



## A HAYEKIAN THEORY OF SOCIAL JUSTICE

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As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise.

- John Locke<sup>1</sup>

### I. Introduction

The purpose of this essay is to critically examine Friedrich Hayek's broadside against the conceptual intelligibility of the theory of social or distributive justice. This theme first appears in Hayek's work in his famous political tract, *The Road to Serfdom* (1944), and later in *The Constitution of Liberty* (1960), but he developed the argument at greatest length in his major work in political philosophy, the trilogy entitled *Law, Legislation, and Liberty* (1973-79). Given that Hayek subtitled the second volume of this work *The Mirage of Social Justice*,<sup>2</sup> it might seem counterintuitive or perhaps even absurd to suggest the existence of a genuinely Hayekian theory of social justice. Notwithstanding the rhetorical tenor of some of his remarks, however, Hayek's actual conclusions are characteristically even-tempered, which, I shall argue, leaves open the possibility of a revisionist account of the matter.

As Hayek understands the term, "social justice" usually refers to the intentional doling out of economic rewards by the government, "some pattern of remuneration based on the assessment of the performance or the needs of different individuals

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<sup>1</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 206 (Peter Laslett ed. 1960) (1690).

<sup>2</sup> 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976).

or groups by an authority possessing the power to enforce it.”<sup>3</sup> His basic contention is that any such conception of justice must be “wholly devoid of meaning or content” within the context of a spontaneous market order in which the aggregate distribution of resources arises as the indirect consequence of economic transactions, the remote effects of which no one specifically intends or foresees.<sup>4</sup> Having stated this claim, Hayek readily acknowledges that it “is one which by its very nature cannot be *proved*. A negative assertion never can.”<sup>5</sup> Instead, he concludes, this assertion “can only be issued as a challenge which will make it necessary for others to reflect on the meaning of the words they use.”<sup>6</sup>

The aim of this essay is to take up Hayek’s challenge and to reflect upon the extent to which his case against the concept of social justice is persuasive. For the purpose of argument, I will allow that the body of Hayek’s work contains deep insights about how real-world productive processes function as a vehicle for the coordination of dispersed and tacitly held knowledge, which is now widely recognized as his most important contribution to social theory.<sup>7</sup> Moreover, given that the market process performs this crucial epistemological function, Hayek is correct that serious efforts to implement comprehensive economic planning by a central authority would create the sorts of negative economic and political consequences that he envisions, because they would distort the efficient functioning of the price system as a mechanism for the coordination of supply and demand.

My thesis is that, from a moral point of view, Hayek’s critique of social justice nonetheless fails. Even granting his empirical assumptions about the workings of the market process, one can still assess the distributive results of that process in terms of justice or fairness. From this perspective, the problem of economic justice is not really a question of *whether* social institutions should “intervene” in the market process. Instead, as we shall see, Hayek himself concedes at various points that the institutional framework within which the market functions necessarily constrains its outcomes in more or less predictable ways. The relevant questions thus become not whether, but *when* and *how* such constraints ought to shape market outcomes consistent with our ideal of social justice, while at the same time preserving the competing values of individual liberty and economic efficiency. If this conclusion is correct, then it is possible to show that Hayek’s argument fails as a matter of principle, without resort to contestable empirical claims about the nature of economic processes.

In what follows, I will first briefly sketch an overview of the essentials of Hayek’s well-known critique and then indicate where, in my view, his reasoning fal-

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<sup>3</sup> *Id.* at 68.

<sup>4</sup> *Id.* at 96.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Israel M. Kirzner, *Economic Planning and the Knowledge Problem*, in FRIEDRICH A. HAYEK: CRITICAL ASSESSMENTS 72 (John Cunningham Wood & Ronald Woods eds., 1991); DONALD LAVOIE, RIVALRY AND CENTRAL PLANNING: THE SOCIALIST CALCULATION DEBATE RECONSIDERED (1985). Hayek’s seminal articles on the epistemological function of the price mechanism are *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), and *Economics and Knowledge*, 4 ECONOMICA 33 (1937).

ters, focusing especially on his principal claim that the very idea of social justice is necessarily meaningless within the context of an extended market order.

## II.

Although Hayek is correctly identified as standing squarely within the classical liberal tradition,<sup>8</sup> his position on distributive justice is distinctive in so far as he does not contend, as classical liberals and libertarians often do, that the distributive pattern that emerges from a series of voluntary market exchanges is necessarily “just,” provided only that it occurs in the absence of overt coercion or fraud. To be sure, Hayek does not believe that interferences with voluntary market exchanges are justifiable merely as an effort to realize a goal such as substantive material equality. Importantly, however, he takes great pains to insist that there is no necessary connection between successful market outcomes and moral merit or desert based on hard work, diligence, skill, or any other similar criteria.<sup>9</sup>

Rather, in Hayek’s view, the remuneration for goods and services that individuals offer in the market, including labor and other factors of production, is determined entirely by the (marginal) value of those goods and services to those who consume them.<sup>10</sup> He thus contends that “[i]t is not good intentions or needs but doing what in fact most benefits others, irrespective of motive, which will secure the best reward.”<sup>11</sup> In this sense, Hayek argues that the market process is directly analogous to a competitive game in which rewards are the product “partly of skill and partly of chance.”<sup>12</sup> And, while it is sensible to insist that the rules of the game “be fair and that nobody cheat, it would be nonsensical to demand that the results for the different players” conform to any preconceived ideal of justice, because the outcome can never be known *ex ante*.<sup>13</sup>

To his credit, Hayek frankly acknowledges that the partially arbitrary character of market outcomes poses a “real dilemma” for defenders of the market order.<sup>14</sup> On the one hand, he recognizes that the widespread belief in the “moral justification of individual success” is a powerful incentive to productive activity.<sup>15</sup> “[F]ew circumstances,” he observes, “will do more to make a person energetic and efficient than the belief that it depends chiefly on him whether he will reach the goals he has set himself.”<sup>16</sup> Indeed, Hayek concedes that it is unlikely that “people will tolerate major inequalities” in material standards of living without the belief that “individuals get on the whole what they deserve,”<sup>17</sup> and, of course, this is partly true in so far as superior skill

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<sup>8</sup> In a famous postscript to *The Constitution of Liberty* entitled “Why I Am Not a Conservative,” Hayek characterizes himself as “an unrepentant Old Whig.” FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 409 (1960).

<sup>9</sup> HAYEK, *supra* note 2, at 73–74.

<sup>10</sup> *Id.* at 92.

<sup>11</sup> *Id.* at 72.

<sup>12</sup> *Id.* at 71.

<sup>13</sup> *Id.*; *see also id.* at 126–27.

<sup>14</sup> *Id.* at 74.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 73.

and effort are met with success. On the other hand, he worries that the belief that achievement is largely based on merit can be seriously misleading, because ability and effort are neither necessary nor sufficient conditions for economic success, and “it bodes ill for the future of the market order that this seems to have become the only defence of it which is understood by the general public.”<sup>18</sup>

For these reasons, Hayek is well aware of the necessity of justifying the collective choice of adopting (or perhaps more precisely, acquiescing in the evolution of) a particular institutional framework in which “actual differences in rewards . . . will be based only partly on achievement and partly on mere chance.”<sup>19</sup> He thus recognizes that “there unquestionably also exists a genuine problem of justice in connection with the deliberate design of political institutions.”<sup>20</sup> Perhaps somewhat surprisingly, given his emphasis on spontaneous order and the inherent limitations of human reason in deliberately ordering social affairs, Hayek is even willing to call this sort of institutional innovation a kind of “planning”:

We can “plan” a system of general rules, equally applicable to all people and intended to be permanent, which provides an institutional framework within which the decisions as to what to do and how to earn a living are left to . . . individuals.<sup>21</sup>

The liberal argument is in favor of making the best possible use of the forces of competition as a means of co-ordinating human efforts, not an argument for leaving things just as they are . . . It does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required, and that neither the existing nor the past legal rules are free from grave defects.<sup>22</sup>

Unlike political philosophers such as John Rawls or Robert Nozick, however, Hayek adopts a methodological approach to the problem of distributive justice in which he eschews what he takes to be the endlessly contestable moral theorizing about just deserts, fairness, or historical entitlements. Instead, he grounds his argument primarily in terms of a purportedly value-neutral social theory about the operation of economic processes.

As noted at the beginning of this essay,<sup>23</sup> Hayek’s basic contention is that, within the context of a spontaneous market order, the concept of “social justice” is *necessarily* meaningless and illusory, because no person or agency intentionally and deliberately determines the particular economic results for particular people. To the con-

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<sup>18</sup> *Id.* at 74.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 100. In this connection, Hayek even quotes with approval Rawls’s statement that “the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them.” John Rawls, *Constitutional Liberty and the Concept of Justice*, in NOMOS VI, JUSTICE 98, 102 (Carl J. Friedrich & John W. Chapman eds., 1963).

<sup>21</sup> 10 THE COLLECTED WORKS OF F. A. HAYEK 194 (Bruce Caldwell ed., 1988), *quoted in* ALAN EBENSTEIN, FRIEDRICH HAYEK: A BIOGRAPHY 125 (2001).

<sup>22</sup> FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 41 (1944) [hereinafter HAYEK, SERFDOM]. For Hayek’s own effort to rationally construct “a model constitution,” see 3 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 105–27 (1979) [hereinafter HAYEK, POLITICAL ORDER].

<sup>23</sup> See *supra* notes 2–3 and accompanying text.

trary, within a free market, the “distribution” of income is merely the byproduct of an impersonal process involving untold numbers of economic exchanges that take place within a framework of rules of just conduct that apply equally to everyone.

Moreover, when individuals engage in ordinary economic activity, their direct purposes are typically to satisfy their immediately perceived wants or needs, to pursue their chosen vocations or avocations, and so forth. Their purposes typically are not to inflict economic injury on others, even if that is a secondary effect of their actions. All other things being equal, the aggregate constellation of property holdings (including financial assets) that obtains in a political community at any particular point in time thus arises as an indirect result of this impersonal process of economic exchange within a regime of abstract rules and is not intended to specifically target anyone. As Hayek sees it, we gradually learned to acquiesce in this system of social coordination, because we found on reflection that it “has greatly improved the chances of all to have their wants satisfied, but at the price of all individuals and groups incurring the risk of unmerited failure. With the acceptance of this procedure, the recompense of different groups and individuals becomes exempt from deliberate control.”<sup>24</sup>

It follows, Hayek reasons, that, while particular transactions may be just or unjust in the strictly legal sense, the overall pattern of distribution resulting from the myriad of legitimate market transactions is morally neutral in the sense that it can be considered *neither* just nor unjust. Indeed, the ultimate outcome of the market process is so remote from the actual intention of any particular agent that it is essentially a brute fact of social existence, directly analogous to the “natural” distribution of physical endowments and defects or so-called “acts of God,” about which people generally have no admissible complaint against “society” or the government. These may be misfortunes, to be sure, but to speak of “social justice” or “social injustice” in this context amounts to what Gilbert Ryle famously called a category mistake, like using the term “a moral stone.”<sup>25</sup> Hayek thus concludes that “[w]e might question whether a deliberate choice of the market order as the method for guiding economic activities . . . is a just one, but certainly not whether, once we have decided to avail ourselves of the catallaxy . . . the particular results it produces are just or unjust.”<sup>26</sup>

Hayek allows that the concept of social justice might be intelligible within the context of a command economy, in which the distribution of resources is, at least in theory, the deliberate choice of a central authority.<sup>27</sup> He argues, however, on positive economic grounds that serious attempts to achieve any pre-determined pattern of income or wealth through state-sponsored redistribution will invariably have disastrous moral, political, and economic consequences. First, given the ineradicable fact of moral pluralism, Hayek contends that it is impossible to reach a consensus on the correct moral criteria that ought to guide government decision-makers in the redistribution of

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<sup>24</sup> HAYEK, *supra* note 2, at 70.

<sup>25</sup> *Id.* at 78. Cf. GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949).

<sup>26</sup> FRIEDRICH A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS* 171 (1967) [hereinafter HAYEK, *STUDIES IN PHILOSOPHY*]. A “catallaxy” is the term Hayek uses for the market order as a whole, which is comprised of a network of interlocking “economies,” such as households, farms, and business firms. See HAYEK, *supra* note 2, at 107–09.

<sup>27</sup> HAYEK, *supra* note 2, at 69.

wealth. Because there is no rationally convincing way to resolve this conflict to everyone's satisfaction, the adoption of any particular distributive principle, such as need, merit, or labor time, would necessarily entail the imposition of a unitary scale of values, which would appear morally arbitrary from the perspectives of those who disagree with the favored criterion.<sup>28</sup>

Moreover, in Hayek's distinctive taxonomy of social orders, the adoption of such a distributive policy would transform society from an end-independent, "spontaneous order," a social structure that freely evolves within the framework of abstract rules of just conduct, into a hierarchical, static "organization."<sup>29</sup> In such a system, economic rewards would ultimately be determined by political authorities, who in turn would be subject to intense interest group pressures. Under these circumstances, the quest for social justice would invariably degenerate into a zero-sum game in which different groups compete in the political arena for what they claim to be their "fair share" of scarce resources. Thus, whether one chooses markets or central planning, inequalities of wealth will still have to be tolerated. In the former case, the outcome will be the result of an impersonal process that maximizes everyone's chances of success within the abstract rules of the game, whereas in the latter case, outcomes will be directly decided by those wielding coercive state power.<sup>30</sup>

Finally, the attempted transformation of society as a whole into an organizational mode would seriously undermine the very economic processes that are responsible for the maintenance of contemporary living standards. We may call this, for lack of a better term, the "don't kill the goose that laid the golden egg" principle of social organization. For in the absence of a market-driven price mechanism, government planning agencies would be confronted with the impossible task of efficiently coordinating the preferences of millions of individuals without access to the tacit dimension, namely the transitory, largely unarticulated knowledge of local circumstances concerning the relative scarcity and desirability of various goods and services, including factors of production.<sup>31</sup> If seriously pursued, such a policy would inevitably lead (as the recent history of the former communist bloc attests) to the severe misallocation of resources, thereby leaving everyone in a relatively worse economic position than they would be in under a free market.<sup>32</sup>

In the final analysis, Hayek believes that we are confronted with a rather stark alternative: either we acknowledge that, in a genuinely free market, the question of distributive justice is inherently meaningless, or we invite the risk that efforts to achieve a material standard of justice will result in the coercive imposition of some form of collectivism, with all its attendant moral, political, and economic difficulties.<sup>33</sup>

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<sup>28</sup> *Id.* at 77–78, 109–11; see also HAYEK, *SERFDOM*, *supra* note 22, at 56–60.

<sup>29</sup> HAYEK, *supra* note 2, at 85; see also 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 35–38 (1973) [hereinafter HAYEK, *RULES AND ORDER*].

<sup>30</sup> HAYEK, *supra* note 2, at 82–83; see also HAYEK, *supra* note 8, at 100; HAYEK, *POLITICAL ORDER*, *supra* note 22, at 13–17.

<sup>31</sup> HAYEK, *supra* note 2, at 71–72, 80, 82.

<sup>32</sup> See *supra* note 7 and accompanying text.

<sup>33</sup> Interestingly enough, Hayek observes that "the belief that . . . existing inequalities are the effect of somebody's decision . . . would be wholly mistaken in a genuine market order and has still only very limited va-

## III.

In assessing the validity of Hayek's critique of social justice, one may grant that he has made a compelling case that a spontaneous market order is a far more efficient method of social coordination than a comprehensively planned economy and is therefore a vastly superior mechanism for the generation of wealth. Yet, it does not follow that the distributive outcomes of the market are immune from moral criticism. While the efficient creation of wealth from which society benefits is obviously a morally relevant consideration when devising social policy, nothing about the nature of the market itself is inherently morally self-justifying. As demonstrated above, Hayek does not deny that the "free market" is something of a misnomer, because it is actually a highly complex legal and cultural institution that gradually emerged in its present form over the course of several centuries, not simply a private civil sphere that is somehow left over after the government exits the social scene.<sup>34</sup> The basic flaw in Hayek's argument, in my view, is that he fails to come to grips with the extent to which this fact undermines his categorical rejection of the concept of social justice.

The institutional framework within which economic activity takes place is constituted, at a minimum, by the positive legal system. This includes not only the private civil law of tort, property, and contract, but also the constitutional structure of government, the criminal law, the various regulatory regimes that directly constrain economic activity (i.e., antitrust, banking, trade, and environmental regulations), as well as the judicial and administrative decisions that interpret and apply these legal principles in particular cases. A complete articulation of the social infrastructure within which the market is embedded would also have to include a description of a wide range of intermediate institutions, such as insurance arrangements, stock exchanges, corporations, trade associations, and the like, as well as the voluntary adherence of individuals to various conventional practices that profoundly affect their attitudes and behavior, such as the family, civic and charitable associations, and religious communities.

These sorts of institutional structures are clearly artifacts of deliberate political and cultural choices for the maintenance of social order and, to one extent or another, constrain the shape of market outcomes. Indeed, the principles of social organization traditionally privileged by the classical liberal ethos, which emphasizes the benign effects of rivalrous competition, profit maximization, well-defined property rights, and contractual autonomy, are themselves by-products of a previous cultural acceptance of competitive markets as the basic mode of economic coordination.

At the same time, Hayek would not seriously dispute the fact that the collective interest in maximizing economic efficiency is insufficient to exhaust the range of concerns that are constitutive of reasonably tolerable social relations. This feature of social life is neatly encapsulated in Gus diZerega's distinction between a small-scale "market place" and a large-scale "market order," which uneasily coexist in the tension

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lidity in the highly interventionist 'mixed' economy existing in most countries today." HAYEK, *supra* note 2, at 81. In other words, the market process remains the basic mechanism of economic coordination, even in existing welfare states.

<sup>34</sup> See *supra* notes 20–22 and accompanying text.

between conflicting sets of animating values.<sup>35</sup> To take what is perhaps an obvious example, a local polity might decide to restrict commercial development and activity in order to preserve green spaces or the traditional character of a downtown district, or to prevent the operation of a pornographic movie theater in a residential neighborhood even if it would be a profitable enterprise in that location. The ubiquity of zoning ordinances designed to impose these kinds of limits on the market suggests, at the very least, that such notions enjoy widespread democratic support.<sup>36</sup>

To be sure, whether any particular land use or business regulation is morally and economically justified is a separate question, and it is fair enough for economists to point out the opportunity costs entailed by various policy alternatives. An essay of this scope cannot resolve the thorny issue of determining the circumstances in which the external costs of particular social arrangements exceed their private gains and therefore give rise to a rationally justified demand for regulation, which is largely a matter for empirical social science. But, for purposes of the present discussion, it suffices to point out that there are no defensible grounds upon which to argue that maximizing economic efficiency or aggregate preference satisfaction, however important they might be as social goals, can serve as the sole criteria of the design of social policy in a just liberal state.

Coupled with the fact that the efficiency criterion itself is formally neutral between the promotion of individual liberty and other normative concerns,<sup>37</sup> it follows that a plausible conception of liberalism will be informed by a plurality of legitimate moral values, which may not be entirely commensurable. As diZerega writes, “[t]here is more to human life than the liberal community of strangers; there are also families, face-to-face and reputational communities, and nature. . . . Within the context of their daily lives, real people integrate the varying and conflicting demands and responsibilities arising from membership in all the basic communities in which they live.”<sup>38</sup>

If the foregoing description is an accurate characterization of a real-world liberal community, then the operation of the market itself plays at best a secondary role in determining the proper function of the state in overseeing economic activity, defining the scope of legitimately acquired property rights, and delimiting the private from the

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<sup>35</sup> Gus diZerega, *Market Non-Neutrality: Systemic Bias in Spontaneous Orders*, 11 CRITICAL REV. 121 (1997), <http://dizerega.com/market.pdf>.

<sup>36</sup> See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). In *Alameda Books*, the Supreme Court upheld against a First Amendment challenge a municipal zoning ordinance that regulated the concentration of pornographic businesses in Los Angeles. Although the Court was divided about whether the city had met its burden of proof, the Justices agreed, in principle, that the justification for such an ordinance is a valid empirical finding that “high concentrations of adult businesses” have damaging secondary effects on “the value and integrity of a neighborhood,” and “[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech.” *Id.* at 444 (Kennedy, J., concurring).

<sup>37</sup> See Eric Rasmusen, *Of Sex and Drugs, and Rock’N’Roll: Law and Economics and Social Regulation*, 21 HARV. J. L. & PUB. POL’Y 71, 72 (1997).

<sup>38</sup> diZerega, *supra* note 35, at 125, 131; see also FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 23, 31 (1980) (noting the social importance of families, voluntary associations, and religious and linguistic communities as independent sources of value); HAYEK, *supra* note 2, at 151 (“Liberalism is not individualistic in the ‘everybody for himself’ sense. . . . It is the great merit of the spontaneous order concerned only with means that it makes possible the existence of a large number of distinct and voluntary value communities serving such values as science, the arts, sports and the like.”).



public spheres—all of which must be justified by recourse to moral and political principles. In this regard, Hayek makes much of the fact that the immensely complex institutional framework of modern civilization evolved over time and in that sense was not “designed” according to any preconceived plan.<sup>39</sup> Even so, this is largely beside the point, because the legitimacy of existing social institutions is *always* amenable to critical assessment retrospectively and is therefore subject (at least within broad limits) to deliberate social control. From this perspective, Hayek’s suggestion that the distributive outcome of the market process is analogous to a “natural” fact of social existence, as if it were a physical process like a weather system or a disease, is highly misleading, to say the least.

Nor should the present argument be understood merely as a pragmatic concession to the vicissitudes of majoritarian democracy. Quite apart from conventional institutions and practices, the classical liberal tradition has always maintained that the rational justification for the establishment of the state—the purpose in virtue of which we tolerate its substantial costs—is that the state provides those subject to its jurisdiction a superior form of protection against the threat of physical insecurity, including the possibility of material deprivation.<sup>40</sup> This is the clear implication, for example, of the so-called “Lockean proviso,” according to which the legitimacy of an initial acquisition from a common stock of unowned resources depends in part upon whether one’s unilateral actions inordinately diminish the well-being of others by excluding them from the use of those resources.<sup>41</sup>

Importantly, as Robert Nozick pointed out, if an *initial* acquisition of resources is constrained in this way, it stands to reason that similar considerations apply with equal weight to the *continued* possession of resources, irrespective of how the owner originally acquired them. The proviso on just acquisition thus casts, in Nozick’s famous phrase, a “historical shadow” over the legitimacy of all current property holdings.<sup>42</sup> This means that in a sophisticated economy, in which virtually all tangible assets are already owned by someone, the crucial issue is whether the continuing possession of privately-held resources by the original owner (or her successors-in-interest) is likely to worsen the situation of those excluded thereby in ways that would have violated the proviso on initial acquisition.<sup>43</sup>

Regardless of how one interprets the practical application of this principle, some limit on the private exploitation of resources is necessary to prevent the Hayekian justification of property rights—the dispersal of social power and the promo-

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<sup>39</sup> HAYEK, *supra* note 2, at 71; see also FRIEDRICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 29–47 (1988) [hereinafter HAYEK, *THE FATAL CONCEIT*].

<sup>40</sup> See, e.g., Robin West, *Rights, Capabilities and the Good Society*, 69 *FORDHAM L. REV.* 1901, 1908–11 (2001).

<sup>41</sup> See LOCKE, *supra* note 1, at 329 (“Whatsoever then he removes out of the state that nature hath provided, and left in it, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property* . . . at least where there is enough, and as good, left in common for others.”).

<sup>42</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175–82 (1974). For a critical appraisal of Nozick’s neo-Lockean defense of private property, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 253–83 (1988).

<sup>43</sup> See A.M. Honoré, *Property, Title, and Redistribution*, 10 *ARCHIV FÜR RECHTS UND SOZIAL PHILOSOPHIE* 113 (1977), quoted in WALDRON, *supra* note 42, at 214 (“However one interprets Locke’s requirement that the acquirer must leave enough and as good for others . . . the intention behind it is not satisfied unless entitlements are adjusted from time to time according to what then remains for others.”).

tion of liberty by demarcating a sphere of personal sovereignty – from collapsing into contradiction. The reason is that a system of property rights that permitted a person to assert exclusive control over an infinite amount of resources would inevitably narrow the range of options available to everyone else. And, this possibility is morally objectionable for reasons having nothing to do with the historical provenance of their acquisition, as when some people are, through no fault of their own, indirectly excluded by the system from access to the basic means of subsistence. In the absence of any such external standard to limit the reach of property claims, the unilateral exploitation of resources is thus morally suspect, because it would conflict with the equally compelling right of others to seek provision for their own needs.<sup>44</sup>

In the classical liberal view, then, one's assertion of an exclusive right to control the disposition of a particular resource is to a certain extent historically contingent, because it must be assessed in the context of existing background social circumstances.

To be sure, the social benefits that generally accrue from preserving the stability of possession may justify a strong presumption in favor of private property under reasonably favorable conditions. Nevertheless, the moral assessment of a proprietary claim ultimately depends upon the consideration of a wide variety of factors that, at least in some measure, determine the legitimate scope and content of the property rights being invoked. These factors include, *inter alia*, the size and density of the population within the relevant political community, the relative scarcity and importance of the goods at issue, the availability of other economic opportunities for those excluded from ownership (hence the importance of mature and stable markets), and the occurrence of exigent circumstances, such as wars or natural disasters. For this reason, it is not possible to specify in wholly abstract terms that any particular assertion of an exclusive proprietary interest is necessarily justified.<sup>45</sup>

Consequently, for both practical and moral reasons, the normative question of distributive justice is in principle logically prior to the deliverances of economic analysis. It is true that, in order to be a socially viable option, the consistent application of one's preferred theory of property must be capable of sustaining an extended social order. The deliberate imposition of a substantively equal distribution of wealth in a complex modern society is thus neither feasible nor desirable given the existence of competing interests in individual liberty and economic efficiency. Hayek is therefore correct that the maintenance of a robust market order has definite implications about the extent to which we can deliberately control concrete social outcomes.

Nevertheless, to reject the concept of social justice merely in the narrow sense that one ought not destroy the market in pursuit of a moral ideal is a remarkably weak *conceptual* argument. It simply does not follow that, because excesses are always pos-

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<sup>44</sup> As Waldron points out, in orthodox Lockean terms, a literally unqualified right to private property would be an absurdity, because it would contradict the fundamental natural law of self-preservation. See WALDRON, *supra* note 42, at 209–18.

<sup>45</sup> The contention that the legitimacy of concrete property claims is relative to background social circumstances has been developed in the context of assessing reparations claims for remote historical injuries, which has informed the argument I advance here. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992); George Sher, *Ancient Wrongs and Modern Rights*, 10 PHIL. & PUB. AFF. 3 (1981); David Lyons, *The New Indian Claims and Original Rights to Land*, 4 SOC. THEORY & PRAC. 249 (1977).

sible, we are therefore morally bound to reject any efforts (on pain of collectivist tyranny no less) to ameliorate the harshest results of the market process. Hayek's insistence that the question of distributive justice is unintelligible within a market order thus mistakenly assumes that there is no morally feasible alternative but to passively accept the unadulterated allocative results that it produces, which he elsewhere (contradictorily) admits is not the case.<sup>46</sup>

Edward Feser, in his recent defense of Hayek, attempts to respond directly to the foregoing line of argument by presenting the following counter-argument. First, Feser correctly points out that Hayek never denies the fact that the overall results of the market process are the results of human actions, but only that they are *not* the results of a comprehensive, *a priori* human design, "and this lack of design," he contends, "is the crucial point."<sup>47</sup> The mere fact that "there are 'alternatives' does not show that a thing is not 'natural' in the relevant sense," since the distribution of wealth "arises spontaneously through the impersonal . . . process of the market."<sup>48</sup>

Feser next employs the predictable *reductio ad absurdum* argument. The distribution of goods in the market, he claims, is not relevantly different from "the 'distribution' of body hair among individuals," which is also "the result of human action, and is even, presumably, subject to human alteration."<sup>49</sup> And, if an egalitarian redistribution of assets is indeed an obligation of justice, the government could just as consistently "require that those with an excess number of hair follicles be required to have them surgically removed and transplanted to the skin of relatively hairless people."<sup>50</sup> A moment's reflection, however, confirms that not only is there "a perfectly good sense in which the current 'distribution' of body hair is 'natural'," but that it would be "absurd to conclude that *that* distribution is therefore evaluable in terms of justice or injustice" merely because it could be altered by deliberate human intervention.<sup>51</sup>

In my view, Feser's argument adds nothing of particular substance to Hayek's own analysis for at least two reasons. In the first place, the force of the analogy depends upon the gratuitous assumption that the ideal of social justice necessarily entails the myopic endorsement of a radically egalitarian distribution of resources to the exclusion of all other important social values, such as the protection of basic civil liberties. No such conclusion is logically entailed by the concept of social justice. As David Johnston points out, Feser defends Hayek "by assuming an exaggerated, unjustifiably perfectionist understanding of the goals of social justice."<sup>52</sup> But by that extravagant standard, he notes, the pursuit of virtually *any* social policy would lead to morally ob-

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<sup>46</sup> See *infra* notes 90–91 and accompanying text. Although I will not pursue the point any further, it bears mentioning that one also cannot assume that social spending is necessarily inimical to sustained economic growth. The historical experience of existing welfare states is much more complicated and suggests that the answer depends upon the total package of tax and welfare policies adopted at any particular time. See, e.g., 1 PETER H. LINDERT, *GROWING PUBLIC: SOCIAL SPENDING AND ECONOMIC GROWTH SINCE THE EIGHTEENTH CENTURY 20–21* (2004).

<sup>47</sup> Edward Feser, *Hayek on Social Justice: Reply to Lukes and Johnston*, 11 *CRITICAL REV.* 581, 598 (1997).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> David Johnston, *Is the Idea of Social Justice Meaningful?*, 11 *CRITICAL REV.* 607, 608 (1997).

jectionable results. To use Johnston's example, if we adopted a criminal justice policy that seriously aimed at the complete eradication of any and all crime whatsoever, we would probably end up living in a totalitarian police-state. Rather than abandon the goal of fighting crime altogether, however,

[t]he sensible conclusion about fighting crime is that we should be interested in reducing the frequency of crime to the lowest feasible level consistent with other objectives we deem valuable. ... Similarly, the sensible conclusion about social justice is that we should be interested in reducing social injustice to the lowest feasible level consistent with other valuable objectives.<sup>53</sup>

Secondly, while it is undoubtedly true that purposive human conduct, when viewed in the aggregate, produces statistical regularities – patterns of “distribution” – that are neither just nor unjust in themselves, a plausible theory of social justice does not necessarily demand, as Feser seems to assume, the alteration of such distributive patterns merely because it is technically feasible to make them conform to some pre-conceived social architecture. Feser's rejoinder is unconvincing, if for no other reason, because some patterns of possession are simply not matters of serious moral concern.

Suppose, for example, that a market research firm determined, to a reasonable degree of certainty, the present distribution of blue jeans among the United States population in relation to age, income, class, region, and so on. Provided the government does not coerce the citizenry to wear a particular uniform and that they have adequate clothing generally, I would argue that the “distribution” of blue jeans *per se* is a matter of complete political indifference (i.e., neither just nor unjust). This is equally the case for the “distribution” of body hair, upon which nothing of great moral or political moment evidently depends. From a classical liberal perspective anyway, taste in fashion, like the decision whether to marry or procreate, seems to be an inherently private matter, almost entirely beyond the legitimate reach of public control. Thus, it would indeed be absurd, as Feser suggests, to embark in the name of justice upon a coercive program of cosmetic surgery designed to redistribute hair follicles in the mindless pursuit of “aesthetic equality.”

Although a full defense of the claim would extend considerably beyond the scope of this essay, it seems to me that similar considerations apply to the aggregate constellation of wealth that happens to obtain in the economy at any particular slice in time. That is, other things being equal, the prevailing pattern of wealth or income distribution, by itself, is also largely a matter of moral indifference. After all, as Harry Frankfurt points out, inequality of income between the rich and the merely upper middle class is certainly not a matter of serious moral concern: “The fact that some people have much less than others is morally undisturbing when it is clear that they have plenty.”<sup>54</sup> Rather, the real concerns are the secondary effects of the unequal distribution of wealth, such as the ability of those with adequate means to unjustifiably subordinate those with lesser means, thereby restricting their liberty to an unacceptable degree.

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<sup>53</sup> *Id.* at 608–09.

<sup>54</sup> Harry Frankfurt, *Equality as a Moral Ideal*, 98 *ETHICS* 21, 33 (1987).

What is urgent from a normative perspective, then, is not that everyone have an equal (or as nearly equal as possible) share of resources, but that everyone have *enough* material resources to satisfactorily pursue his or her own conception of the good life. According to Frankfurt, it is not that “some of the individuals . . . have *less* money than others but the fact that those with less have *too little*” that is the source of moral anxiety.<sup>55</sup> As demonstrated below, this is a conception of social justice that is entirely compatible with Hayek’s own theory of the operation of the free market.

## VI.

Turning from the implications of Hayek’s social theory to his own particular conception of justice, I have shown that he assumes that, strictly speaking, justice applies only to the deliberate and intended consequences of the actions of individuals and organized groups, rather than to the unintended consequences of their collective actions. Hayek is quite specific on this point. The concept of justice, he writes, “ought to be confined to the deliberate treatment of men by other men. It is an aspect of the intentional determination of those conditions of people’s lives that are subject to such control.”<sup>56</sup> On this view, it is not possible to meaningfully describe a particular state of affairs in these terms, except “in so far as we hold someone responsible for bringing it about or allowing it to come about. A bare fact, or a state of affairs which nobody can change, may be good or bad, but not just or unjust.”<sup>57</sup>

Thus, notwithstanding Hayek’s recognition of the fact that human beings are responsible for defining and enforcing the legal “rules which state the conditions under which property can be acquired and transferred, valid contracts or wills made, or other ‘rights’ or ‘powers’ acquired and lost,”<sup>58</sup> Hayek insists that the concept of justice does not apply to the distribution of income or wealth that spontaneously arises in a market operating within those rules. “If it is not the *intended or foreseen* result of somebody’s action that *A* should have much and *B* little,” he writes, “this [state of affairs] cannot be called just or unjust.”<sup>59</sup> It follows, Hayek believes, that because no identifiable person or group bears personal responsibility for deliberately causing the overall distributive results of the market process, there can be no moral justification for the state to intervene to redistribute of resources.

There are two main problems with Hayek’s definition of justice. First, his explanatory strategy commits a fallacy of composition, because he uncritically assumes that the set of moral principles that ordinarily applies to private transactions between

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<sup>55</sup> *Id.* at 32; see also Madison Powers, *Forget About Equality*, 6 KENNEDY INST. OF ETHICS J. 129, 135 (1996); J.R. Lucas, *Against Equality*, 40 PHIL. 296, 301 (1965). I should emphasize that what constitutes the minimum level of resources necessary for meaningful social existence and the most efficient means of delivering them are separate questions, which should be carefully distinguished from arguments grounded merely on envy. As Lucas sardonically remarks, “It may be a good thing that nobody should be without a television set: but it is only one desideratum among many; it does not have, though sometimes pretends to have, the compelling force of the claim that nobody should be without food.” *Id.* at 301.

<sup>56</sup> HAYEK, *supra* note 8, at 99.

<sup>57</sup> *Id.* at 31.

<sup>58</sup> *Id.* at 35.

<sup>59</sup> *Id.* (emphasis added); see also *id.* at 32, 64–65, 70–71, 80–81.

individual agents — which is chiefly embodied in the private law of property, contract, and tort — necessarily serves as the normative model against which we should assess the validity of claims of justice concerning social and economic relations writ large. However, this inference clearly presupposes that the reach of justice cannot extend to the consequences flowing from overall allocation of resources by the market, when that is precisely what is at issue in the first place. Accordingly, Hayek’s formal definition of justice assumes the truth of its conclusion in advance and thus begs the question.

To demonstrate this point more clearly, it is useful to briefly digress by invoking the figure of Immanuel Kant, whose status as one of the leading figures in the classical liberal tradition presumably makes him a congenial counter-example.<sup>60</sup> According to Kant, a state of nature would be “devoid of justice,” not in the Hobbesian sense of a complete moral vacuum, but because “when rights are in dispute, there would be no judge competent to render a verdict having rightful force,” particularly in controversies over the ownership of tangible property.<sup>61</sup> Because this situation would render each person’s preexisting natural rights insecure and hence “provisional,” Kant argues that it is rationally justifiable for those in a state of nature to “impel . . . other[s] by force to leave this state and enter into a rightful condition,” that is, to enter into a formal condition of civil union governed by the rule of law.<sup>62</sup>

Kant characterizes the fundamental principle of justice as a law of “reciprocal coercion,” according to which the state regulates the conduct of individuals by enforcing general rules of law, which has the effect of “hindering . . . hindrance[s] to freedom.”<sup>63</sup> On this view, the state takes no direct interest in compelling critical self-direction in the robust Kantian sense of rational moral autonomy — “enforced virtue,” like “enforced faith,” being an oxymoron. Instead, the object of legal and social policy in a liberal state is to maintain a coherent system of civil and political freedom in which each citizen is free to pursue his own plans and purposes, consistent with the comparable freedom of others. The state’s authority to exert coercion is thus grounded in its duty to maintain this social condition, and individual citizens, having entered into civil society, relinquish their natural rights to use coercion to enforce their own rights in exchange for the greater security provided by the state.<sup>64</sup> This point is vividly illustrated by Kant’s claim that a law forbidding the use of self-defense would be unjust, “since if the state cannot protect me, it also cannot command me. The state can obli-

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<sup>60</sup> The comparison is particularly apt in this context, because Hayek specifically acknowledges that, in the course of writing *Law, Legislation and Liberty*, “I became aware *how* closely my conclusions agree with Kant’s philosophy of law . . . [H]is brilliant treatment . . . of the ideal of the rule of law with its stress on the negative and end-independent character of the legal rules seems to me to be one of his permanent achievements.” HAYEK, *supra* note 2, at 43 n.24.

<sup>61</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 90 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

<sup>62</sup> *Id.* For Kant, of course, the “idea of a social contract” is not an actual historical event, but rather an authoritative “rational principle for judging any lawful public constitution.” Immanuel Kant, *On the Common Saying: ‘This May be True in Theory, but It Does Not Apply in Practice,’* in KANT’S POLITICAL WRITINGS 61, 83 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 1970) (1793). In Kantian political theory, the contractual paradigm serves essentially a negative function by precluding social arrangements that could not have been rationally agreed to by everyone in a hypothetical choice situation.

<sup>63</sup> KANT, *supra* note 61, at 24–25.

<sup>64</sup> *Id.* at 89–90.

gate me, because it gives me protection. It prohibits me from using force, because it promises to secure me from the force of another.”<sup>65</sup>

With respect to economic relations, Kant holds that the rule of law implies the formal legal equality of all citizens, which involves above all the elimination of entrenched class-based privileges, so that each person is free to pursue his own social and economic advantage as far as his “talent, industry and good fortune” takes him.<sup>66</sup> Kant readily acknowledges that such formal equal treatment of people with widely different capacities will lead to the factual inequality of economic rewards. Nevertheless, Kant believes that this result is morally justified, on balance, because in the absence of hereditary or mercantilist privileges, force, or fraud, “if [a person] does not reach the same level as others, the fault lies either with himself (i.e. lack of ability or serious endeavor) or with circumstances for which he cannot blame others, and not with the irresistible will of any outside party.”<sup>67</sup>

At the same time, Kant maintains that a stable regime of enforceable property rights, from which everyone derives obvious economic advantages, cannot exist outside the legal structure of civil society, and, further, that there is no compelling reason that free and equal individuals would agree to surrender their natural liberty to participate in a social arrangement that exposes them to the possibility of destitution. For these reasons, he argues, the state retains the authority to tax the excess means of the wealthy in order to provide for the poor and needy.<sup>68</sup>

From this view, it does not necessarily follow that the government holds ultimate title to *all* property subject to its jurisdiction and is therefore free to redistribute it at will. To the contrary, Kant is at pains to emphasize that moral rights to property are grounded in purposive human conduct independent of conventional legal arrangements. Thus, rather than assuming a communal theory of property, the Kantian state is obligated to ameliorate the effects of poverty, within the limits of its resources, because this constitutes a necessary condition of the legitimacy of legal institutions that coercively facilitate the private allocation of property. Indeed, this is a crucial aspect of the *reciprocal* nature of justice: my obligation to respect the property rights of others cannot be reciprocated if I do not have any holdings of my own that others in their turn must respect.<sup>69</sup>

Conversely, the reasoning continues, if the state fails to satisfy this condition, then the enforcement of exclusive rights to property against the poor would be fundamentally unjust, because it would be morally indistinguishable from a prohibition on the use of self-defense in response to physical aggression. From the perspective of those without any substantial resources, the institution of private property would confront them as a potentially life-threatening force, in the face of which they purportedly would have a legal obligation to acquiesce. The coercive imposition of such a regime

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<sup>65</sup> IMMANUEL KANT, *Lectures on Natural Law*, in 2 COLLECTED WORKS 1374, quoted in Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151, 188 (1989).

<sup>66</sup> Kant, *supra* note 62, at 75–76.

<sup>67</sup> *Id.* at 76–77.

<sup>68</sup> KANT, *supra* note 61, at 101.

<sup>69</sup> On the important distinction between the *reciprocity* of rights and duties and their *correlativity*, see Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J.L. & JURIS. 185, 203–05 (1993).

of property rights would no more give rise to a legitimate choice situation than the proverbial armed robber's refrain "your money or your life." As Waldron observes,

Any time we find that we have nothing to say to a homeless person, for example, to explain why she should obey the laws of property, we come close to resting all the weight of the institution on our ability to force or frighten her to do things that she has, independently, no reason to do that connects with any of her interests or desires. . . . As far as she is concerned, compliance with the institutional rules will be the result of force, fraud, mystification or despair, not the result of understanding and consent.<sup>70</sup>

Thus, in the absence of the provision of an adequate social minimum (however defined), it would strain credulity to expect those at the very bottom of the economic ladder to willingly pledge their allegiance to an institutional structure that does not in any obvious way serve their most rudimentary needs, to say nothing of affording them a realistic opportunity to successfully pursue a rational plan of life. Though it goes perhaps without saying that one need not accept the orthodox Kantian account of the matter, if this account, or something close to it, is substantially correct, it casts serious doubt on the coherence of Hayek's exclusive reliance on a private law model of justice, even from within a staunchly classical liberal paradigm.<sup>71</sup>

The second problem with Hayek's definition of justice is that it is uncontroversially true that persons may be held responsible for the *reasonably foreseeable* consequences of their conduct, even if the results were not actually intended or foreseen. For this reason, it is typically irrelevant to our moral or legal assessment of an agent's responsibility that the consequences of his actions were neither deliberately intended nor actually foreseen. Contrary to Hayek's bald assertion, the justice or injustice of a state of affairs may thus be judged according to whether it was the reasonably foreseeable consequence of an agent's wrongful or negligent conduct. If so, then an agent might legitimately be held responsible for causing or allowing the state of affairs to exist, notwithstanding his lack of deliberation or foresight.<sup>72</sup>

In this regard, what is true for individual agency is likewise true for collective decision-making. While Hayek is certainly correct that the specific economic results

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<sup>70</sup> *Id.* at 197-98. Locke states the point succinctly: "[A] Man can no more justly make use of another's necessity, to force him to become his Vassal . . . than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery." LOCKE, *supra* note 1, at 206.

<sup>71</sup> For a contemporary version of this argument, see LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 125-29 (1987). Lomasky argues that "[i]f acknowledgment of rights is rationally motivated by concern for one's future as a project pursuer, it will be plainly irrational to pledge support to a regime in which one's prospects for project pursuit are extinguished." *Id.* at 127.

<sup>72</sup> Although it goes beyond the scope of this essay, deliberation and intention are also not *sufficient* conditions for the attribution of legal responsibility. For example, an entrepreneur may introduce a new product or service into the market with the express intention of enriching himself at his competitors' expense. Provided he acts within the rules of a just legal system, it makes no difference, *ceteris paribus*, that he harbors such a subjective intention and he is not personally responsible in the relevant legal sense if his competitors' standard of living declines as a result. This issue need not detain the present discussion, however, because I am not concerned here with the theory of compensatory justice, but rather with the separate question of the social responsibility for the design and enforcement of the institutional structure within which discrete market transactions take place.



for particular individuals in a free market are not usually deliberately intended or foreseen by anyone, the overall results of the market process are reasonably foreseeable, at least in general terms. Indeed, as many critics have pointed out, Hayek cannot plausibly deny that the tendency of the market process to produce predictable results is reasonably foreseeable to policy makers, because otherwise his own positive case for the extension of the market order would be unintelligible. For he repeatedly stresses that the market process is morally justified, because it creates the best chance for all to have their needs and wants satisfied, that it tends, albeit imperfectly, to maximize efficiency by allocating resources to their most productive uses, and so on.<sup>73</sup>

Among the other necessary features of the market process are that, if property rights are equally enforced and careers are open to talents, the resulting distribution of wealth will end up being highly unequal and there will inevitably be winners and losers in the competition for economic rewards. For the reasons already advanced, the mere inequality of economic rewards by itself is not necessarily immoral or unjustified. Further, it is undoubtedly true that the evolution of market institutions has led to a clear rise in absolute living standards for most people in those places where the culture of market liberalism has prospered. Nevertheless, it is also well-established that a more or less direct correlation exists between poverty and a host of social ills, such as crime, disease, illiteracy, and the like, which not only significantly diminish the quality of people's lives generally, but also undermine their prospects for successful pursuit of economic rewards in the market.

Thus, it is reasonable to conclude that the continued existence of poverty, coupled with the concomitant differences in individuals' life prospects, is entirely predictable under the market order, because the distribution of resources is the systematic result of the institutional framework which defines the rules of the economic game. As such, the distributive results of the market process must constitute a reasonably foreseeable state of affairs.

Moreover, because the design and enforcement of this institutional framework is in principle subject to human control, the members of a political community are collectively or socially responsible for tolerating the results that predictably ensue. Even if economic inequality *per se* is not unjust, we can hardly escape responsibility for failing to ameliorate the worst effects of poverty by the simple expedient of insisting that we are merely "following the rules," since *any* specification of the incidents of property ownership – including pure *laissez-faire* – amounts to the implicit adoption of a distributive policy. Accordingly, we may further conclude that this situation is a state of affairs that must be intelligibly subject to moral criticism, despite the fact that there is no feasible alternative social arrangement that would completely eliminate the problem of poverty.

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<sup>73</sup> On the foreseeability of the results of the market process, see Johnston, *supra* note 52, at 610–16; ROLAND KLEY, HAYEK'S SOCIAL AND POLITICAL THOUGHT 203–04 (1994); Raymond Plant, *Hayek on Social Justice: A Critique*, in HAYEK, CO-ORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 164, 169–70 (Jack Birner & Rudy van Zijp eds., 1994); Steven Lukes, *Social Justice: The Hayekian Challenge*, 11 CRITICAL REV. 65, 72–74 (1997).

## V.

Finally, closely related to Hayek's conception of justice is his theory of liberty. He defines personal freedom, with distinct echoes of Kant, as the "state [of affairs] in which a man is not subject to coercion by the arbitrary will of another."<sup>74</sup> Coercion occurs, according to Hayek, "when one man's actions are made to serve another man's will, not for his own but for the other's purpose," in circumstances where this implies "both the threat of inflicting harm and the intention thereby to bring about certain conduct."<sup>75</sup>

At the same time, since coercion is not entirely avoidable in social life, the state is justified in coercively enforcing rules of just conduct, most importantly rules defining the rights of property and contract, "where it is required to prevent coercion by private persons."<sup>76</sup> The rules of just conduct draw the boundary line between justified and unjustified coercion by "determining the protected domain of each on which nobody must encroach,"<sup>77</sup> and within which each individual is free to "use his knowledge for his own purposes" and to "pursue his own aims."<sup>78</sup> Such rules are, therefore, nearly always negative in character: "practically all rules of just conduct are negative in the sense that they normally impose no positive duties on any one, unless he has incurred such duties by his own actions."<sup>79</sup>

On this view, the distributive outcome of the market process cannot be considered a remediable infringement on liberty, not only because it is the unintended result of an impersonal process, but also because the mere lack of material resources does not coercively prevent individuals from acting in whatever circumstances they happen to find themselves. Hayek thus rejects positive conceptions of liberty, on the ground that there is no necessary connection between being *free* to do something and having the *power* or *ability* to do something, the confusion of which, he says, "inevitably leads to the identification of liberty with wealth" and supports "a demand for the redistribution of wealth."<sup>80</sup> Hayek thus attempts to draw a sharp dividing line between illegitimate coercion and "the conditions or terms on which our fellow men are willing to render us specific services or benefits."<sup>81</sup>

While many have argued that the rigid conceptual distinction between positive and negative liberty does not bear close scrutiny, for present purposes it is not necessary to become entangled in the metaphysical intricacies of that debate. For, as I have argued,<sup>82</sup> the coercive enforcement of property rights constrains the freedom of all

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<sup>74</sup> HAYEK, *supra* note 8, at 11; *see also* LOCKE, *supra* note 1, at 324 ("Freedom of Men under Government is, to have a standing Rule to live by, common to every one of that Society, . . . a Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.").

<sup>75</sup> HAYEK, *supra* note 8, at 133-34.

<sup>76</sup> *Id.* at 21.

<sup>77</sup> HAYEK, *supra* note 2, at 123.

<sup>78</sup> HAYEK, RULES AND ORDER, *supra* note 29, at 56; *see also* HAYEK, *supra* note 8, at 11-13, 139-40; HAYEK, *supra* note 2, at 37-38.

<sup>79</sup> HAYEK, *supra* note 2, at 36.

<sup>80</sup> HAYEK, *supra* note 8, at 17.

<sup>81</sup> *Id.* at 135.

<sup>82</sup> *See supra* notes 44-45, 68-70 and accompanying text.

those who are excluded from the use of privately-held resources in a way that is entirely consistent with Hayek's negative conception of liberty. A person is ordinarily not permitted to make use of another's possessions without first obtaining her consent and to that extent one's freedom of action is literally constrained by the existing structure of property rights. Hayek maintains that this sort of restriction on one's freedom of action is justified, because, by demarcating a private sphere within which persons are free to act for their own purposes, the enforcement of property rights enables society to maximize the use of local knowledge in the service of allocative efficiency. But, if property rights are justified because of the social gains that accrue from honoring such conventions, one cannot coherently claim on Hayekian grounds that the private exercise of the incidents of property and contract is *constitutive* of liberty, because this would define the concept of liberty in strictly tautological terms.<sup>83</sup> To avoid the charge of circularity, Hayek must admit that property rights are justified by values other than negative liberty itself, but this provides no principled basis for rejecting the redistribution of income for legitimate public purposes (e.g., preserving the conditions under which all persons may be free) on the ground that it "violates" the economic liberties of taxpayers.

Perhaps expectedly, in the face of such obstacles Hayek's definition of liberty is not quite as inflexible as it might appear, since he is prepared to concede that individuals are occasionally "placed by circumstances beyond [their] control" in exigent situations that give rise to positive rights and obligations.<sup>84</sup> Hayek admits, for instance, that there are exceptional circumstances in which the rules of just conduct impose a positive obligation to come to another's rescue as a so-called "Good Samaritan," such as the common law's recognition of a duty to rescue on the high seas. This sort of obligation to assist another, even a stranger, arises in situations, he explains, "where accident has temporarily placed persons in a close community with others."<sup>85</sup>

Although Hayek rightly insists that the legal imposition of positive obligations is the exception rather than the rule, the important point is that he grants that the demands of justice at least sometimes dictate how people ought to *respond* to a state of affairs, even one that is not a product of deliberate choice and for which no identifiable person may be justly blamed. But if it is true, in principle, that an entirely accidental chain of events, which no person or group is responsible for causing, can give rise to a positive obligation to come to another's physical aid, then why cannot such an obligation arise in response to exigent circumstances (i.e., poverty) that are the reasonably foreseeable result of the rules that govern the market process? As Stephen Macedo

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<sup>83</sup> See Jeffrey Reiman, *The Fallacy of Libertarian Capitalism*, 92 ETHICS 85, 88 (1981) ("If the validity of property rights is to be traced to their compatibility with the right to liberty, this compatibility is contrived if the exercise of rights to property are by definition not violations of the right to liberty. . . . This is a textbook case of circular reasoning."); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 308 (1991) ("If when we use the words 'free' and 'unfree,' we are already assuming that it is wrong for A to use something that belongs to B, we cannot appeal to 'freedom' to explain why B's ownership of the resource is justified. We cannot even extol our property system as the basis of a 'free' society, for such a boast would be nothing more than tautological.")

<sup>84</sup> HAYEK, *supra* note 2, at 36.

<sup>85</sup> *Id.*

remarks, “[i]f we decide not to intervene collectively . . . to provide a basic safety net . . . we need some positive justification. It is not up to us how the market allocates rewards, but it is up to us how we respond to that allocation.”<sup>86</sup>

Hayek’s position is yet more vulnerable, because he further concedes that there are circumstances in which an individual’s legitimately acquired property rights may be overridden by others’ needs. He famously cites the example of the owner of the only remaining spring in an oasis. In such a situation, where the spring owner has monopoly control over “an essential commodity on which people [are] completely dependent,” it would be “a clear case of coercion” if he exacts unreasonable conditions in exchange for the water.<sup>87</sup> This is true, moreover, even though the spring owner simply exercises his legitimately acquired property rights over the water and does nothing by means of overt force or threat of violence to impinge upon the protected domain of anyone else. Hayek thus allows that a person is coerced whenever a monopolist refuses to sell him, on reasonably affordable terms, goods or services that are “crucial to [his] existence or the preservation of what [he] most value[s].”<sup>88</sup>

If one is willing to concede this much, however, it becomes difficult to resist the conclusion that the withholding of resources by a *non-monopolist* under similar circumstances is merely a difference in degree, not in kind or quality. What practical difference would it make if there were two or more spring owners, none of whom were willing to sell water on affordable terms to the same person in the example above? Thus, if situations exist in which a property owner’s rights may be trumped by others’ physical and perhaps even psychological needs (what a person most *values*), then “the argument passes from principles to cases. Hayek is unable to find a principle which excludes all appeals to . . . conceptions of human autonomy and need.”<sup>89</sup>

Taken together, these considerations suggest, in my view, that a morally sound conception of the liberal doctrine of political freedom consists in the enforcement of a legal regime that accords those subject to its jurisdiction, in so far as reasonably possible, with a meaningful opportunity to pursue their own idiosyncratic plans and purposes. If so, then the lack of material resources can indeed count as a practical constraint on liberty, in the sense of a person’s realistic prospects for the pursuit of her goals (as opposed to their actual achievement), at least if she falls below a certain threshold of sufficiency. Whatever else it may mean to be free, if the enforcement of a system of property rights renders a person chronically hungry, diseased, or illiterate,

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<sup>86</sup> Stephen Macedo, *Hayek’s Liberal Legacy*, 19 CATO J. 289, 294 (1999); see also JUDITH SHKLAR, *THE FACES OF INJUSTICE* 81–82 (1990).

<sup>87</sup> HAYEK, *supra* note 8, at 136.

<sup>88</sup> *Id.* The concern about an adequate supply of potable water is hardly far-fetched, as anyone living in the western United States or the Middle East can attest. In fact, Hayek’s conclusion is entirely consistent with the modern law of private necessity. Confronted with such a life-threatening situation, it is well-settled that a person would be privileged to take the water, by force if necessary, in order to save his own life. Moreover, he would not be liable for trespass or theft, although he would be liable to pay some reasonable compensation to the owner for the value of the goods taken. See RESTATEMENT (SECOND) OF TORTS § 263 (1965). Such forced transactions are the private law analogue to the government’s power of eminent domain.

<sup>89</sup> ANDREW GAMBLE, *HAYEK: THE IRON CAGE OF LIBERTY* 42 (1996). For an extended discussion of Hayek’s theory of liberty and its attendant difficulties, see CHANDRAN KUKATHAS, *HAYEK AND MODERN LIBERALISM* 130–65 (1989).

she is certainly not free from those constraints in the pursuit of whatever aspirations she happens to have. Thus, a person cannot really be said to be free in the relevant sense if she is faced with substantial material obstacles that unjustifiably defeat her ability to develop and pursue her own life's goals, in her own way, for her own purposes.

As we have seen, the social justification for tolerating the inequalities generated by the market system, in Hayek's view, is that the development of advanced industrial capitalism has dramatically increased everyone's ability to fulfill their needs and wants in precisely this sense.<sup>90</sup> It follows that, if the provision of certain material needs (i.e., security, food, clothing, shelter, education) is a necessary condition of a person's ability to make his own way successfully in a free society, then a liberal state should secure those conditions for the meaningful exercise of freedom on behalf of all responsible citizens as a matter of right, within the limits of the resources at its command.

As is widely known, Hayek does not deny that this may be a genuine obligation of a just liberal state. Indeed, he repeatedly endorses the legitimacy of a welfare system that provides for people's basic material needs, as well as for various public goods that the market cannot efficiently deliver. For instance, in a striking passage, he writes,

There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a clear moral duty of all to assist, within the organized community, those who cannot help themselves. So long as such a minimum income is provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance, this need not lead to a restriction on freedom, or conflict with the Rule of Law.<sup>91</sup>

Given these concessions to the moral acceptability of welfare rights, "[o]n the face of it, Hayek would seem to have scored an impressive own goal."<sup>92</sup>

Though Hayek does not seem to have appreciated how difficult it is to square such concessions with his theoretical rejection of social justice, Feser attempts to deal with them directly, though, in my view, not very successfully. First, Feser argues that

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<sup>90</sup> See HAYEK, *supra* note 2, at 70; see also HAYEK, THE FATAL CONCEIT, *supra* note 39, at 120–134; FRIEDRICH A. HAYEK, *History and Politics*, in CAPITALISM AND THE HISTORIANS 3, 9–27 (1954). Cf. David Johnston, *Hayek's Attack on Social Justice*, 11 CRITICAL REV. 81, 92 (1997) ("The reason individuals in civilized societies can pursue such a wide range of ends—and the reason that, according to Hayek, these societies are preferable to their less-developed forerunners—is that civilized societies generate vast amounts of wealth. A short name for the ability to pursue a wide range of ends is 'power.'").

<sup>91</sup> HAYEK, *supra* note 2, at 87; see also HAYEK, *supra* note 8, at 257–60, 285–89; HAYEK, POLITICAL ORDER, *supra* note 22, at 41–64; FRIEDRICH A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS 64, 92 (1978); HAYEK, SERFDOM, *supra* note 22, at 119–22; HAYEK, STUDIES IN PHILOSOPHY, *supra* note 26, at 175.

<sup>92</sup> Jeremy Shearmur, *Hayek and the Case for Markets*, in HAYEK, CO-ORDINATION AND EVOLUTION: HIS LEGACY IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS 196 (Jack Birner & Rudy van Zijp eds., 1994).

if human reactions to a particular state of affairs, like a distribution of income or a natural disaster, are indeed a matter of justice, then it follows that

Hayek's opponents must, to be consistent, concede also that it is only *individuals'* reactions which are just or unjust; we cannot speak of 'society's' reactions without slipping back into anthropomorphism . . . It is not clear how, if it is *individuals'* actions we're talking about, the advocate of social justice can argue for the usual *government* programs put forward as what social justice demands; at best, it can only be the actions of individuals in their economic lives that are 'socially' just or unjust.<sup>93</sup>

Second, notwithstanding Hayek's own pronouncements on the subject, Feser insists that there is no reason on Hayekian grounds to concede that people's responses to others' misfortunes are a matter of justice at all, even if they are governed by other moral considerations, such as benevolence. Feser thus states that "questions of justice and injustice clearly do not apply" to cases in which "one has suffered a misfortune such as losing a kidney, where it would not be unjust for one to refuse to give up his own kidney to save the other, even if it would be kind to do so."<sup>94</sup> He concludes that Hayek's opponents, therefore, "beg the question" when they assert that "cases like this are cases of injustice, rather than cases of cruelty," citing in support Judith Thomson's well-known argument in defense of abortion.<sup>95</sup>

By way of response, I find it somewhat ironic that Feser fails to note the fact that Hayek himself (not just his opponents) admits that our responses to others' misfortunes may be intelligibly evaluated in terms of justice, even where no identifiable person is at fault. Either way, it seems, Hayek has contradicted himself. Perhaps more to the point, however, the basic flaw in Feser's argument is that he obdurately refuses to acknowledge the *social* dimension of the problem. No one of whom I am aware denies the fact that only individual agents (including, of course, agents acting on behalf of organized groups like the government and corporations) have the capacity to act toward one another in ways that are either just or unjust. Strictly speaking, it is true, in a trivial sense, that "society" as a whole does not literally "act" toward anyone.

This fact, however, is entirely beside the point. Rather, the crucial point is that, whereas individual agents are morally permitted, within certain boundaries, to arrange their private lives as they see fit, they do not have the authority to define the rules that determine what types of actions, under what sorts of circumstances, count as having caused an actionable injustice and, therefore, call for a social response. This is no less true of the rules that govern at least some of the appropriate responses to cases of misfortune, such as poverty.

## II. Conclusion

Given the intellectual climate during which his views about social justice were formed, it is perhaps understandable that Hayek's overriding concern was to shore up

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<sup>93</sup> Feser, *supra* note 47, at 599–600.

<sup>94</sup> *Id.* at 600.

<sup>95</sup> *Id.* at 600, 605 n.10, citing Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

the moral and theoretical foundations of the market process. Unfortunately, one of the unintended consequences of this preoccupation, as I have attempted to show in this essay, is a tangle of contradictory assertions about the nature of justice that, taken together, are less than convincing. Many of Hayek's academic critics have been content to leave matters where they stand and to dismiss his excursions into political philosophy as little more than an exercise in ideological rhetoric. In my view, however, it would be unfair to attribute to a scholar of Hayek's stature a blatantly ideological position, at least where it is possible to reconstruct a more plausible alternative. We thus pay tribute to his legacy not by ignoring his inconsistencies, but by picking up the various threads of his thought and weaving them into a more coherent whole. It is in this sense, I think, that we can intelligibly speak of a Hayekian theory of social justice.

For if it is a legitimate state function to impose taxes on those with excess means in order to provide for public goods that the market cannot efficiently deliver and to provide for the basic needs of those who are unable to fend for themselves in the market, which Hayek freely allows, then we may consistently embrace a morally defensible principle of distributive justice, namely the satisfaction of the material conditions necessary for the meaningful exercise of individual liberty. Moreover, if this can be accomplished without corrupting the epistemological function of a market-driven price mechanism or degenerating into a full-fledged command economy, which Hayek also allows, then a moderate welfare state animated by a reasonably constrained conception of social justice is entirely compatible with the operation of a spontaneous market order.

The mere fact that these questions cannot be answered with mathematical certainty, or pursued to the exclusion of other important political and moral values, does not mean that their pursuit as social goals is either incoherent or disastrous.

