

CHAPTER

7

Distributive Justice

THE minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. Yet many persons have put forth reasons purporting to justify a more extensive state. It is impossible within the compass of this book to examine all the reasons that have been put forth. Therefore, I shall focus upon those generally acknowledged to be most weighty and influential, to see precisely wherein they fail. In this chapter we consider the claim that a more extensive state is justified, because necessary (or the best instrument) to achieve distributive justice; in the next chapter we shall take up diverse other claims.

The term "distributive justice" is not a neutral one. Hearing the term "distribution," most people presume that some thing or mechanism uses some principle or criterion to give out a supply of things. Into this process of distributing shares some error may have crept. So it is an open question, at least, whether *redistribution* should take place; whether we should do again what has already been done once, though poorly. However, we are not in the position of children who have been given portions of pie by someone who now makes last minute adjustments to rectify careless cutting. There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out. What each person gets, he gets from others who give to him in exchange for something, or as a gift. In a free soci-

ety, diverse persons control different resources, and new holdings arise out of the voluntary exchanges and actions of persons. There is no more a distributing or distribution of shares than there is a distributing of mates in a society in which persons choose whom they shall marry. The total result is the product of many individual decisions which the different individuals involved are entitled to make. Some uses of the term "distribution," it is true, do not imply a previous distributing appropriately judged by some criterion (for example, "probability distribution"); nevertheless, despite the title of this chapter, it would be best to use a terminology that clearly is neutral. We shall speak of people's holdings; a principle of justice in holdings describes (part of) what justice tells us (requires) about holdings. I shall state first what I take to be the correct view about justice in holdings, and then turn to the discussion of alternate views.¹

SECTION I

THE ENTITLEMENT THEORY

The subject of justice in holdings consists of three major topics. The first is the *original acquisition of holdings*, the appropriation of unheld things. This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on. We shall refer to the complicated truth about this topic, which we shall not formulate here, as the principle of justice in acquisition. The second topic concerns the *transfer of holdings* from one person to another. By what processes may a person transfer holdings to another? How may a person acquire a holding from another who holds it? Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society. The complicated truth about this subject (with placeholders for conventional details) we shall call the principle of justice in transfer. (And we shall suppose it also in-

cludes principles governing how a person may divest himself of a holding, passing it into an unheld state.)

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

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

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

A distribution is just if it arises from another just distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate first "moves" are specified by the principle of justice in acquisition.* Whatever arises from a just situation by just steps is itself just. The means of change specified by the principle of justice in transfer preserve justice. As correct rules of inference are truth-preserving, and any conclusion deduced via repeated application of such rules from only true premisses is itself true, so the means of transition from one situation to another specified by the principle of justice in transfer are justice-preserving, and any situation actually arising from repeated transitions in accordance with the principle from a just situation is itself just. The parallel between justice-preserving transformations and truth-preserving transformations illuminates where it fails as well as where it holds. That a conclusion could have been deduced by truth-preserving means from premisses that are true suffices to show its truth. That from a just situation a situation *could* have arisen via justice-preserving means does *not* suffice to show its justice. The fact that a thief's victims voluntarily *could* have presented him with gifts

* Applications of the principle of justice in acquisition may also occur as part of the move from one distribution to another. You may find an unheld thing now and appropriate it. Acquisitions also are to be understood as included when, to simplify, I speak only of transitions by transfers.

does not entitle the thief to his ill-gotten gains. Justice in holdings is historical; it depends upon what actually has happened. We shall return to this point later.

Not all actual situations are generated in accordance with the two principles of justice in holdings: the principle of justice in acquisition and the principle of justice in transfer. Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges. None of these are permissible modes of transition from one situation to another. And some persons acquire holdings by means not sanctioned by the principle of justice in acquisition. The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings. If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices? What obligations do the performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, than it would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? I do not know of a thorough or theoretically sophisticated treatment of such issues.² Idealizing greatly, let us suppose theoretical investigation will produce a principle of rectification. This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a

probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.*

The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice (as specified by the first two principles). If each person's holdings are just, then the total set (distribution) of holdings is just. To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here. (Locke's principle of justice in acquisition is discussed below.)

HISTORICAL PRINCIPLES AND END-RESULT PRINCIPLES

The general outlines of the entitlement theory illuminate the nature and defects of other conceptions of distributive justice. The entitlement theory of justice in distribution is *historical*; whether a distribution is just depends upon how it came about. In contrast, *current time-slice principles* of justice hold that the justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural* principle(s) of just distribution. A utilitarian who judges between any two distributions by seeing

* If the principle of rectification of violations of the first two principles yields more than one description of holdings, then some choice must be made as to which of these is to be realized. Perhaps the sort of considerations about distributive justice and equality that I argue against play a legitimate role in *this* subsidiary choice. Similarly, there may be room for such considerations in deciding which otherwise arbitrary features a statute will embody, when such features are unavoidable because other considerations do not specify a precise line; yet a line must be drawn.

which has the greater sum of utility and, if the sums tie, applies some fixed equality criterion to choose the more equal distribution, would hold a current time-slice principle of justice. As would someone who had a fixed schedule of trade-offs between the sum of happiness and equality. According to a current time-slice principle, all that needs to be looked at, in judging the justice of a distribution, is who ends up with what; in comparing any two distributions one need look only at the matrix presenting the distributions. No further information need be fed into a principle of justice. It is a consequence of such principles of justice that any two structurally identical distributions are equally just. (Two distributions are structurally identical if they present the same profile, but perhaps have different persons occupying the particular slots. My having ten and your having five, and my having five and your having ten are structurally identical distributions.) Welfare economics is the theory of current time-slice principles of justice. The subject is conceived as operating on matrices representing only current information about distribution. This, as well as some of the usual conditions (for example, the choice of distribution is invariant under relabeling of columns), guarantees that welfare economics will be a current time-slice theory, with all of its inadequacies.

Most persons do not accept current time-slice principles as constituting the whole story about distributive shares. They think it relevant in assessing the justice of a situation to consider not only the distribution it embodies, but also how that distribution came about. If some persons are in prison for murder or war crimes, we do not say that to assess the justice of the distribution in the society we must look only at what this person has, and that person has, and that person has, . . . at the current time. We think it relevant to ask whether someone did something so that he *deserved* to be punished, deserved to have a lower share. Most will agree to the relevance of further information with regard to punishments and penalties. Consider also desired things. One traditional socialist view is that workers are entitled to the product and full fruits of their labor; they have earned it; a distribution is unjust if it does not give the workers what they are entitled to. Such entitlements are based upon some past history. No socialist holding this view would find it comforting to be told that because the actual dis-

tribution *A* happens to coincide structurally with the one he desires *D*, *A* therefore is no less just than *D*; it differs only in that the "parasitic" owners of capital receive under *A* what the workers are entitled to under *D*, and the workers receive under *A* what the owners are entitled to under *D*, namely very little. This socialist rightly, in my view, holds onto the notions of earning, producing, entitlement, desert, and so forth, and he rejects current time-slice principles that look only to the structure of the resulting set of holdings. (The set of holdings resulting from what? Isn't it implausible that how holdings are produced and come to exist has no effect at all on who should hold what?) His mistake lies in his view of what entitlements arise out of what sorts of productive processes.

We construe the position we discuss too narrowly by speaking of *current* time-slice principles. Nothing is changed if structural principles operate upon a time sequence of current time-slice profiles and, for example, give someone more now to counterbalance the less he has had earlier. A utilitarian or an egalitarian or any mixture of the two over time will inherit the difficulties of his more myopic comrades. He is not helped by the fact that *some* of the information others consider relevant in assessing a distribution is reflected, unrecoverably, in past matrices. Henceforth, we shall refer to such unhistorical principles of distributive justice, including the current time-slice principles, as *end-result principles* or *end-state principles*.

In contrast to end-result principles of justice, *historical principles* of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things. An injustice can be worked by moving from one distribution to another structurally identical one, for the second, in profile the same, may violate people's entitlements or deserts; it may not fit the actual history.

PATTERNING

The entitlement principles of justice in holdings that we have sketched are historical principles of justice. To better understand their precise character, we shall distinguish them from another

subclass of the historical principles. Consider, as an example, the principle of distribution according to moral merit. This principle requires that total distributive shares vary directly with moral merit; no person should have a greater share than anyone whose moral merit is greater. (If moral merit could be not merely ordered but measured on an interval or ratio scale, stronger principles could be formulated.) Or consider the principle that results by substituting "usefulness to society" for "moral merit" in the previous principle. Or instead of "distribute according to moral merit," or "distribute according to usefulness to society," we might consider "distribute according to the weighted sum of moral merit, usefulness to society, and need," with the weights of the different dimensions equal. Let us call a principle of distribution *patterned* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions. And let us say a distribution is patterned if it accords with some patterned principle. (I speak of natural dimensions, admittedly without a general criterion for them, because for any set of holdings some artificial dimensions can be gimmicked up to vary along with the distribution of the set.) The principle of distribution in accordance with moral merit is a patterned historical principle, which specifies a patterned distribution. "Distribute according to I.Q." is a patterned principle that looks to information not contained in distributional matrices. It is not historical, however, in that it does not look to any past actions creating differential entitlements to evaluate a distribution; it requires only distributional matrices whose columns are labeled by I.Q. scores. The distribution in a society, however, may be composed of such simple patterned distributions, without itself being simply patterned. Different sectors may operate different patterns, or some combination of patterns may operate in different proportions across a society. A distribution composed in this manner, from a small number of patterned distributions, we also shall term "patterned." And we extend the use of "pattern" to include the overall designs put forth by combinations of end-state principles.

Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the forego-

ing, and so on. The principle of entitlement we have sketched is *not* patterned.* There is no one natural dimension or weighted sum or combination of a small number of natural dimensions that yields the distributions generated in accordance with the principle of entitlement. The set of holdings that results when some persons receive their marginal products, others win at gambling, others receive a share of their mate's income, others receive gifts from foundations, others receive interest on loans, others receive gifts from admirers, others receive returns on investment, others make for themselves much of what they have, others find things, and so on, will not be patterned. Heavy strands of patterns will run through it; significant portions of the variance in holdings will be accounted for by pattern-variables. If most people most of the time choose to transfer some of their entitlements to others only in exchange for something from them, then a large part of what many people hold will vary with what they held that others wanted. More details are provided by the theory of marginal productivity. But gifts to relatives, charitable donations, bequests to children, and the like, are not best conceived, in the first instance, in this manner. Ignoring the strands of pattern, let us suppose for the moment that a distribution actually arrived at by the operation of the principle of entitlement is random with respect to any pattern. Though the resulting set of holdings will be unpatterned, it will not be incomprehensible, for it can be seen as arising from the operation of a small number of principles. These principles specify how an initial distribution may arise (the principle of acquisition of holdings) and how distributions may be transformed into others

* One might try to squeeze a patterned conception of distributive justice into the framework of the entitlement conception, by formulating a gimmicky obligatory "principle of transfer" that would lead to the pattern. For example, the principle that if one has more than the mean income one must transfer everything one holds above the mean to persons below the mean so as to bring them up to (but not over) the mean. We can formulate a criterion for a "principle of transfer" to rule out such obligatory transfers, or we can say that no correct principle of transfer, no principle of transfer in a free society will be like this. The former is probably the better course, though the latter also is true.

Alternatively, one might think to make the entitlement conception instantiate a pattern, by using matrix entries that express the relative strength of a person's entitlements as measured by some real-valued function. But even if the limitation to natural dimensions failed to exclude this function, the resulting edifice would *not* capture our system of entitlements to *particular* things.

(the principle of transfer of holdings). The process whereby the set of holdings is generated will be intelligible, though the set of holdings itself that results from this process will be unpatterned.

The writings of F. A. Hayek focus less than is usually done upon what patterning distributive justice requires. Hayek argues that we cannot know enough about each person's situation to distribute to each according to his moral merit (but would justice demand we do so if we did have this knowledge?); and he goes on to say, "our objection is against all attempts to impress upon society a deliberately chosen pattern of distribution, whether it be an order of equality or of inequality."³ However, Hayek concludes that in a free society there will be distribution in accordance with value rather than moral merit; that is, in accordance with the perceived value of a person's actions and services to others. Despite his rejection of a patterned conception of distributive justice, Hayek himself suggests a pattern he thinks justifiable: distribution in accordance with the perceived benefits given to others, leaving room for the complaint that a free society does not realize exactly this pattern. Stating this patterned strand of a free capitalist society more precisely, we get "To each according to how much he benefits others who have the resources for benefiting those who benefit them." This will seem arbitrary unless some acceptable initial set of holdings is specified, or unless it is held that the operation of the system over time washes out any significant effects from the initial set of holdings. As an example of the latter, if almost anyone would have bought a car from Henry Ford, the supposition that it was an arbitrary matter who held the money then (and so bought) would not place Henry Ford's earnings under a cloud. In any event, *his* coming to hold it is not arbitrary. Distribution according to benefits to others *is* a major patterned strand in a free capitalist society, as Hayek correctly points out, but it is only a strand and does not constitute the whole pattern of a system of entitlements (namely, inheritance, gifts for arbitrary reasons, charity, and so on) or a standard that one should insist a society fit. Will people tolerate for long a system yielding distributions that they believe are unpatterned?⁴ No doubt people will not long accept a distribution they believe is *unjust*. People want their society to be and to look just. But must the look of justice reside in a

resulting pattern rather than in the underlying generating principles? We are in no position to conclude that the inhabitants of a society embodying an entitlement conception of justice in holdings will find it unacceptable. Still, it must be granted that were people's reasons for transferring some of their holdings to others always irrational or arbitrary, we would find this disturbing. (Suppose people always determined what holdings they would transfer, and to whom, by using a random device.) We feel more comfortable upholding the justice of an entitlement system if most of the transfers under it are done for reasons. This does not mean necessarily that all deserve what holdings they receive. It means only that there is a purpose or point to someone's transferring a holding to one person rather than to another; that usually we can see what the transferrer thinks he's gaining, what cause he thinks he's serving, what goals he thinks he's helping to achieve, and so forth. Since in a capitalist society people often transfer holdings to others in accordance with how much they perceive these others benefiting them, the fabric constituted by the individual transactions and transfers is largely reasonable and intelligible.* (Gifts to loved ones, bequests to children, charity to the needy also are nonarbitrary components of the fabric.) In stressing the large strand of distribution in accordance with benefit to others, Hayek shows the point of many transfers, and so shows that the system of transfer of entitlements is not just spinning its gears aimlessly. The system of entitlements is defensible when constituted by the individual aims of individual transactions. No overarching aim is needed, no distributional pattern is required.

To think that the task of a theory of distributive justice is to fill in the blank in "to each according to his _____" is to be predis-

* We certainly benefit because great economic incentives operate to get others to spend much time and energy to figure out how to serve us by providing things we will want to pay for. It is not mere paradox mongering to wonder whether capitalism should be criticized for most rewarding and hence encouraging, not individualists like Thoreau who go about their own lives, but people who are occupied with serving others and winning them as customers. But to defend capitalism one need not think businessmen are the finest human types. (I do not mean to join here the general maligning of businessmen, either.) Those who think the finest should acquire the most can try to convince their fellows to transfer resources in accordance with *that* principle.

posed to search for a pattern; and the separate treatment of "from each according to his _____" treats production and distribution as two separate and independent issues. On an entitlement view these are *not* two separate questions. Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is *not* one of something's getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete "to each according to his _____" treat objects as if they appeared from nowhere, out of nothing. A complete theory of justice might cover this limit case as well; perhaps here is a use for the usual conceptions of distributive justice.⁵

So entrenched are maxims of the usual form that perhaps we should present the entitlement conception as a competitor. Ignoring acquisition and rectification, we might say:

From each according to what he chooses to do, to each according to what he makes for himself (perhaps with the contracted aid of others) and what others choose to do for him and choose to give him of what they've been given previously (under this maxim) and haven't yet expended or transferred.

This, the discerning reader will have noticed, has its defects as a slogan. So as a summary and great simplification (and not as a maxim with any independent meaning) we have:

From each as they choose, to each as they are chosen.

HOW LIBERTY UPSETS PATTERNS

It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings. For suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D_1 ; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimen-

sion you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. (Also suppose contracts run only for a year, with players being free agents.) He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. (We ignore the question of whether he is "gouging" the owners, letting them look out for themselves.) The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D_2 , unjust? If so, why? There is *no* question about whether each of the people was entitled to the control over the resources they held in D_1 ; because that was the distribution (your favorite) that (for the purposes of argument) we assumed was acceptable. Each of these persons *chose* to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review*. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. If D_1 was a just distribution, and people voluntarily moved from it to D_2 , transferring parts of their shares they were given under D_1 (what was it for if not to do something with?), isn't D_2 also just? If the people were entitled to dispose of the resources to which they were entitled (under D_1), didn't this include their being entitled to give it to, or exchange it with, Wilt Chamberlain? Can anyone else complain on grounds of justice? Each other person already has his legitimate share under D_1 . Under D_1 , there is nothing that anyone has that anyone else has a claim of justice against. After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed. By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was

transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer?*

To cut off objections irrelevant here, we might imagine the exchanges occurring in a socialist society, after hours. After playing whatever basketball he does in his daily work, or doing whatever other daily work he does, Wilt Chamberlain decides to put in *overtime* to earn additional money. (First his work quota is set; he works time over that.) Or imagine it is a skilled juggler people like to see, who puts on shows after hours.

Why might someone work overtime in a society in which it is assumed their needs are satisfied? Perhaps because they care about things other than needs. I like to write in books that I read, and to have easy access to books for browsing at odd hours. It would be very pleasant and convenient to have the resources of Widener Library in my back yard. No society, I assume, will provide such resources close to each person who would like them as part of his regular allotment (under D_1). Thus, persons either must do without some extra things that they want, or be allowed to do something extra to get some of these things. On what basis could the inequalities that would eventuate be forbidden? Notice also that small factories would spring up in a socialist society, unless forbidden. I melt down some of my personal possessions (under D_1) and build a machine out of the material. I offer you, and others, a philosophy lecture once a week in exchange for your cranking the

* Might not a transfer have instrumental effects on a third party, changing his feasible options? (But what if the two parties to the transfer independently had used their holdings in this fashion?) I discuss this question below, but note here that this question concedes the point for distributions of ultimate intrinsic noninstrumental goods (pure utility experiences, so to speak) that are transferable. It also might be objected that the transfer might make a third party more envious because it worsens his position relative to someone else. I find it incomprehensible how this can be thought to involve a claim of justice. On envy, see Chapter 8.

Here and elsewhere in this chapter, a theory which incorporates elements of pure procedural justice might find what I say acceptable, *if* kept in its proper place; that is, if background institutions exist to ensure the satisfaction of certain conditions on distributive shares. But if these institutions are not themselves the sum or invisible-hand result of people's voluntary (nonaggressive) actions, the constraints they impose require justification. At no point does *our* argument assume any background institutions more extensive than those of the minimal night-watchman state, a state limited to protecting persons against murder, assault, theft, fraud, and so forth.

handle on my machine, whose products I exchange for yet other things, and so on. (The raw materials used by the machine are given to me by others who possess them under D_1 , in exchange for hearing lectures.) Each person might participate to gain things over and above their allotment under D_1 . Some persons even might want to leave their job in socialist industry and work full time in this private sector. I shall say something more about these issues in the next chapter. Here I wish merely to note how private property even in means of production would occur in a socialist society that did not forbid people to use as they wished some of the resources they are given under the socialist distribution D_1 .⁶ The socialist society would have to forbid capitalist acts between consenting adults.

The general point illustrated by the Wilt Chamberlain example and the example of the entrepreneur in a socialist society is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them. (But if some time limit is to be set on how long people may keep resources others voluntarily transfer to them, why let them keep these resources for *any* period of time? Why not have immediate confiscation?) It might be objected that all persons voluntarily will choose to refrain from actions which would upset the pattern. This presupposes unrealistically (1) that all will most want to maintain the pattern (are those who don't, to be "reeducated" or forced to undergo "self-criticism"?), (2) that each can gather enough information about his own actions and the ongoing activities of others to discover which of his actions will upset the pattern, and (3) that diverse and far-flung persons can coordinate their actions to dovetail into the pattern. Compare the manner in which the market is neutral among persons' desires, as it reflects and transmits

widely scattered information via prices, and coordinates persons' activities.

It puts things perhaps a bit too strongly to say that every patterned (or end-state) principle is liable to be thwarted by the voluntary actions of the individual parties transferring some of their shares they receive under the principle. For perhaps some *very* weak patterns are not so thwarted.* Any distributional pattern with any egalitarian component is overturnable by the voluntary actions of individual persons over time; as is every patterned condition with sufficient content so as actually to have been proposed as presenting the central core of distributive justice. Still, given the possibility that some weak conditions or patterns may not be unstable in this way, it would be better to formulate an explicit description of the kind of interesting and contentful patterns under discussion, and to prove a theorem about their instability. Since the weaker the patterning, the more likely it is that the entitlement system itself satisfies it, a plausible conjecture is that any patterning either is unstable or is satisfied by the entitlement system.

SEN'S ARGUMENT

Our conclusions are reinforced by considering a recent general argument of Amartya K. Sen.⁷ Suppose individual rights are interpreted as the right to choose which of two alternatives is to be

* Is the patterned principle stable that requires merely that a distribution be Pareto-optimal? One person might give another a gift or bequest that the second could exchange with a third to their mutual benefit. Before the second makes this exchange, there is not Pareto-optimality. Is a stable pattern presented by a principle choosing that among the Pareto-optimal positions that satisfies some further condition *C*? It may seem that there cannot be a counterexample, for won't any voluntary exchange made away from a situation show that the first situation wasn't Pareto-optimal? (Ignore the implausibility of this last claim for the case of bequests.) But principles are to be satisfied over time, during which new possibilities arise. A distribution that at one time satisfies the criterion of Pareto-optimality might not do so when some new possibilities arise (Wilt Chamberlain grows up and starts playing basketball); and though people's activities will tend to move then to a new Pareto-optimal position, *this*

more highly ranked in a social ordering of the alternatives. Add the weak condition that if one alternative unanimously is preferred to another then it is ranked higher by the social ordering. If there are two different individuals each with individual rights, interpreted as above, over different pairs of alternatives (having no members in common), then for some possible preference rankings of the alternatives by the individuals, there is no linear social ordering. For suppose that person *A* has the right to decide among (X, Y) and person *B* has the right to decide among (Z, W) ; and suppose their individual preferences are as follows (and that there are no other individuals). Person *A* prefers W to X to Y to Z , and person *B* prefers Y to Z to W to X . By the unanimity condition, in the social ordering W is preferred to X (since each individual prefers it to X), and Y is preferred to Z (since each individual prefers it to Z). Also in the social ordering, X is preferred to Y , by person *A*'s right of choice among these two alternatives. Combining these three binary rankings, we get W preferred to X preferred to Y preferred to Z , in the social ordering. However, by person *B*'s right of choice, Z must be preferred to W in the social ordering. There is no transitive social ordering satisfying all these conditions, and the social ordering, therefore, is nonlinear. Thus far, Sen.

The trouble stems from treating an individual's right to choose among alternatives as the right to determine the relative ordering of these alternatives within a social ordering. The alternative which has individuals rank *pairs* of alternatives, and separately rank the individual alternatives is no better; their ranking of pairs feeds into some method of amalgamating preferences to yield a social ordering of pairs; and the choice among the alternatives in the highest ranked pair in the social ordering is made by the individual with the right to decide between this pair. This system also has the result that an alternative may be selected although *everyone* prefers some other alternative; for example, *A* selects X over Y , where (X, Y) somehow is the highest ranked *pair* in the social or-

new one need not satisfy the contentful condition *C*. Continual interference will be needed to insure the continual satisfaction of *C*. (The theoretical possibility of a pattern's being maintained by some invisible-hand process that brings it back to an equilibrium that fits the pattern when deviations occur should be investigated.)

dering of pairs, although everyone, including A, prefers W to X. (But the choice person A was given, however, was only between X and Y.)

A more appropriate view of individual rights is as follows. Individual rights are co-possible; each person may exercise his rights as he chooses. The exercise of these rights fixes some features of the world. Within the constraints of these fixed features, a choice may be made by a social choice mechanism based upon a social ordering; if there are any choices left to make! Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on. (If I have a right to choose to live in New York or in Massachusetts, and I choose Massachusetts, then alternatives involving my living in New York are not appropriate objects to be entered in a social ordering.) Even if all possible alternatives are ordered first, apart from anyone's rights, the situation is not changed: for then the highest ranked alternative *that is not excluded by anyone's exercise of his rights* is instituted. Rights do not determine the position of an alternative or the relative position of two alternatives in a social ordering; they *operate upon* a social ordering to constrain the choice it can yield.

If entitlements to holdings are rights to dispose of them, then social choice must take place *within* the constraints of how people choose to exercise these rights. If any patterning is legitimate, it falls within the domain of social choice, and hence is constrained by people's rights. *How else can one cope with Sen's result?* The alternative of first having a social ranking with rights exercised within *its* constraints is no alternative at all. Why not just select the top-ranked alternative and forget about rights? If that top-ranked alternative itself leaves some room for individual choice (and here is where "rights" of choice is supposed to enter in) there must be something to stop these choices from transforming it into another alternative. Thus Sen's argument leads us again to the result that patterning requires continuous interference with individuals' actions and choices.⁸

REDISTRIBUTION AND PROPERTY RIGHTS

Apparently, patterned principles allow people to choose to expend upon themselves, but not upon others, those resources they are entitled to (or rather, receive) under some favored distributional pattern D_1 . For if each of several persons chooses to expend some of his D_1 resources upon one other person, then that other person will receive more than his D_1 share, disturbing the favored distributional pattern. Maintaining a distributional pattern is individualism with a vengeance! Patterned distributional principles do not give people what entitlement principles do, only better distributed. For they do not give the right to choose what to do with what one has; they do not give the right to choose to pursue an end involving (intrinsically, or as a means) the enhancement of another's position. To such views, families are disturbing; for within a family occur transfers that upset the favored distributional pattern. Either families themselves become units to which distribution takes place, the column occupiers (on what rationale?), or loving behavior is forbidden. We should note in passing the ambivalent position of radicals toward the family. Its loving relationships are seen as a model to be emulated and extended across the whole society, at the same time that it is denounced as a suffocating institution to be broken and condemned as a focus of parochial concerns that interfere with achieving radical goals. Need we say that it is not appropriate to enforce across the wider society the relationships of love and care appropriate within a family, relationships which are voluntarily undertaken?* Incidentally,

* One indication of the stringency of Rawls' difference principle, which we attend to in the second part of this chapter, is its inappropriateness as a governing principle even within a family of individuals who love one another. Should a family devote its resources to maximizing the position of its least well off and least talented child, holding back the other children or using resources for their education and development only if they will follow a policy through their lifetimes of maximizing the position of their least fortunate sibling? Surely not. How then can this even be considered as the appropriate policy for enforcement in the wider society? (I discuss below what I think would be Rawls' reply: that some principles apply at the macro level which do not apply to micro-situations.)

love is an interesting instance of another relationship that is historical, in that (like justice) it depends upon what actually occurred. An adult may come to love another because of the other's characteristics; but it is the other person, and not the characteristics, that is loved.⁹ The love is not transferrable to someone else with the same characteristics, even to one who "scores" higher for these characteristics. And the love endures through changes of the characteristics that gave rise to it. One loves the particular person one actually encountered. Why love is historical, attaching to persons in this way and not to characteristics, is an interesting and puzzling question.

Proponents of patterned principles of distributive justice focus upon criteria for determining who is to receive holdings; they consider the reasons for which someone should have something, and also the total picture of holdings. Whether or not it is better to give than to receive, proponents of patterned principles ignore giving altogether. In considering the distribution of goods, income, and so forth, their theories are theories of recipient justice; they completely ignore any right a person might have to give something to someone. Even in exchanges where each party is simultaneously giver and recipient, patterned principles of justice focus only upon the recipient role and its supposed rights. Thus discussions tend to focus on whether people (should) have a right to inherit, rather than on whether people (should) have a right to bequeath or on whether persons who have a right to hold also have a right to choose that others hold in their place. I lack a good explanation of why the usual theories of distributive justice are so recipient oriented; ignoring givers and transferrers and their rights is of a piece with ignoring producers and their entitlements. But why is it *all* ignored?

Patterned principles of distributive justice necessitate *redistributive* activities. The likelihood is small that any actual freely-arrived-at set of holdings fits a given pattern; and the likelihood is nil that it will continue to fit the pattern as people exchange and give. From the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of people's rights. (An exception is those takings that fall under the principle of the rectification of injustices.) From other points of view, also, it is serious.

Taxation of earnings from labor is on a par with forced labor.* Some persons find this claim obviously true: taking the earnings of n hours labor is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose. Others find the claim absurd. But even these, *if* they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy.† And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. But a system that takes five hours' wages in taxes does not seem to them like one that forces someone to work five hours, since it offers the person forced a wider range of choice in activities than does taxation in kind with the particular labor specified. (But we can imagine a gradation of systems of forced labor, from one that specifies a particular activity, to . . . ; and so on up.) Furthermore, people envisage a system with something like a proportional tax on everything above the amount necessary for basic needs. Some think this does not force someone to work extra hours, since there is no fixed number of extra hours he is forced to work, and since he can avoid the tax entirely by earning only enough to cover his basic needs. This is a very uncharacteristic view of forcing for those who *also* think people are forced to do something *whenever* the alternatives they face are considerably worse. However, *neither* view is correct. The fact that others intentionally intervene, in violation of a side constraint against aggression, to threaten force to limit the alternatives, in this case to paying taxes or (presumably the worse alternative) bare subsistence, makes the taxation system one of forced labor and distinguishes it from other cases of limited choices which are not forcings.¹⁰

* I am unsure as to whether the arguments I present below show that such taxation merely *is* forced labor; so that "is on a par with" means "is one kind of." Or alternatively, whether the arguments emphasize the great similarities between such taxation and forced labor, to show it is plausible and illuminating to view such taxation in the light of forced labor. This latter approach would remind one of how John Wisdom conceives of the claims of metaphysicians.

† Nothing hangs on the fact that here and elsewhere I speak loosely of *needs*, since I go on, each time, to reject the criterion of justice which includes it. If, however, something did depend upon the notion, one would want to examine it more carefully. For a skeptical view, see Kenneth Minogue, *The Liberal Mind*, (New York: Random House, 1963), pp. 103-112.

The man who chooses to work longer to gain an income more than sufficient for his basic needs prefers some extra goods or services to the leisure and activities he could perform during the possible nonworking hours; whereas the man who chooses not to work the extra time prefers the leisure activities to the extra goods or services he could acquire by working more. Given this, if it would be illegitimate for a tax system to seize some of a man's leisure (forced labor) for the purpose of serving the needy, how can it be legitimate for a tax system to seize some of a man's goods for that purpose? Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such goods unnecessary for his happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not? Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures? If anything, one would have expected the reverse. Why is the person with the nonmaterial or nonconsumption desire allowed to proceed unimpeded to his most favored feasible alternative, whereas the man whose pleasures or desires involve material things and who must work for extra money (thereby serving whomever considers his activities valuable enough to pay him) is constrained in what he can realize? Perhaps there is no difference in principle. And perhaps some think the answer concerns merely administrative convenience. (These questions and issues will not disturb those who think that forced labor to serve the needy or to realize some favored end-state pattern is acceptable.) In a fuller discussion we would have (and want) to extend our argument to include interest, entrepreneurial profits, and so on. Those who doubt that this extension can be carried through, and who draw the line here at taxation of income from labor, will have to state rather complicated patterned *historical* principles of distributive justice, since end-state principles would not distinguish *sources* of income in any way. It is enough for now to get away from end-state principles and to make clear how various patterned principles are dependent upon particular views about the sources or the ille-

gitimacy or the lesser legitimacy of profits, interest, and so on; which particular views may well be mistaken.

What sort of right over others does a legally institutionalized end-state pattern give one? The central core of the notion of a property right in *X*, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with *X*; the right to choose which of the constrained set of options concerning *X* shall be realized or attempted.¹¹ The constraints are set by other principles or laws operating in the society; in our theory, by the Lockean rights people possess (under the minimal state). My property rights in my knife allow me to leave it where I will, but not in your chest. I may choose which of the acceptable options involving the knife is to be realized. This notion of property helps us to understand why earlier theorists spoke of people as having property in themselves and their labor. They viewed each person as having a right to decide what would become of himself and what he would do, and as having a right to reap the benefits of what he did.

This right of selecting the alternative to be realized from the constrained set of alternatives may be held by an *individual* or by a *group* with some procedure for reaching a joint decision; or the right may be passed back and forth, so that one year I decide what's to become of *X*, and the next year you do (with the alternative of destruction, perhaps, being excluded). Or, during the same time period, some types of decisions about *X* may be made by me, and others by you. And so on. We lack an adequate, fruitful, analytical apparatus for classifying the *types* of constraints on the set of options among which choices are to be made, and the *types* of ways decision powers can be held, divided, and amalgamated. A *theory* of property would, among other things, contain such a classification of constraints and decision modes, and from a small number of principles would follow a host of interesting statements about the *consequences* and effects of certain combinations of constraints and modes of decision.

When end-result principles of distributive justice are built into the legal structure of a society, they (as do most patterned principles) give each citizen an enforceable claim to some portion of the total social product; that is, to some portion of the sum total of the individually and jointly made products. This total product is

produced by individuals laboring, using means of production others have saved to bring into existence, by people organizing production or creating means to produce new things or things in a new way. It is on this batch of individual activities that patterned distributional principles give each individual an enforceable claim. Each person has a claim to the activities and the products of other persons, independently of whether the other persons enter into particular relationships that give rise to these claims, and independently of whether they voluntarily take these claims upon themselves, in charity or in exchange for something.

Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big *social pot* so that it's not clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it.

End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals' notion of self-ownership to a notion of (partial) property rights in *other* people.

Considerations such as these confront end-state and other patterned conceptions of justice with the question of whether the actions necessary to achieve the selected pattern don't themselves violate moral side constraints. Any view holding that there are moral side constraints on actions, that not all moral considerations can be built into end states that are to be achieved (see Chapter 3, pp. 28–30), must face the possibility that some of its goals are not achievable by any morally permissible available means. An entitlement theorist will face such conflicts in a society that deviates from the principles of justice for the generation of holdings, if and

only if the only actions available to realize the principles themselves violate some moral constraints. Since deviation from the first two principles of justice (in acquisition and transfer) will involve other persons' direct and aggressive intervention to violate rights, and since moral constraints will not exclude defensive or retributive action in such cases, the entitlement theorist's problem rarely will be pressing. And whatever difficulties he has in applying the principle of rectification to persons who did not themselves violate the first two principles are difficulties in balancing the conflicting considerations so as correctly to formulate the complex principle of rectification itself; he will not violate moral side constraints by applying the principle. Proponents of patterned conceptions of justice, however, often will face head-on clashes (and poignant ones if they cherish each party to the clash) between moral side constraints on how individuals may be treated and their patterned conception of justice that presents an end state or other pattern that *must* be realized.

May a person emigrate from a nation that has institutionalized some end-state or patterned distributional principle? For some principles (for example, Hayek's) emigration presents no theoretical problem. But for others it is a tricky matter. Consider a nation having a compulsory scheme of minimal social provision to aid the neediest (or one organized so as to maximize the position of the worst-off group); no one may opt out of participating in it. (None may say, "Don't compel me to contribute to others and don't provide for me via this compulsory mechanism if I am in need.") Everyone above a certain level is forced to contribute to aid the needy. But if emigration from the country were allowed, anyone could choose to move to another country that did not have compulsory social provision but otherwise was (as much as possible) identical. In such a case, the person's *only* motive for leaving would be to avoid participating in the compulsory scheme of social provision. And if he does leave, the needy in his initial country will receive no (compelled) help from him. What rationale yields the result that the person be permitted to emigrate, yet forbidden to stay and opt out of the compulsory scheme of social provision? If providing for the needy is of overriding importance, this does militate against allowing internal opting out; but it also speaks against allowing external emigration. (Would it also support, to

some extent, the kidnapping of persons living in a place without compulsory social provision, who could be forced to make a contribution to the needy in your community?) Perhaps the crucial component of the position that allows emigration solely to avoid certain arrangements, while not allowing anyone internally to opt out of them, is a concern for fraternal feelings within the country. "We don't want anyone here who doesn't contribute, who doesn't care enough about the others to contribute." That concern, in this case, would have to be tied to the view that forced aiding tends to produce fraternal feelings between the aided and the aider (or perhaps merely to the view that the knowledge that someone or other voluntarily is not aiding produces unfraternal feelings).

LOCKE'S THEORY OF ACQUISITION

Before we turn to consider other theories of justice in detail, we must introduce an additional bit of complexity into the structure of the entitlement theory. This is best approached by considering Locke's attempt to specify a principle of justice in acquisition. Locke views property rights in an unowned object as originating through someone's mixing his labor with it. This gives rise to many questions. What are the boundaries of what labor is mixed with? If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot? Which plot does an act bring under ownership? The minimal (possibly disconnected) area such that an act decreases entropy in that area, and not elsewhere? Can virgin land (for the purposes of ecological investigation by high-flying airplane) come under ownership by a Lockean process? Building a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).

Why does mixing one's labor with something make one the owner of it? Perhaps because one owns one's labor, and so one comes to own a previously unowned thing that becomes permeated with what one owns. Ownership seeps over into the rest. But why isn't mixing what I own with what I don't own a way of losing

what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice? Perhaps the idea, instead, is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created. (Reinforcing this, perhaps, is the view that laboring is unpleasant. If some people made things effortlessly, as the cartoon characters in *The Yellow Submarine* trail flowers in their wake, would they have lesser claim to their own products whose making didn't *cost* them anything?) Ignore the fact that laboring on something may make it less valuable (spraying pink enamel paint on a piece of driftwood that you have found). Why should one's entitlement extend to the whole object rather than just to the *added value* one's labor has produced? (Such reference to value might also serve to delimit the extent of ownership; for example, substitute "increases the value of" for "decreases entropy in" in the above entropy criterion.) No workable or coherent value-added property scheme has yet been devised, and any such scheme presumably would fall to objections (similar to those) that fell the theory of Henry George.

It will be implausible to view improving an object as giving full ownership to it, if the stock of unowned objects that might be improved is limited. For an object's coming under one person's ownership changes the situation of all others. Whereas previously they were at liberty (in Hohfeld's sense) to use the object, they now no longer are. This change in the situation of others (by removing their liberty to act on a previously unowned object) need not worsen their situation. If I appropriate a grain of sand from Coney Island, no one else may now do as they will with *that* grain of sand. But there are plenty of other grains of sand left for them to do the same with. Or if not grains of sand, then other things. Alternatively, the things I do with the grain of sand I appropriate might improve the position of others, counterbalancing their loss of the liberty to use that grain. The crucial point is whether appropriation of an unowned object worsens the situation of others.

Locke's proviso that there be "enough and as good left in common for others" (sect. 27) is meant to ensure that the situation of others is not worsened. (If this proviso is met is there any motiva-

tion for his further condition of nonwaste?) It is often said that this proviso once held but now no longer does. But there appears to be an argument for the conclusion that if the proviso no longer holds, then it cannot ever have held so as to yield permanent and inheritable property rights. Consider the first person *Z* for whom there is not enough and as good left to appropriate. The last person *Y* to appropriate left *Z* without his previous liberty to act on an object, and so worsened *Z*'s situation. So *Y*'s appropriation is not allowed under Locke's proviso. Therefore the next to last person *X* to appropriate left *Y* in a worse position, for *X*'s act ended permissible appropriation. Therefore *X*'s appropriation wasn't permissible. But then the appropriator two from last, *W*, ended permissible appropriation and so, since it worsened *X*'s position, *W*'s appropriation wasn't permissible. And so on back to the first person *A* to appropriate a permanent property right.

This argument, however, proceeds too quickly. Someone may be made worse off by another's appropriation in two ways: first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could. A *stringent* requirement that another not be made worse off by an appropriation would exclude the first way if nothing else counterbalances the diminution in opportunity, as well as the second. A *weaker* requirement would exclude the second way, though not the first. With the weaker requirement, we cannot zip back so quickly from *Z* to *A*, as in the above argument; for though person *Z* can no longer *appropriate*, there may remain some for him to *use* as before. In this case *Y*'s appropriation would not violate the weaker Lockean condition. (With less remaining that people are at liberty to use, users might face more inconvenience, crowding, and so on; in that way the situation of others might be worsened, unless appropriation stopped far short of such a point.) It is arguable that no one legitimately can complain if the weaker provision is satisfied. However, since this is less clear than in the case of the more stringent proviso, Locke may have intended this stringent proviso by "enough and as good" remaining, and perhaps he meant the non-waste condition to delay the end point from which the argument zips back.

Is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property? Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on. These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the "enough and as good left over" proviso, *not* as a utilitarian justification of property. They enter to rebut the claim that because the proviso is violated no natural right to private property can arise by a Lockean process. The difficulty in working such an argument to show that the proviso is satisfied is in fixing the appropriate base line for comparison. Lockean appropriation makes people no worse off than they would be *how?*¹² This question of fixing the baseline needs more detailed investigation than we are able to give it here. It would be desirable to have an estimate of the general economic importance of original appropriation in order to see how much leeway there is for differing theories of appropriation and of the location of the baseline. Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material *in situ*, and by the percentage of current wealth which represents such income in the past.*

* I have not seen a precise estimate. David Friedman, *The Machinery of Freedom* (N.Y.: Harper & Row, 1973), pp. xiv, xv, discusses this issue and sug-

We should note that it is not only persons favoring *private* property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).

THE PROVISIO

Whether or not Locke's particular theory of appropriation can be spelled out so as to handle various difficulties, I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke. A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened. It is important to specify *this* particular mode of worsening the situation of others, for the proviso does not encompass other modes. It does not include the worsening due to more limited opportunities to appropriate (the first way above, corresponding to the more stringent condition), and it does not include how I "worsen" a seller's position if I appropriate materials to make some of what he is selling, and then enter into competition with him. Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one.* A theory of

gests 5 percent of U.S. national income as an upper limit for the first two factors mentioned. However he does not attempt to estimate the percentage of current wealth which is based upon such income in the past. (The vague notion of "based upon" merely indicates a topic needing investigation.)

* Fourier held that since the process of civilization had deprived the members of society of certain liberties (to gather, pasture, engage in the chase),

appropriation incorporating this Lockean proviso will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.*

A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. Some reflection of the proviso about appropriation constrains later actions. If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.) This proviso (almost?) never will come into effect; the more someone acquires of a scarce substance which others want, the higher the price of the rest will go, and the more difficult it will become for him to acquire it all. But still, we can imagine, at least, that something like this occurs: someone makes simulta-

a socially guaranteed minimum provision for persons was justified as compensation for the loss (Alexander Gray, *The Socialist Tradition* (New York: Harper & Row, 1968), p. 188). But this puts the point too strongly. This compensation would be due those persons, if any, for whom the process of civilization was a *net loss*, for whom the benefits of civilization did not counterbalance being deprived of these particular liberties.

* For example, Rashdall's case of someone who comes upon the only water in the desert several miles ahead of others who also will come to it and appropriates it all. Hastings Rashdall, "The Philosophical Theory of Property," in *Property, its Duties and Rights* (London: MacMillan, 1915).

We should note Ayn Rand's theory of property rights ("Man's Rights" in *The Virtue of Selfishness* (New York: New American Library, 1964), p. 94), wherein these follow from the right to life, since people need physical things to live. But a right to life is not a right to whatever one needs to live; other people may have rights over these other things (see Chapter 3 of this book). At most, a right to life would be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else's rights. With regard to material things, the question is whether having it does violate any right of others. (Would appropriation of all unowned things do so? Would appropriating the water hole in Rashdall's example?) Since special considerations (such as the Lockean proviso) may enter with regard to material property, one *first* needs a theory of property rights before one can apply any supposed right to life (as amended above). Therefore the right to life cannot provide the foundation for a theory of property rights.

neous secret bids to the separate owners of a substance, each of whom sells assuming he can easily purchase more from the other owners; or some natural catastrophe destroys all of the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. His later acquisition of it all does not show that the original appropriation violated the proviso (even by a reverse argument similar to the one above that tried to zip back from Z to A). Rather, it is the combination of the original appropriation *plus* all the later transfers and actions that violates the Lockean proviso.

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights.* Similarly, an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.

Notice that the theory does not say that owners do have these rights, but that the rights are overridden to avoid some catastrophe. (Overridden rights do not disappear; they leave a trace of a sort absent in the cases under discussion.)¹³ There is no such external (and *ad hoc*?) overriding. Considerations internal to the theory of property itself, to its theory of acquisition and appropria-

* The situation would be different if his water hole didn't dry up, due to special precautions he took to prevent this. Compare our discussion of the case in the text with Hayek, *The Constitution of Liberty*, p. 136; and also with Ronald Hamowy, "Hayek's Concept of Freedom; A Critique," *New Individualist Review*, April 1961, pp. 28-31.

tion, provide the means for handling such cases. The results, however, may be coextensive with some condition about catastrophe, since the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation).

The fact that someone owns the total supply of something necessary for others to stay alive does *not* entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one. A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated. The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso. Nor would someone else's purchasing the total supply of the synthesized substance from the medical researcher. The fact that the medical researcher uses easily available chemicals to synthesize the drug no more violates the Lockean proviso than does the fact that the only surgeon able to perform a particular operation eats easily obtainable food in order to stay alive and to have the energy to work. This shows that the Lockean proviso is not an "end-state principle"; it focuses on a particular way that appropriative actions affect others, and not on the structure of the situation that results.¹⁴

Intermediate between someone who takes all of the public supply and someone who makes the total supply out of easily obtainable substances is someone who appropriates the total supply of something in a way that does not deprive the others of it. For example, someone finds a new substance in an out-of-the-way place. He discovers that it effectively treats a certain disease and appropriates the total supply. He does not worsen the situation of others; if he did not stumble upon the substance no one else would have, and the others would remain without it. However, as time passes, the likelihood increases that others would have come across the substance; upon this fact might be based a limit to his property right in the substance so that others are not below their baseline position; for example, its bequest might be limited. The

theme of someone worsening another's situation by depriving him of something he otherwise would possess may also illuminate the example of patents. An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others). Furthermore, a known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it, and the notion of independent discovery here would be murky at best. Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.

I believe that the free operation of a market system will not actually run afoul of the Lockean proviso. (Recall that crucial to our story in Part I of how a protective agency becomes dominant and a *de facto* monopoly is the fact that it wields force in situations of conflict, and is not merely in competition, with other agencies. A similar tale cannot be told about other businesses.) If this is correct, the proviso will not play a very important role in the activities of protective agencies and will not provide a significant opportunity for future state action. Indeed, were it not for the effects of previous *illegitimate* state action, people would not think the possibility of the proviso's being violated as of more interest than any other logical possibility. (Here I make an empirical historical claim; as does someone who disagrees with this.) This completes our indication of the complication in the entitlement theory introduced by the Lockean proviso.