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Why Libertarianism Is Mistaken

Taxing the income of some people to provide goods or services to others, even those with urgent needs, is unjust. It is a violation of the wage earner's rights, a restriction of his freedom. At least that is what the libertarian tells us. I disagree. Not all redistribution of income is unjust; or so I shall argue.

Libertarianism has experienced a noticeable re-emergence in the past few years. F. A. Hayek, Milton Friedman, and Robert Nozick have given new intellectual impetus to the movement¹ while a growing concern for personal autonomy has provided personal ground for the sowing of the idea. Yet even though this theory is *prima facie* plausible and demands serious reassessment of the concepts of liberty and property, it ultimately fails. Once we admit, as the libertarian does, that the state justifiably takes on certain functions, for example, police protection of persons and property, there is no rational basis for believing that the state is unjustified in redistributing tax revenue. We cannot stop, as the libertarian suggests, with the minimal state of classical liberal philosophy. I will not, in this paper, say exactly how far beyond the minimal state we should go. I only argue that libertarianism is not a moral option. On the surface this conclusion seems meager, yet its implications are far-reaching. By eliminating a previously plausible and popular conception of distributive justice, we will narrow the alternatives. By identifying a major flaw in libertarianism, we will secure direction in our search for an adequate theory.

After briefly describing libertarianism I will argue that the theory is guilty of internal incoherence: the theory falls prey to the very objection it offers against competing theories. Then I will consider four possible libertarian replies to my argument. Each, I will claim, fails to disarm my internal objection. After concluding my argument, I will speculate on the roles freedom and property should play in an adequate theory of distributive justice.

A Description of Libertarianism

Central to libertarianism is the claim that individuals should be free from the interference of others. Personal liberty is the supreme moral good. Hence, one's liberty can justifiably be restricted only if he consents to the restriction. Any other restriction, including taxing incomes for purposes of redistribution, is unjust. Or the libertarian may couch his theory in the language of rights: each individual has natural negative rights² to at least life, liberty, and property. No one can justifiably harm him, restrict his freedom, or take his property--that is, no one can violate his rights--without his consent. Moreover, these are general (*in rem*) rights; they apply, so to speak, against the whole world. And since rights invariably have correlative duties, all the people in the world have the duty not to interfere with the right holder's life, liberty, and property. Each person possesses these rights simply in virtue of his humanity—he does not have to *do* anything to obtain this moral protection. The possession of rights does not depend upon the consent of others. They are essential moral constituents of personhood.

However, we should note that these two ways of speaking seem to amount to the same thing for the libertarian. Libertarian theorists often move back and forth between talk of negative rights and talk of liberty. I suspect that is because they ultimately see rights and liberty as equivalent or because they hold a theory of rights which is grounded in personal liberty. That is, the libertarian might say, the *reason* we have all and only libertarian rights (absolute negative rights to life, liberty property, etc.) is that these rights protect individual liberty. Hence, on both models liberty is fundamental.

Libertarianism also contends that in certain prescribed circumstances there can be positive *in personam* rights, that is, that individual X has a positive right to, say, \$1,000 and someone else Y has a positive duty to give X that money. These positive rights, however, are not natural rights; they are not possessed by all persons just because they are persons. They can arise only consensually. For example, if A promises B that he will serve as a lifeguard at B's swimming pool, then B has a right against A and A has a duty to B--a duty to guard those in B's pool. But unless A so consents, he has no positive duties to B, or to anyone else for that matter. Consequently, for the libertarian, there are no general positive duties and no general positive rights. There are only *alleged* general positive rights; claims to such rights (or of such duties) are mistaken. For if there were positive general duties we would have to violate negative general

rights to satisfy them. For example, suppose everyone had a positive general right to life; then everyone would have rights (entitlements) to those goods necessary to stay alive, e.g., food to eat. But food, or the money to buy it, doesn't grow on trees (or, if it does, the trees are owned). Those who own the food or the money have negative rights protecting their possession of these things. And negative general rights, for the libertarian, are absolute.³

There are no circumstances in which these rights can be justifiably overridden, in which one's liberty can be justifiably limited without his consent. Hence, X's rights to property (or life or liberty) can never be overridden for the benefit of others (to satisfy the alleged positive rights of others). X can choose to charitably give his property to, someone, or he can voluntarily give someone a positive right to his property. Nevertheless, morally he cannot be forced--either by legal sanctions or moral rules--to give up his life, liberty, or property. This moral/legal prohibition insures that an individual's liberty cannot be restricted in any way without his consent.

Thus we see two important features of libertarianism. First, the primary purpose of negative general rights is the protection of individual liberty, to insure that no one's life is restricted without his consent. Or as Nozick puts it: "Side constraints [which are equivalent to negative general rights] upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they cannot be sacrificed or used for the achieving of other ends without their consent... [These constraints] reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us."⁴ Secondly, the libertarian holds that a sufficient reason to reject any alleged moral rule or principle of distributive justice is that rule or principle restricts someone's freedom without his consent. Hayek, for example, argues that we should reject plans to expand governmental roles since such expansion necessarily undermines individual liberty.⁵ And Nozick's primary objection to Rawls is that Rawls's two principles restrict individual liberty without consent.

Libertarianism, though morally austere, has a certain plausibility. Each of us wants to be able to live his own life, to be free from the unnecessary interference of others. We want, in Kant's words, to be ends in ourselves and not mere means for others.⁶ But just because a theory is plausible does not mean that it is correct. Libertarianism, I think, can be shown to be mistaken. I will argue that negative general rights fail to protect individual liberty the way the libertarian suggests. Since the protection of liberty is the express purpose of these libertarian rights, the theory fails. My argument will also show that even the libertarian must hold that one should not reject a moral rule or principle of distributive justice simply because it permits (or requires) non-consensual limitations on freedom. Once this failure is exposed there appears to be no good reason for denying that there are at least some positive general duties and probably some positive general rights. How many and how extensive these duties or rights are is another question.

Libertarianism Limits Liberty

The problem with libertarianism can be seen once we recognize the limitations that negative rights (libertarian constraints) themselves place on individual liberty. Suppose, for example, that I am the biggest and strongest guy on the block. My size is a natural asset, a physical trait I inherited and then developed. But can I use my strength and size any way I please? No! At least not morally. Though I am physically capable of pummeling the peasants, pillaging property, and ravishing women, I am not morally justified in doing so. My freedom is restricted without my consent. I didn't make a contract with the property owners or the women; I didn't promise not to rap, rob, or rape. Just the same, morally I cannot perform these actions and others can justifiably prohibit me from performing them.

Consequently, everyone's life is not, given the presence of negative general rights and negative general duties, free from the interference of others. The "mere" presence of others imposes duties on each of us, it limits everyone's freedom. In fact, these restrictions are frequently extensive. For example, in the previously described case I could have all of the goods I wanted; I could take what I wanted, when I wanted. To say that such actions are morally or legally impermissible significantly limits my freedom, and my "happiness," without my consent. Of course I am not saying these restrictions are bad. Obviously they aren't. But it does show that the libertarian fails to achieve his major objective, namely, to insure that an individual's freedom cannot be limited without his consent. The libertarian's own moral constraints limit each person's freedom without consent.⁷

This is even more vividly seen when we look at an actual historical occurrence. In the nineteenth century American slaveholders were finally legally coerced into doing what they were already morally required to do: free their slaves. In many cases this led to the slave owners' financial and social ruin: they lost their farms, their money, and their power. Of course they didn't agree to their personal ruin; they didn't agree to this restriction on their freedom. Morally they didn't have to consent; it was a remedy long overdue. Even the libertarian would agree. The slave holders' freedom was justifiably restricted by the presence of other people; the fact that there were other persons limited their acceptable alternatives. But that is exactly what the libertarian denies. Freedom, he claims, cannot be justifiably restricted without consent. In short, the difficulty in this: the libertarian talks as if there can be no legitimate non-consensual limitations on freedom, yet his very theory involves just such limitations. Not only does this appear to be blatantly inconsistent, but even if he could avoid this inconsistency, there appears to be no principled way in which he can justify only his theory's non-consensual limitations on freedom.

This theoretical difficulty is extremely important. First, the libertarian

objections against redistribution programs (like those practiced in the welfare state) are weakened, if not totally disarmed. His ever-present objection to these programs has always been that they are unjust because they are non-consensual limitations on freedom. However, as I have shown, libertarian constraints themselves demand such limitations. Therefore, that cannot be a compelling reason for rejecting welfare statism unless it is also a compelling reason for rejecting libertarianism.

Secondly, once we see that justice demands certain non-consensual limitations on someone (X's) freedom, there seems to be no good reason for concluding (and good reason not to conclude) that X's freedom can be limited only by negative general duties. There seems to be no reason, for example, for concluding that X's freedom to make \$1 million should not be restricted to aid other people, e.g., to give some workers enough funds to help them escape the de facto slavery in which they find themselves.

Think of it this way. Liberty, for the libertarian, is negative in nature. An individual's liberty is restricted whenever (and only if) his potential actions are restricted. This is essentially a Hobbesian view of liberty. So imagine with Hobbes and some libertarians that individuals are seen as initially being in a state of perfect freedom. In such a state, Hobbes claims, "nothing can be just. Right and wrong have there no place."⁸ To introduce right and wrong of any sort is to put moral limitations on individual freedom. To that extent, everyone's freedom is restricted. Each person has an external impediment--a moral rule which can be coercively enforced--against doing some action A (and actions relevantly like A). Therefore, to introduce negative general rights and duties, as the libertarian does, is to admit that there are non-consensual limitations on freedom. And these limits--as I argued--are sometimes significant and far-reaching. They arise--and this is crucial--without consent; each person has them simply because he is a person. Now if one's freedom can be limited without consent by negative rights, then it is unreasonable to hold that these are the only limitations on freedom which can legitimately arise without consent. This is particularly apparent when we realize that in a number of cases the limitations on freedom imposed by negative duties are more--even much more--than limitations which would be imposed if some claims of positive rights or duties were recognized. For example, forcing a slaveholder to free his slaves would limit his freedom more than would a law forcing him to pay ten percent of his salary to educate and provide health care for his slaves. Or forcing Hitler to not take over the world (in other words, forcing him to recognize others' negative rights) would limit his freedom more extensively than would forcing him to support, by his taxes, some governmental welfare program. Yet the libertarian concludes that redistribution of income is unjust since it limits the taxed person's liberty without his consent. If redistribution is unjust for that reason, then so are libertarian constraints. Libertarian constraints also limit personal liberty without consent.

The libertarian might attempt to immediately avoid my conclusion

y claiming that there is a principled difference between redistribution of income and libertarian constraints such that the former is *never* a justified restriction of liberty while the latter is always justified. For although both do limit personal liberty without consent, he might argue, libertarian constraints only restrict liberty in order to protect individual rights. And it is the protection of personal rights which justifies these, and only these, non-consensual restrictions on liberty.

However, this reply won't do. For as I have stated, any libertarian conception of rights is itself grounded in--justified by reference to--personal liberty. Or, as Eric Mack puts it, they are grounded in the right not to be coerced.⁹ Hence, given my preceding argument, there is no principled way that concerns for personal liberty could generate *only* libertarian rights and duties, since negative rights restrict liberty as much as, or more than, would some positive rights or duties. Consequently, appeals to personal rights cannot provide the libertarian with a principled basis for distinguishing between types of non-consensual limitations on liberty.

We have uncovered a very telling incoherence. We have taken the main libertarian weapon against welfare statism and turned it on itself. The once so-sharp sword is seen to have two sides. Instead of menacing the enemy, the sword only frustrates its wielder. As everyone knows, two edged swords cut both ways. The libertarian is unable to support his conception of the minimal state. At least some redistribution of tax monies is justified.

Possible Libertarian Replies

"Liberty" Is Normative, not Descriptive

The libertarian might object to this argument by claiming that I have misunderstood his use of the word "liberty." "Liberty" is not, he might argue, a purely descriptive term. On a purely descriptive model of liberty, anything which restricts an individual's options would be a restriction of his liberty. Hence, negative rights would be a restriction of individual liberty. But not just any restriction of someone's option is a restriction of his liberty. Prohibitions of unjust actions are surely not limitations of freedom. For example, a person does not have the liberty to knife someone even though he physically might be able to do it. In short, individuals have liberty to do only those things which are just. Consequently, "liberty" should be seen as a normative term such that if A has the liberty to do if then not only is no one prohibiting him from doing it, but it is also morally permissible that he do it. "Therefore," the libertarian might conclude, "your objection fails since negative duties do not really limit individual liberty. It is not just that people kill each other, so prohibitions against killing are not limitations of freedom."

This linguistic proposal is intriguing since "liberty" clearly does have a positive emotive force which suggests ethical overtones. My own hunch, though, is that "liberty" should be maintained as a descriptive term. That

is, "liberty" is, and should be maintained as, a value-neutral term which merely states that there are limitations, without any judgment as to their propriety. For although we all have some tendencies to vacillate between the descriptive and normative senses of the term,¹⁰ it seems clear that its basic sense is descriptive. It is only after we identify liberty descriptively that we are able to distinguish between just and unjust restrictions on it. For the purposes of this paper, however, I need not belabor the point. For even the acceptance of this linguistic proposal cannot patch up the libertarian's deflated case. For if "liberty" is a normative term in the way proposed, then we could not know if something is a restriction of liberty until we knew if the restrained action is just. For example, we would not know that taxing a millionaire's money and distributing it to the needy was a violation of the millionaire's liberty until we knew if it was just to so tax him. Hence, the claim that A has the liberty to do X (spend his millions any way he pleases) could not be a *reason* for believing that some action (taxing his millions) is unjust. The justificatory relationship on this model would be exactly opposite. We would have reason to believe that A had the liberty to do X only if we already knew that it was just that he do it. Consequently, the protection of individual liberty cannot be the purpose of (or consequence of) negative rights since the determination that someone had the liberty to do X depends upon the determination that he has the right to do it. For example, one would have the liberty to bequeath property P to Z only if he had the right of bequeathal. Yet the libertarian wants to ground such rights in personal liberty. Therefore, even if this linguistic proposal were acceptable, the libertarian's stated purpose of negative rights would be undermined. He would no longer be able to argue for stringent negative rights on the grounds that they protect individual liberties. Nor would he be able to reject other principles of distributive justice on grounds that they limited individual liberty without consent.

Liberty Should Be Maximized

The libertarian might attempt another tack. "Admittedly negative rights limit individual freedom. There has never been any doubt about that. What the libertarian demands is that everyone have maximum personal liberty with equal liberty consistent for all." However, this popular statement of libertarianism fails to soften my objection. The maximum amount of liberty with equal liberty for all is absolute liberty --a state in which there are no legal or moral prohibitions of any kind. (Notice that this is a Hobbesian state of nature.) In such a state there are no prohibitions and everyone is equally free from prohibitions. The libertarian, I suspect, would disagree. Although in such a state people would *ideally* have equal liberty, the libertarian would probably contend that because some people would take advantage of the situation and deprive others of their liberty, people so situated would not, in fact, have equal liberty. In other words, though liberty is ideally maximal, it would not be prudentially maximal.

There are three problems with this reply. First, on this view there would no longer be absolute prohibitions against restriction of liberty. Liberty could be justifiably restricted; it would not be an absolute good. True, it is only liberty which overrides liberty. Nevertheless, to say that one species of liberty overrides another is to say that there is something about one of them (liberty₁) which makes it morally more potent than the other (liberty₂). This something--e.g., good consequences following the action--which makes liberty₁ more potent, must be something other than liberty. Otherwise, there would be no rational basis for preferring liberty₁ over liberty₂. This implies that this other feature (e.g., good consequences) is more important than liberty or that liberty is morally good only when it has this (or some other) specific feature.¹¹ Thus, liberty would be neither absolute nor supreme.

Secondly, if the libertarian concern *is* with maximizing liberty, then there would no longer be absolute rights to liberty. Instead, liberty would be a goal, an end-state to be maximized. And, as Robert Nozick realizes (he makes his point in the language of rights), "This. . . would require us to violate someone's rights when doing so minimizes the total (weighted) amount of violations of rights in the society."¹¹ That is why he rejects such an option. An individual's liberty could be justifiably protected only if certain empirical statements (about whether the requisite action maximized liberty) were true. Hence, negative rights would be neither theoretically nor practically absolute. And to deny that they are absolute is to deny libertarianism.

Thirdly, if liberty must be *exactly* equal, as the rebuttal suggests, then we would have to have an extremely repressive government (a police state with constant electronic surveillance, etc.). Otherwise some people's (but not all people's) rights would be violated by murders, muggers, etc. Consequently, if the demand were on maximizing liberty, a Hobbesian state of liberty would be chosen; if the emphasis were on equality of liberty, then something like a police state would be chosen.

In other words, any reference to maximal or equal liberty indicates only a formal criterion of justice which fails to distinguish between alternative determinations of what counts as maximal or equal liberty.

Individuals Tacitly Consent to Libertarianism

The libertarian could attempt another reply by appealing to the notion of implied or tacit consent. "You have correctly identified my criterion for justifiably restricting personal freedom," he might say. "An individual must consent to any restriction. Consent, however, need not be explicitly offered. An individual can, merely by his action, tacitly consent to some limitations of his freedom."¹³ The libertarian then might go on to conjecture that by seeking interaction with others, all individuals tacitly agree to respect others' liberty in certain specified ways, namely, those ways protected by negative general rights.

There are, however, several difficulties with this reply. Initially there is the difficult question of how to adequately describe some action(s) such

that it does indicate tacit consent. And no matter how one describes such an action, undoubtedly someone in the world would fail to perform it-- yet the libertarian would still assume that person had a duty not to violate libertarian constraints. We could also note that the notion of tacit consent normally implies that such consent is like explicit consent, it is just that it is not verbally offered. That suggests that A cannot be said to have tacitly consented to X, if, when he is explicitly asked if he so consents, he (A) denies it. Yet surely there would be at least one person in the world who would vehemently deny that he had consented to the presence of all and only negative general rights. Hence, there would be no basis for claiming that A is morally or legally required to do X. Still the libertarian would want to contend that A could not justifiably kill others, steal their property, etc.

Secondly, it is highly implausible to think that all people would consent--explicitly or implicitly--to all and only libertarian constraints. Robert Nozick, for example, recognizes this when he emphatically rejects the principle of fairness.¹⁴ If a rule of tacit consent could undergird negative general rights, then it could also justify at least some governmental redistribution programs. We don't, however, need to cite Nozick here; we can simply make the obvious claim that people would choose something other than libertarianism. They would at least opt for a system which also gave them sufficient goods (or the ready opportunity to obtain them) to stay alive. Finally, we could also note John Rawls's argument in *A Theory of Justice*¹⁵ which shows that if one works from a consent model, a more than-minimal state would emerge. The rebuttal fails.

Libertarianism Is Grounded in Immediate Intuition

Libertarianism is beginning to flounder. So the libertarian might attempt to salvage his theory by arguing that his view of morality, and its emphasis on negative general rights, is established by immediate intuition. "Rights are not grounded in liberty," he might say; "hence your arguments just miss the mark. I intuitively recognize that we have these and only these rights." Or he might offer a slightly more sophisticated intuitionist model: he claims to immediately intuit some fundamental moral "fact" which justifies all and only libertarian rights. For example, he might claim that he intuitively knows that people can *never* be used as a means for others' ends (a la Kant), and that this truth strictly implies his account of rights.

There are two questions to be raised about this proposal. First, even if the suggested intuition about the Kantian imperative were true, would it imply the truth of libertarianism? Secondly, are *any* intuitions singularly sufficient to ground particular moral principles? The answer to both, I will argue, is: "No."

Let us imagine for a moment that the proposed intuition is indubitably true: "(I)ndividuals are ends and not merely means; they cannot be sacrificed or used for the achieving of other ends without their consent."¹⁶

Why must we suppose, as this reply suggests, that the only way people are used as a means for others is if libertarian rights are violated? Why, for example, isn't a poor worker being used by a rich factory owner as a means for his making a million dollars? I, for one, think he clearly is.¹⁷

Besides, I could also point out, following my argument in the second section, that libertarian restraints themselves involve using some individuals as means for others. For example, the slaveholder is used against his will as a means for achieving the freedom of the slaves; he is forced to do something just to benefit others. In fact, all libertarian constraints use us to benefit others. They force us to do (or not do) certain actions as a means of allowing individuals to do other actions--actions which are deemed more important than the prohibited ones. The presence of other individuals uses each of us by limiting our range of permissible alternatives. Admittedly, we may sometimes not see ourselves as being used under these circumstances; but if we don't, I suspect it is because we don't desire (for the most part) to kill other people, enslave them, etc., or because we have been so ingrained with the view that such restrictions are morally required. But when the cost is significant, people often do, in fact, see this. The slaveholders, for example, argued that since they didn't agree to abolition, they shouldn't have to set their slaves free-- to force them to was a nonconsensual limitation of their freedom. And they're right: it was a violation of their descriptive liberty. It is just that it was a just violation. The libertarian, it seems, must agree. But, of course, that implies that there are no absolute prohibitions against using people.¹⁸

In fact, this argument helps focus on an underlying difficulty with libertarianism. Libertarians seem to desire a totally individualistic system in which one's interests never have to be weighed against anyone (or everyone) else's. But that is impossible. People's interests inevitably will conflict in any society in which there is limited space and resources. The purpose of law and morality is just to provide a rational procedure for settling such conflicts. For example, on this view (X's) enslaving some one to increase his (X's) income, is clearly a worse "using" than is prohibiting X from enslaving others. That is why we prohibit slavery. One person's interest (not to be enslaved) is weighed against another person's interest (to enslave) and the former is clearly superior. Surely this is a more plausible understanding of negative rights. Therefore, even if we grant the suggested intuition, the libertarian view of rights is not established.

However, there is still the general question concerning the role of intuition in moral argument. I would contend that intuitions may play some legitimate role in moral argument. But if they do, these intuitions must be revisable in the face of cogent argument; they must also be sensitive to opposing intuitions. Yet I have shown that there appears to be no principled basis for the absolute emphasis on negative general rights. So if the libertarian does found his theory only on intuitions, particularly when basic distinctions within the theory (the emphasis on libertarian constraints rather than positive duties) seem *ad hoc* and even

counter-intuitive, then the theory crumbles in the sands of weak intuitions. In short, since the claim that there are no general positive duties or rights is unprincipled, we must reject it. Therefore, even if the suggested intuitions did strictly imply a libertarian conception of rights, libertarianism would still not be established since the intuitions themselves would be highly questionable.

Conclusion and Speculation

My argument is completed. I have argued that libertarianism is untenable.¹⁹ I have challenged four possible replies to my argument. I would like to end with some rather brief speculation on the direction an adequate theory of justice must go. My speculation emerges from the previous arguments. I have shown that neither property nor liberty (as defined by the libertarian) should be seen as the only social good; singling these out as the only social values is unreasonable. Instead, these should be seen as two values among many, all competing for recognition.

Property, as I have said, is important. But how important? Well, it should be apparent that an individual cannot be alive without some property, or at least some goods to use; neither can a person have any real options without goods to world on. In addition, there is some force to the Hegelian claim that individuals need property with which to "identify" themselves, and there is the Jeffersonian point that property seems to be necessary for the protection of civil liberty. These might suggest that everyone is entitled to some minimum of goods, and that that minimum is protected by negative rights. Beyond this minimum? That's a difficult question.

And what of liberty? Surely it is important. Just as surely it is not all-important. But in some societies, say, rather affluent ones, it (e.g., political and civil liberties) may be the highest (but even here not the only) value. The libertarian's claim that it is is mistaken.

NOTES

1. F. A. Hayek, *The Constitution of Liberty* (Chicago: Henry Regnery Company, 1960) and *Individualism and Economic Order* (Chicago: Henry Regnery Company, 1948); Milton Friedman, *Capitalism and Freedom* (Chicago: The University of Chicago Press, 1958); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, Inc., 1974).

2. These rights are natural, inasmuch as they exist prior to the existence of the state and set limits within which the state can justifiably act. They are negative since they prohibit external, other-agent interference.

3. E.g., Nozick, particularly pp. 28-32.

4. Although Nozick equates liberties and negative rights, there are good reasons to separate the concepts. See, e.g., W. N. Hohfeld's analysis, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University

Press 1953). Still since Nozick does identify them--in fact many theorists do--I will in this paper adhere to that identification.

5. Hayek *The Road to Serfdom* (Chicago: The University of Chicago Press 1944).

6. There is serious question whether Kant would want his "slogan" appropriated by libertarianism. Still it is easy to understand why they gravitate toward Kant.

7. Some libertarians might object: Negative rights are not limitations of liberty. You have simply misunderstood they might say the very nature of libertarianism. One does not have the liberty to kill others. However, it seems to me that such rights are restriction- of liberty and hence my objections go through. Nonetheless I will consider this suggestion in some detail in the next section.

8. Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (New York: Collier Books 1973 edition) p. 101.

9. Eric Mack "Natural and Contractual Rights" *Ethics*, vol. 87 no. 2 (1977) pp. 153ff.

10. Actually I think it is the libertarian's vacillation in his use of this term that makes his case so initially compelling.

11. See Joel Feinberg *Social Philosophy* (Englewood Cliffs N.J.: Prentice-Hall Inc. 1973) p. 19.

12. Nozick p. 28.

13. For two discussions of tacit consent see R. P. Wolff's *In Defense of Anarchism* (New York: Harper & Row 1970) and P. Singer's *Democracy and Disobedience* (Oxford: Oxford University Press, 1972).

14. Nozick. pp. 90-95.

15. John Rawls *A Theory of Justice* (Cambridge Mass.: Harvard University Press, 1971).

16. Nozick p. 31.

17. It won't do for the libertarian to argue that this is a just "using" while violations of negative rights are unjust "usings." Such a distinction (between just and unjust "usings") presupposes that the Kantian ends/means principle is not the fundamental building block of libertarianism. Hence such a response would undermine the very ground of this objection.

18. A similar argument could be developed against any libertarian attempt to use the act/omission distinction to undergird his theory of rights. Let me explain: occasionally the libertarian will claim that there is an unbridgeable moral gulf between actively harming someone and "merely" letting harm happen to him. Active harms are always wrong while omissions (failures to act) are never wrong. This explains why all general rights are only negative the libertarian might say. Violations of negative rights are active harms while omissions never violate negative rights.

I have three comments about such a reply. First though this distinction apparently has some service--there is in many cases some moral difference between omissions and commissions--it does not seem even to most supporters of this distinction that the moral difference is so vast that omissions are *never* wrong. Secondly the libertarian has never tried as far as I know to defend his use of the distinction. Thirdly and probably more to the point my main argument first aired in the second section spells trouble for the distinction's utility as a grounding for the libertarian view of rights. Libertarian constraints themselves actively intrude into individuals' lives. They justify coercively prohibiting individuals from doing actions they may want to do and are able to do. So by his own account active intrusions are not always wrong. The act/omission distinction cannot undergird the libertarian conception of rights. And it won't do for the libertarian to argue that active intrusions to stop active intrusions are permissible since there is no non-question-begging way in which such an analysis would support the libertarian view of rights. The slaveholder for example could claim that by enslaving other he was actively intruding to stop the state from actively intruding on him.

Therefore, I would again want to argue that the libertarian is overlooking the obvious reason why the slaveholder's activities are curtailed: an individual's interest in not being enslaved is more fundamental and more extensive than his (or anyone

else's) interest in enslaving another. One need not resort to mysterious talk of either intrusions to stop intrusions or acts and omissions. In fact I suspect that if the act/omission distinction is morally significant because it describes part of our moral life--not because it proscribes that life.

19. There is one possible variety of libertarianism that I have not examined here. Someone might offer a distinctly consequential argument for libertarianism. They might argue for example that a society which recognized only negative general rights would be freer, happier, etc. However this certainly does appear to violate the spirit as well as the letter of libertarianism. Libertarianism involves the claim that violations of negative general rights are always wrong, come what may and it is difficult to envision how such a theory could be compatible with anything but a deontological justification.

Secondly it is wildly implausible to think that any traditional consequentialist principle could generate libertarian claims or even something closely approximating them. Classical utilitarianism for example would at least insure that each individual has the basic goods necessary for survival (given the truth of the principle of diminishing utility).

Still I suppose someone might develop such a theory and if he did then further argument would be required to demonstrate its inadequacies.