takes us back to exactly where we were at the beginning of our search of possible justifications, looking for a political principle that allows us to do so.

Luckily, the possible principles one could use here come in a wide variety of shapes and sizes. Equality, of course, is one possible source of justification. In other words, an infringement of negative liberty could be justified if it promotes rather than infringes whatever conception of equality a particular society happens to embrace. This, for example, is what liberal egalitarians believe (see e.g. Hart 1973). But as I have already noted, most libertarians find reliance on equality uncomfortable, at least to the extent the relevant conception of equality cannot be derived from self-ownership—the same fundamental idea behind genuine libertarianism—alone. Even if justification cannot be sourced in equality, however, it could be sourced in another kind of liberty, the kind that philosophers call "positive" liberty (see Berlin 2002).

Positive liberty, remember, is the idea that one can only be free if one lives a certain kind of life, one that enables our true self to live up to its full potential, to be, as in the popular army recruiting slogan, "all that we can be" (Berlin 2002). Conceptions of positive liberty accordingly tend to be very comprehensive, for they attempt to set out a complete plan of how to live a moral life in all its countless aspects. Because they are so comprehensive, however, they are highly controversial—no two people are likely to embrace exactly the same conception of positive liberty. Even when there is substantial overlap, there are likely to be many highly significant disagreements. If one is a *faux* libertarian, reliance on some conception of positive liberty is the *only* thing that can justify infringements of negative liberty, because this is how *faux* libertarianism becomes a vehicle for imposing one's own conception of the good on everybody else. But if one is a genuine libertarian, one must reject the use of controversial conceptions of positive liberty as justifications for interference with negative liberty, because even libertarians must embrace the liberal principles of toleration and neutrality.

Why? Because to show that libertarianism is distinct from both anarchy and fascism and is able to offer a real alternative to other forms of social and political organization, libertarians must be able to show that something which looks like the modern state, stripped down as it may need to be (I shall discuss how stripped down in a moment), would be able to arise as the result of a series of free market transactions without violating anyone's rights, which for libertarians are inviolable. To do this, libertarians must be able to show, as Nozick puts it, that dominant protective associations, which look like versions of a modern state, could arise through a series of voluntary transactions in each geographic area. But to become dominant and maintain such dominance in a particular geographic area, the protective association must be tolerant of and neutral between controversial comprehensive conceptions of the good. This is because these will vary within each geographic area, and often quite dramatically. Indeed, it is unclear what the point of libertarianism would be if this were not the case. Why would everyone need the freedom to do what they want if everyone embraced exactly the same comprehensive conception of the good, for then everyone would want exactly the same thing? Assuming there were a wide variety of conceptions of the good embraced in a libertarian society, however, a dominant protective association would have to embrace the principles of toleration and neutrality; otherwise, rival ideologically affiliated protective associations would arise and battle each other continuously within each geographic area, as the actual history of the world makes abundantly clear. And no one would want to be a member of a protective association that makes them feel like second-class citizens. It is even hard to see why people who shared a particular comprehensive conception of the good would want to join a protective association that could not become dominant because of its lack of toleration and neutrality and would therefore not be able to offer them the peace and security that one which did embrace these principles would be able to offer. So only by accepting the principles of

toleration and neutrality can libertarianism offer a stable alternative form of government (see Reiff 2020).

But there is another alternative political theory beside equality and positive liberty, one that is consistent with toleration and neutrality and therefore appropriate for use in a left-libertarian version of a liberal capitalist society. This is the principle of republican liberty. Republican liberty is a form of positive liberty, but it is not a controversial form. I know, some conceptions of republican liberty are so thick they amount to a complete theory of justice on their own, and these thick conceptions are controversial. For purposes of using republican liberty to explain what libertarians do or should believe, however, a thin conception of republican is what we need, for only a thin conception could be instrumentally useful in the pursuit of a wide variety or reasonable comprehensive political doctrines and therefore consistent with the principles of neutrality and toleration (see Reiff 2020). Indeed, such a thin conception of republican liberty can be thought of as part of what Rawls called "a thin theory of the good," reliance on which is not ruled out by the principles of toleration and neutrality (see Reiff 2020: 106). Moreover, it is difficult to imagine any situation in which the protection of this thin form of republican liberty for one can be purchased only by the diminishment of republican liberty for another. Which means that no consequentialist-type balancing is required here if as libertarians we focus on protecting thin republican liberty.

What is this thin conception, then? Under my version of it, there is an infringement of republican liberty only when one is subjected to the arbitrary will of another. Arbitrariness, in turn, can arise in any of four ways. A decision is arbitrary when it is based on no criteria, is made without relevant criteria being adequately considered, is based in whole or in part on criteria that are unrelated to the performance of the task or role under consideration, or is based on performance-related criteria but does not treat similarly situated people similarly. In other words, under my conception of republican liberty, arbitrariness can be result of either a defect

in the procedure that produced a particular outcome, or a defect in the nature of what has been considered and/or the weight assigned to various factors. And that's it (see Reiff 2020: 89-93).

This right to be free of arbitrary treatment, in turn, is not only a way of understanding republican liberty; it is also an expression of the principle of self-ownership. Someone who is treated arbitrarily in any of these ways is not being treated with the respect that self-ownership and the personhood it entails demands (see Reiff 2013: 292-294). Rather, they are being treated like a thing. For a thing can be property, and property has no right to republican liberty—nor any rights at all. A thing has no right not to be treated arbitrarily. And to treat a person like a thing in this sense, at least if that treatment is wide-ranging enough, is to treat that person as a slave, the gravest violation of self-ownership possible. It is therefore republican liberty, at least in the narrow form in which I have conceived of it here, that is most direct expression of self-ownership among the various conceptions of liberty we have available.

I recognize am leaving leave aside here the question of whether certain animals are something other than things, even if not fully persons, and therefore may have certain rights (or in weaker sense, may be the beneficiaries of certain duties that persons owe to the state) even if they are not self-owners and therefore may be property. Arguably, in this sense, animals have a right not to be treated cruelly, and perhaps not even arbitrarily. One could even conceive of a slave-owning society, I suppose, that prohibited the arbitrary treatment of slaves, even though that would not vest slaves with a right against such mistreatment themselves, but rather assign enforcement of that right to the state. And of course, even certain non-sentient things that are unambiguously forms of property may not be treated arbitrarily. For example, it is a moral wrong for me to burn a Rembrandt or indeed any other great work of art even if I do own it, at least absent highly unusual circumstances. So there could be limitations on what I can arbitrarily do to an animal or a thing that do not stem from their self-ownership and the inherent right to republican liberty that flows from this. The fact that self-ownership implies republican

liberty does not mean that a right against arbitrary treatment or even a weaker duty not to treat a thing arbitrarily cannot come from somewhere else. This does not change the fact that for persons, self-ownership entails republican liberty and republican liberty entails a right against arbitrary treatment.

Note that even though this conception of republican liberty as freedom from arbitrary treatment is very thin, it invokes a concern that is also central to most conceptions of equality: the idea that similarly situated people should be treated the same. And this means that contrary to the claim often advanced by those on the libertarian right, equality and liberty do not conflict. Rather than being an argument against liberal egalitarianism, as it is in Nozick's conception of right libertarianism, the left libertarian argument and the argument from equality are entirely consistent. Whatever is required by the equality requirement will also be required by the non-arbitrary requirement of republican liberty, an expression of self-ownership. One can accordingly be a left libertarian without having to reject the ideas, policies, and suggestions of liberal egalitarianism. One would have to reject liberal egalitarianism only if (1) one took negative liberty to be at the heart of libertarianism, as *faux* libertarians do; or (2) if one failed to recognize, as right libertarians do, that the concerns that liberal egalitarians express against arbitrary treatment can stem from a concern for republican liberty and not only from a concern for welfare.

b. Libertarianism and Economic Liberalism

Aside from positive liberty and republican liberty, there is another conception of liberty that is often mentioned as underlying libertarianism: economic liberty. So it seems prudent to say something here about the relationship between economic liberty and libertarianism. Indeed, it is undeniable that many right libertarians are economic neoliberals. Given this, it is often difficult to tell whether a particular policy position is the product of their neoliberalism or their libertarianism. Especially since many of these right libertarians seem to believe that

libertarianism entails neoliberalism and *vice versa*, although they never actually discuss this—they simply act as if such entailment were obvious. But in my view, this conflation of neoliberalism and libertarianism is a mistake. Neoliberalism is a form of economic liberalism, and economic liberalism began as a purely economic theory, just as its name suggests, not a political one (see Reiff 2017b). Economic liberals argued that the fewer the restrictions on market activity, the more efficient the market will be, and therefore the larger the economy's net national product. Of course, there are powerful reasons to doubt this assertion—there is much evidence, for example, that government regulation can increase efficiency as well as reduce it, depending on the particular regulation one has in mind (the whole idea of antitrust regulation, for example, is to protect market efficiency). There is also a clear distinction to be made between market enabling legislation and market interference, for without the former setting the framework for trading activity, nothing like a free market could possibly exist. So even as an economic theory, there are reasons to be cautious about putting too much reliance on the idea that non-interference with the market always increases efficiency and therefore is to be preferred no matter what. But even if it were true that non-interference always increased efficiency, there is still the question of whether increasing efficiency should be given the status of an overarching moral value. Indeed, there are even some *faux* libertarians who reject the idea that economic efficiency should be treated as an end in itself and therefore also reject the idea that economic liberty could be a fundamental moral principle (see Reiff 2017b). But regardless of whether economic liberalism is defensible or not, nothing about this economic view is entailed by either form of genuine libertarianism, for again, neither genuine form of libertarianism makes negative liberty an end in itself.

While it started as a theory purely about economic efficiency, however, economic liberalism eventually morphed into what became a distinctly more political view. In its new form, which is the form now known as "neoliberalism," it made a connection between

economic liberty and political outcomes. It remained superficially committed to the idea of the free market, but argued ferociously that government restrictions on market activity represented an intolerable threat to *political* liberty. Indeed, whether these restrictions increased or decreased economic efficiency became largely irrelevant. The thought was that the extensive government apparatus that would develop if government were permitted to interfere with the economy would not be able to resist interfering with every aspect of our lives (Hayek 1944: 91-104). In other words, opposition to economic regulation is necessarily connected to political liberty through what amounts to a consequentialist "slippery slope" argument (Reiff 2017b).

But this consequentialist claim is nonsense. A great deal of economic regulation may be instantiated without necessarily infringing political liberty or even bringing a society close to much less down the slippery slope toward serfdom. Which is why left libertarians uniformly reject the idea that neoliberalism is entailed by libertarianism. *Faux* libertarians may accept the slippery slope argument, but only because their views are consequentialist anyway, in contrast to the deontological views of both left and right libertarians, and they see maximizing negative liberty as an ultimate end and not merely something that may or may not be justified depending on the circumstances. So while many right libertarians are indeed neoliberals, this view is in fact inconsistent with their supposed commitment to libertarianism rather than entailed by it.

There is yet another reason, however, to reject neoliberalism if one is a genuine libertarian. Both neoliberals and right libertarians object exclusively to restraints on negative liberty imposed by the state. But this makes no sense. If one cares about negative liberty, why would one care about it only when it is infringed by the state? Private parties can infringe negative liberty too. Indeed, perhaps the greatest institutionalized infringement of negative liberty ever, short of mass murder and genocide, was holding people as slaves, and this was not a government activity but a private one. It took government action to abolish it. True, both *faux* libertarians and right libertarians see the government as a *Leviathan*, a vast, multi-tentacled

organism that we must constantly be on guard against for fear it will intertwine itself with and crush the wind out of every aspect of our lives. But this is simply a paranoid delusion. There is no such thing as "The Government" with a capital G. Rather than being some kind of giant monolithic institution, what there is (at least in liberal democratic capitalist societies, and libertarianism is supposed to be a theory about how we can live in such a society and not a utopian view that is as a practical matter unattainable) is a large number of differently-sized, differently-focused, often autonomous or at least semi-autonomous but always bounded and sometimes even competing units across which government power is distributed, diluted, and divided. The idea that there is a nefarious army of "men in black" at the beck and call of some centrally controlled government hierarchy is the stuff only of Hollywood movies and the internet chatter of uninformed government-phobes (Reiff 2020: 198-199). And while government may have a monopoly on the use of physical force, it certainly has no monopoly on the use of other forms of coercive power (Reiff 2005). Private corporations and even especially wealthy individuals, for example, can rival or even exceed the economic and political power of all but the largest government units. So even if there were some reason to be more concerned about government infringements of negative liberty than private ones, there is no basis to be *un*concerned with private intrusions altogether, as *faux* and right libertarians as well as economic neoliberals are.

Luckily, there is a form of economic liberalism that does indeed recognize that threats to liberty can come from either the public or the private sector. This is called ordoliberalism, and it is the form of economic liberalism that has long been popular in German-speaking and various Northern European nations (Reiff 2017b). Unlike their neoliberal cousins, ordoliberals are concerned about all threats to liberty, whatever their source. Sometimes this means restraining what government can do, but often it means using government to restrain private parties from engaging in what would otherwise be predatory conduct that infringes on self-

ownership. Indeed, this is why ordoliberals are concerned with maintaining and enforcing the antitrust laws, while neoliberals are content to let them fall into disuse. Yet if one is committed to the idea that a "free" market makes everyone better off, it is hard to see how an economy where a few monopolists control everything could make everyone better off in any meaningful sense. And because ordoliberalism does not focus exclusively on government interference with liberty while leaving private interference unchecked, it does not stray so far into the political. It does not make controversial value choices between *kinds* of interference. It uses what is in effect a thin conception of republican liberty to determine this. Unlike neoliberalism, it is accordingly a form of economic liberalism that left libertarians can comfortably embrace.

c. Libertarianism and the Proper Size of Government

The same reasoning applies when we come to determining the proper size of government. Right libertarians imagine this to be very small, for they believe that almost everything that government does is an infringement of liberty. But small and large are relative terms; they have no meaning out of context. One can drive a small Volkswagen or be stuck with a large pin. The idea that government should be "small," like the myth of the *Leviathan* itself, is a mere slogan, not a principled position. Left libertarians believe that government should be neither small nor large—it should be exactly the size it needs to be to perform its required functions of protecting property, enforcing contracts, ensuring republican liberty, preventing, punishing, and otherwise rectifying fraud, theft, violence, and, as I shall argue in the next section, policing anti-competitive behavior (see Reiff 2020: 177-199). While even left libertarians may disagree on where to draw the line here, it is not an exaggeration to say that almost all forms of modern regulation can be defended as an aspect of one of these powers. Accordingly, left libertarians, unlike right libertarians, are not committed to shrinking government until it is so small "[we] can drag it into the bathroom and drown it in the bathtub," as one *faux* libertarian conservative once famously said.[5] Indeed, what the staggeringly inept

response to the coronavirus pandemic by the Trump administration has made abundantly clear is that "when you drown government in the bathtub, people die" (Milbank 2020). For left libertarians, government is neither the problem nor the solution, notwithstanding Ronald Reagan's famous claim. Rather, government simply has a job to do, and as long as it does not try to do more than this, and does not fail to do what it must do to protect the republican liberty of all from private interference too, there is no reason for complaint.

III. Libertarian Thought and the Nature and Scope of Individual Rights

a. Libertarianism and Anti-Competitive Conduct

Which brings up the question of the extent to which policing anticompetitive conduct is a legitimate activity of the libertarian state. This is a big issue, with right and left libertarians on both sides, and I will only be able to sketch out the differences in their respective viewpoints and express my own views briefly here. One of the most esteemed right libertarians, F. A. Hayek, expressly thought the prevention of anticompetitive behavior was an essential function of government (see Hayek 1948a and b). But other influential right libertarians disagreed. Milton Friedman, for example, claimed that the "antitrust laws do far more harm than good and that we would be better off if we didn't have them at all" (Friedman 1999: 6-7). Friedman's view, of course, is consequentialist, and therefore was probably driven by his economic neoliberalism, not his libertarianism, for Friedman thought anticompetitive conduct could be economically efficient (Reiff 2017b). And many neoliberals who did not consider themselves libertarians agreed. As a result, neoliberal antipathy to antitrust regulation proved powerful politically, and this, not libertarianism, is what drove the US and many other liberal capitalist states to spend most of the last four decades failing if not expressly refusing to enforce the applicable antitrust laws.

What the experience of this sharp decline in enforcement of the antitrust laws has taught us, however, is that Friedman was dangerously wrong. While there might be instances where a

particular anticompetitive act is economically efficient, an overall lack of concern for anticompetitive behavior is disastrous for any market-based economy (see Reiff 2021). Indeed, it is the widespread and lengthy lack of antitrust enforcement that has resulted in the rise of a small number of giant corporations which almost everyone now agrees control far too much of the economy. And this goes some way toward explaining the precarious economic condition in which the US and many other liberal capitalist states now find themselves (Isaac, et al. 2020; Lynn 2011; Mitchell 2017). So regardless of whether Friedman's view is attributed to his libertarianism or his neoliberalism, it is hard to see how any true libertarian could defend this view today.

Nevertheless, some libertarians, even on the left, still agree with Friedman. They contend that if as long as a monopoly were to arise rise through a series of voluntary transactions, it would not be proper for a libertarian government to interfere. Perhaps this view divides similarly to that about voluntary slavery. Some libertarians, even on the left, see voluntary slavery as unproblematic, although many do not. But it is hard to see how anticompetitive conduct could be viewed as consistent with the idea that justice in distribution should be guided by the free market if the market is controlled by one or a just a small group of economic players. Simply put, the vast number of persons who must subject themselves to such an uncompetitive market are undeniably having their republican liberty infringed rather than protected. And if libertarianism is not supposed to entail support for the free market, then libertarianism loses much of what is attractive about it as a political ideology, for who wants to live under the thumb of the monopolists and oligopolists who control such a market and the arbitrary power they could use it to wield? (Reiff 2019).

b. Libertarianism and Freedom of Association

Right libertarians are fanatically anti-union. While I believe this is contrary to the fundamental principles that right libertarians purport to embrace—indeed, I have argued

elsewhere that universal unionization would arise in a libertarian utopia and be something the dominant protective association was obliged to protect—this is another important point on which left and right libertarians differ (see Reiff 2020: 21-59). For many right libertarians believe that the right of freedom of association requires not only that one be allowed to associate with whomsoever one wants, but also that one not be compelled to associate with anyone whom one does not want to associate (see e.g. Epstein 2014: 440; Brown 2012; Block 2015). Hence their anti-unionism and their support of right-to-work laws, laws that prohibit workers from being compelled to join unions and pay dues, even when those unions are still required to negotiate with the nonmember's employer on their behalf (e.g. Hayek 1984: 61).

But this restrictive view of the scope of the right to freedom of association is not correct. Indeed, outside of the issue of compulsory unionization, many right libertarians embrace a much more relaxed view. For example, despite railing against compulsory unionization, Hayek seemed open to the possibility that joining a private health insurance scheme could be made compulsory without violating anyone's liberty (see Hayek 1960: 259). Hayek did not explain why his views might differ according to the nature of the association in question, but the inconsistency is perhaps explained by Hayek's overpowering fear of socialism. At the time of Hayek's most strident anti-union statements, unions were likely to be advocates of socialism, whereas private health insurance companies were not. In other words, Hayek's objection to unions may not have been based on a concern that compulsory unionization was a violation of freedom of association, but rather on his overall fear of taking even the slightest step onto what he viewed as the slipperiest of slopes toward a Marxist dictatorship.

Remember also that as I have already noted, Nozick himself rejected the idea that compulsory association was a violation of libertarian rights (including, by implication, the right to free association) when he recognized that independents—those who refused to join the dominant protective association and agree to be bound by its rulings—could be compelled to

join as long as they were provided services just like any voluntary member (Nozick 1974: 87, 110-113). Nozick thought independents could be compelled to associate, remember, because he thought being an independent was risky behavior—it exposed those who were members of the association to the possibility of rogue acts of retaliation by independents who might not accept the dominant protective association's ruling on the scope of everyone's rights as authoritative and erroneously perceive themselves as victims of rights violations when they were not. But the same argument could be made with regard to compulsory unionization—unions must be able to bargain for everybody, for if enough employees do not join, the union would ultimately lose its ability to protect any of its members. And in the real world, workers at non-unionized firms and those with weak unions are indeed much more at risk of being subjected to violations of their employee rights than those with strong unions (see Reiff 2020: 50). So just as the existence of independents is risky behavior with regard to the dominant protective association, the existence of independents is risky behavior with regard to unionization (Reiff 2020: 45-54). For left libertarians, compulsory union membership is therefore not a violation of the right to freedom of association.

Of course, one cannot compel people to associate with others in all cases—one could not, for example, compel Jews to become Catholics. But this is because such an action would violate the principle of freedom of religion and not because it would violate freedom of association. Preventing someone from joining an association they want to join and that wants them *is* a violation of the right to freedom of association; compelling someone to join an association they do not want to join need not be; this depends on the circumstances. People cannot just refuse to be an American or a plumber or a homeowner if they meet the relevant criteria for those groupings. They can sever their ties to the relevant criteria if they want, and this may remove them from that grouping. But as long as these ties remain, they are members of that group. Similarly, a person need not take a job if they do not want one. But if they

voluntarily become an employee, that can automatically entail membership in more than just the firm: it can mean that one automatically becomes a member of the relevant union too. No right to free association precludes that. At least, that is a view that left libertarians can embrace.

e. Libertarianism and Freedom of Speech and Freedom of Religion

Despite the fact that Nozick does not mention freedom of speech as one of the rights that the dominant protective association is meant to protect, right libertarians have recently realized that by weaponizing the First Amendment, the US constitutional provision that sets forth the right to freedom of speech, they can use the argument from liberty to overturn a wide variety of antidiscrimination laws and even business regulation that they have until now fruitlessly sought to reverse (see generally Reiff 2020: 234-238). The pinnacle of this effort is the Supreme Court's recent decision in *Janus v. AFSCME*, in which the Court held that the mandatory payment of funds used to support or implement controversial political views is compelled "political" speech and therefore a violation of freedom of speech.[6] But this cannot be correct. First, because when conduct is compelled, it is not at all clear what kind of message that conduct should be interpreted as sending, and there can be no such thing as compelled speech when the content of the speech is this indeterminate. If I pay a fee because required to do so by law, why would anyone think I am therefore stating my approval of the practice the fee is designed to support? But more importantly, if such conduct could be deemed compelled speech despite the ambiguity of its message, every conceivable government regulation could be reinterpreted as impermissibly compelling those who are subject to it to endorse its objectives politically, and government itself would be impossible (see Reiff 2020:230-238). Once again, we would be left with anarchy. So while right and *faux* libertarians may support this interpretation of the First Amendment, left libertarians are against it.

An argument similar to that used to weaponize the First Amendment has also been used by many right and *faux* libertarians to weaponize religious liberty, most famously in opposition

to the recognition that gay couples have an equality-based right to marry as long as straight couples do. Because liberty trumps equality, however, opponents of gay marriage argue that no matter what equality may require, it cannot impede their religious liberty to refuse service to gay people. But this is nonsense (Reiff 2017a). There is no general right to religious liberty, just as there is no general libertarian right to negative liberty, no matter how frequently *faux* libertarians act as if there is.[7] Rather, religious liberty is the product of two principles. First, neutrality, which prohibits controversial conceptions of positive liberty, such as the idea some people find in religious doctrine that homosexual behavior is morally wrong, from being used to either justify or overturn an infringement of negative liberty. And second, the recognition that discriminating against gay couples would infringe their republican liberty because it would subject them to arbitrary treatment, while prohibiting such discrimination infringes the republican liberty of no one. This is what gives everyone religious liberty, for government could otherwise prohibit the practice of all religions, or all religions other than the one the government favored. So while right libertarians are often sympathetic to the argument that religious liberty trumps antidiscrimination laws, and *faux* libertarians often wholeheartedly support it, left libertarians reject this argument in its entirety.

Before I close this section, I also want to point out one common difference between right, *faux*, and left libertarians with regard to their attitude to what I might call derivative rights to liberty—freedom or association, freedom of speech, freedom of religion, and freedom of contract. Both right and *faux* libertarians treat these derivative rights as if they were free-standing rights, independent of any general right to liberty, but they are not. And no derivative right to liberty can be more extensive than the general right from which it is derived. Ronald Dworkin argues that these rights are actually derived from equality, not liberty (Dworkin 1977); I argue they are derived from a right to republican liberty and its interaction with the principle of neutrality; and we both argue that there is no general right to negative liberty, as

do all genuine libertarians. But in either case, this is yet another point on which these various kinds of libertarians can differ.

IV. The Relationship between Left Libertarianism and Liberal Egalitarianism

I have already noted that given the conception of republican liberty that my version of left libertarianism employs, the policy positions that it generates will be very close, and perhaps even identical to, those generated by liberal egalitarianism. But then why go to all the trouble of promoting left libertarianism as a new form of political theory? Why not simply be a liberal egalitarian? The problem is that when it comes to determining distributive justice, the argument from equality is not an argument from right in the same way as the argument from liberty, at least when the inequality at issue is economic inequality. Unlike violations of equality such as those that result from various kinds of invidious discrimination based on race, ethnicity, age, religion, or the like, economic violations are generally considered *distributive* injustices rather than *commutative* injustices, even if they do produce or exacerbate unjust economic inequality. In other words, rather than being a violation of individual right, the injustices here would be a social problem that we as a society have a moral duty to remedy in some broad sense, but not ones that imposed a duty on some individual or entity to cease engaging in the conduct that contributed to this problem and remedy past violations. It is also usually very clear what could be done to prevent a commutative injustice from arising—stop the violator from doing what it is that is causing the commutative injustice. What is to be done to prevent a distributive injustice from arising, in contrast, is much more open to debate. There are usually a variety of possible remedies here, and no one of these is likely to be unquestionably better than the others, leaving egalitarians to squabble among themselves when distributive rather than commutative justice is at stake. This all makes claims against distributive injustice inherently weaker than those against commutative injustice (see Lafer 2017: 91-92). But the left libertarian argument

against exploitation I have presented is an argument from *both* distributive and commutative injustice (Reiff 2013: 25-26, 44-45). It therefore does not suffer from these disadvantages.

Note, however, that this does not mean that left libertarians should be opposed to liberal egalitarianism or that if one is a left libertarian, one cannot also be a liberal egalitarian or *vice versa*. Under my conception of it, left libertarianism is not *arrogantly* libertarian—in other words, it does not claim that it is correct and all political theories based on the principle of equality are wrong, which is what other forms of libertarianism, including some early expressions of left libertarianism claim (e.g. Otsuka 2003: 114-131). It is instead a simpler, more secure, and more direct route to the same place, for the thin concept of republic liberty that left libertarianism employs effectively reproduces the prohibitions in the principle of equality. Left libertarianism accordingly does not invite a weakening of the concept of what a right is by suggesting that rights, even fundamental rights, can conflict, and that when they do, liberty wins and equality loses.

Establishing such a conflict has long been a tactic of the right (see e.g. Nozick 1974; Dworkin 1977; Kymlicka 2002: 138-153). And it has therefore been a serious mistake by those on the left to cede the argument from liberty to those on the right, for if equality and liberty do conflict it is difficult to explain why equality and not liberty should be given priority in our moral deliberations. After all, even Rawls concedes that liberty—or at least certain "basic" kinds of liberty—have priority over equality (Rawls 1971: 266, 474-480). Even if we were to reject the Rawlsian position and claim that all forms of equality and all forms of liberty are to be given equal weight, it would still be difficult to explain why the argument from equality should be treated as decisive in determining what we should do. We would simply have a moral standoff. And this is not sufficient if we are going to convince anyone whose mind may still be open that what equality requires, liberty actually requires too. To do this, we have to reclaim the argument from liberty from the political right and show that it is susceptible to a principled

interpretation that is consistent with both libertarian and left liberal values, and not right libertarian or conservative values. And that is why I consider myself a left libertarian.

Notes

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[1] Note that some right libertarians refer to themselves as "classical liberals" (see e.g. Hayek 1960: 344-355; Buchanan 2006). Both right libertarianism and classical liberalism, however, refer to the same collection of views. All my references in this paper to right libertarians should therefore be understood to apply to classical liberals too.

[2] See also Hillel Steiner, "Compensation for Liberty Lost: Left Libertarianism and Unconditional Basic Income," *Juncture* 22 (2016): 293-297 ("virtually all types of libertarianism, left and right . . . regard self-ownership as a fundamental moral right")

[3] But see Vallentyne, Steiner and Otsuka 2005.

[4] Alternatively, some left libertarians accept that natural resources were originally unowned but contend this means that everyone has an equal liberty to appropriate them. When a resource is appropriated by one individual, compensation is accordingly owed by that individual for depriving everyone else of their liberty to appropriate that resource. In either case, however, the result is the same: appropriation is allowed as long as compensation is paid.

[5] This quip was made by Grover Norquist, President of Americans for Tax Reform, during an interview on National Public Radio's *Morning Edition* on May 25, 2001.

[6] *Janus v. American Federation of State, County, and Municipal Employees,* 585 U. S. — (2018).

[7] On the popularity of the argument from liberty among those on the right in general, see Krugman 2017; O'Harrow, Jr. and Boburg 2017.

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