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CHAPTER 11

Deontology and the Antinomy of Libertarianism: A Response to James Sterba

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I. Sterba's Argument 'From Liberty to Welfare' vs the *Reductio* Alternative[1]

In academic philosophy, libertarianism is widely viewed as a minority position beset with theoretical difficulties. But through the popular influence of writers like Ayn Rand, F. A. Hayek, Milton Friedman, and the promotion of libertarian rhetoric by the Heritage Foundation and other conservative lobbying groups, libertarian claims that taxation for most social functions of government violates our rights have gained a prominent position in the New Right ideology that now arguably dominates popular political discourse in the United States and underlies a majority of our citizens' presuppositions about social justice. In response, it is time for philosophers to challenge libertarianism directly by focusing on the *internal* incoherence of its assumptions, rather than indirectly by defending alternative approaches to rights and liberties.

This paper attempts to offer such an internal critique starting from presuppositions common to most libertarian formulations of Right.[2] The approach I take builds on James P. Sterba's article, "From Liberty to Welfare,"[3] which presents the newest version of his

evolving argument that the principles of both "Spencerian" or "Lockean" libertarianism imply what he characterizes as "negative welfare rights" for the poor (p. 81). In other words, according to Sterba, libertarians have misconstrued what follows from their own conception of justice: surprisingly, it actually leads to rights assuring the satisfaction of basic needs and equality of educational opportunity.

The basis for a powerful internal critique of libertarianism is revealed in this argument 'from liberty to welfare' (abbreviated 'L→W'). But Sterba's own intention in proposing the L→W argument is not to discredit libertarian conceptions of justice but rather to employ libertarian principles as grounds for his right to basic needs satisfaction. As Sterba says,

> I have argued in this article that a libertarian conception of justice supports the practical requirements that are usually associated with a welfare liberal conception of justice, namely, a right to welfare and to equal opportunity (p. 98).

Any libertarian who was persuaded by Sterba that such rights followed from his or her libertarian conception of justice would be likely to feel that the whole point of libertarianism had been thwarted, and therefore to take it as a *reductio* of that conception of Right. But when he concludes that on their own principles, "libertarians should endorse the practical requirements of a welfare state" (p. 66), Sterba is not taking this as a *reductio* of libertarianism; rather, it is supposed to demonstrate that we do not need a deontological conception of justice stronger than libertarian ones to justify the normative priority of 'basic needs.' Since Sterba relies on this principle at many later points in his overall argument for the convergence of different ethical philosophies, the welfarist conclusion of the L→W argument must be a positive result.[4]

By contrast, I will argue that the basic libertarian notion of legitimate enforceable norms entails, for reasons that Sterba's argument unwittingly clarifies, an antinomy that cannot be resolved by any libertarian theory. If this conclusion can be sustained, it constitutes

an *a priori* refutation of the libertarian approach to justice in general. It would also suggest that in order to justify a 'right to welfare' (or the normative priority of 'basic needs' to non-basic desires), Sterba will have to pay a higher theoretical price by starting from stronger assumptions about the requirements of moral legitimacy than libertarian theories furnish for us.

My internal *reductio* argument against libertarianism is therefore both a critique and an alternative development of Sterba's L→W argument. In the process of analyzing Sterba's case, the position of libertarian theories in the field of deontological interpretations of the Right in general will be clarified, giving us a better understanding of the reasons behind the deep inconsistency in libertarianism, and the theoretical implications of its failure.

II. A Summary of Sterba's L→W Argument

I begin by outlining Sterba's argument schematically in six main steps. (1) Sterba begins with the Spencerian conception of liberty as "being unconstrained by other persons from doing what one wants or is able to do" (p. 66). This tells us that potential or 'candidate' liberties must be specified as negative side constraints rather than as end-state maximizing principles.[5] Since justice for the libertarian requires the maximization of individual liberty, properly formed candidate liberties count as real liberties if they meet the basic libertarian criterion of normative legitimacy he characterizes as follows:

> *L:* Libertarians go on to characterize their political ideal as requiring the greatest amount of liberty commensurate with the same liberty for all (p. 67).

This principle (*L*) says in effect that liberties are illegitimate or unacceptable *only if* (a) they restrict freedoms that could be granted equally to all, or (b) they grant liberties to some that cannot be granted equally to all. What *L* requires is the *maximum universally prescribable* liberty.

As Sterba notes, there are two different ways libertarians have developed their theories from *L*. "Spencerian libertarians" have tried to derive "more specific requirements, in particular a right to life, a right to freedom of speech, press, and assembly, and a right to property" directly from *L* (p. 67). By contrast, "For Lockean libertarians, liberty is the ultimate political ideal because liberty is just the absence of constraints in the exercise of people's fundamental rights" (p. 66), which will include rights to speech, conscience, property, and so on. In other words, Lockean libertarians "take a set of rights, typically including a right to life and property, as basic" (p. 79) or *prepolitically* given, and then use *L* to determine the scope of these rights: any extension of a basic right that is universally prescribable is included; only extensions that cannot be formally granted to all on the same terms is 'unacceptable' in the relevant sense.[6] In either formulation, then, modern libertarianism takes what Jürgen Habermas calls the possibility of "equal juridification"[7] of a formal liberty to be a sufficient condition for its justice or 'moral legitimacy.' As I will argue, libertarianism also takes the legal impossibility of such equal juridification to be the only basis for judging a potential liberty unjust or illegitimate.

(2) Sterba then argues that one possible personal right is the negative "liberty of the poor not to be interfered with in taking from the surplus possessions of the rich what is necessary to satisfy their basic needs" (p. 70). I will refer to this as *NWL* (negative welfare liberty) for short. There is an important insight behind Sterba's proposition: just as side-constraints can often be reformulated in terms of end-state maximizing principles,[8] so also principles (such as welfare rights) aiming to bring about some social end-state can often be *restated as negative libertarian side-constraints*. Thus NWL is phrased as a negative prohibition on interference, protecting the positive personal liberty to carry out a particular type of action under certain conditions.

As Sterba points out, however, NWL is in conflict with another potential Spencerian liberty: the liberty of the rich to use all their surplus assets for luxury purposes, such as pursuing their conception of the good to their full capacity (assuming this goes beyond fulfilling their basic needs). I will call this potential liberty *LL* (luxury liberty). Sterba suggests that "when the conflict between the rich and the poor is viewed as a conflict of liberties" in this way, we see that it is an open question which liberty libertarianism should sanction. Sterba's interpretation (contrary to my own) is that the libertarian definition of justice or legitimacy itself rules out such conflicts: thus the question whether the libertarian would accept LL or NWL must remain open, because libertarianism forbids the acceptance of two or more conflicting liberties.[9]

(3) Third, Sterba invokes what he calls the "moral 'ought'-implies-'can'" principle (*MOC* for short) to argue that, while "it would be unreasonable to ask or require the poor to sacrifice" NWL (p. 73), since in extreme cases this means asking them to "sit back and starve to death" (p. 72), "it is not unreasonable to ask the rich to sacrifice the liberty not to be interfered with when using their surplus resources for luxury purposes" (p. 73). These judgments are largely intuitive—as they must be, because MOC by itself does not provide a substantive conception of what is reasonably or morally acceptable. They only establish, however, that it is *possible* that the rich may be required to sacrifice their luxury-liberty LL for the sake of NWL (p. 73). In other words, this resolution is morally permissible or acceptable, so it is *compatible* with MOC to hold that it is morally required. Sterba uses a related principle—the "conflict resolution principle" (CR)—to justify the further step that giving up LL for NWL is the *only* morally acceptable resolution, and thus is required.

(4) The argument for this stronger conclusion begins with the contention that only three resolutions are possible for the conflict between LL and NWL: (I) surrender LL for the sake of NWL, (II) surrender NWL for the sake of LL, and (III) "require the rich and the poor to accept the results of a power struggle in which both the rich and the poor are at liberty to appropriate and use the surplus resources of the rich" (p. 74). Sterba uses his conflict-resolution principle (CR) to rule out (II) and (III), on the grounds that it is not reasonable to ask all

affected parties to accept either of these resolutions (the unacceptability of III follows from the unacceptability of II, since III has the same practical effect as II). The intuitive force of these judgments about acceptability again comes from the suggestive distinction between basic needs and non-basic desires and pursuits: as Sterba says, what is objectionable about resolutions II and III is "the size of the sacrifice that the poor would be required to bear *compared to the size of the benefit of the rich*" (p. 76—my italics).[10]

(5) The fifth step is to give a parallel argument for NWL over LL starting this time from the *Lockean* conception of liberty as the unconstrained exercise of prepolitical rights such as the right to life and "a right to property . . . understood as a right to acquire goods and resources either by initial acquisition or by voluntary agreement" (p. 79-80). Sterba does this by contrasting an unconstrained right to property (URP) by acquisition and agreement with a constrained right to property (CRP) allowing acquisition by free exchange only for "goods and resources except those surplus goods of the rich that are required to satisfy basic needs of the poor" who cannot otherwise satisfy their basic needs (e.g. by employment) (p. 80). For the Lockean, URP and CRP become the basis for different *potential liberties*: the liberties not to be prevented from possessing (by means of contract and removal from a state of nature) *all* types of goods and resources, or only the goods and resources left over after everyone's basic needs are satisfied, respectively. Here there is not the same type of direct clash between two potential negative liberties that both might serve the basic end of maximizing liberty: instead, the conflict for the Lockean is between two ways of construing a single right that will give content to one basic category of prepolitical liberty, namely the liberty not to be prevented by others from acquiring, keeping, and disposing of property as one wishes. But the result is the same as in the Spencerian framework: the only acceptable resolution for all concerned is to give up the URP construal in favor of the CRP construal (p. 81).

(6) Finally, Sterba argues that if they acknowledged a negative right to welfare (in either the NWL or CRP sense), the rich have both moral and pragmatic reasons to accept "adequate positive welfare rights for the poor" (p. 82). Pragmatically, this is the only way to ensure that no poor persons will be in bad enough shape to be qualified to help themselves to the property of the rich. Morally, welfarist institutions assuring the satisfaction of basic needs is the only way the rich can assure that when they use surplus resources they are not violating NWL (p. 82, note 28). Thus the side-constraint right to welfare justifies positive institutions explicitly aimed at securing an end-state: the satisfaction of all persons' 'basic needs.'[11]

In arguing for my alternative conclusion that libertarianism is internally inconsistent, I will concentrate on analyzing the crucial elements in the first three of these six steps in Sterba's argument, beginning with interpretation of *L* as the libertarian criterion for moral acceptability of *liberties*. It is important to note that libertarians commonly attempt to distinguish a 'first-phase' justification of certain basic negative liberties from a 'second-phase' justification of state institutions, positive constitutional entitlements, and social and economic policies designed to bring about determinate ends. Libertarians tend to rely on the *weakness* of their condition for the first-phase justification of liberties to generate a sufficient set of normative rights to produce very strong conditions for the second phase, thus ruling out most state-mandated departures from unconstrained free markets. This is how libertarian accounts of rights argue against collective interference with 'invisible hand' determination of socioeconomic outcomes. Professor Sterba's L→W argument ingeniously outmaneuvers this libertarian theoretical tactic: by conceiving a right to welfare in terms of a negative *liberty*, he produces a potential side-constraint whose normativity libertarian conceptions must consider along with other possible liberties in their *first phase*; they cannot postpone judgment of the right to welfare to a second phase, where it can be rejected as a violation of liberties already established in the first phase. As examples such as NWL show, libertarians cannot justify regarding all formal liberties limiting state power as *prior* to any substantive entitlement or distributive principle

guaranteeing the *worth* of formal liberties merely on the grounds that the former are all side-constraints and the latter are all end-state-maximizing principles whose acceptability must be decided *after* the side-constraints are determined. Sterba's approach thus turns the weakness of the libertarian criterion for the first phase (i.e. for the normativity of liberties) against traditional libertarianism. But as Sterba fails to see, far from helping the welfarist, this very weakness in the libertarian principle *L* is also its undoing: it is *so* weak that entails a fatal antinomy.

III. Liberties as Acceptable If and Only If Equally Juridifiable: Rand, Nozick, Hayek

My argument for this alternative conclusion will thus depend crucially on the accuracy of principle *L* as sketched above. Some assurance is therefore required that libertarian theorists do understand the normative rightness of liberties in terms of Sterba's principle *L* as I have interpreted it: if and only if a liberty can be equally juridified for all, then it is morally acceptable. This may not be immediately obvious, because libertarian authors often do not describe in explicit detail the criterion by which they judge their principal liberties (or the wide scope of Lockean basic rights) to be morally 'acceptable.' Nevertheless, we can see that *L* is implicitly used as the criterion for the legitimacy of liberties in the writings of several prominent contemporary libertarians.

This may seem less surprising when we realize that the emphasis on equal juridifiability in *L* has classical roots. The origin of this way of conceiving the legitimacy of liberties seems to be Hobbes's argument for his famous 'second law of nature' in the *Leviathan*:

> That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.[12]

Out of an unlimited natural liberty to do anything, we retain only that portion of our positive liberty which we are content to allow others: surrendering the remainder is equivalent to granting others individual rights of sole proprietorship and freedom from intervention by us, on the assumption that they surrender the same liberties to act against us and thus grant us the same rights. The proto-Spencerian implications are that we would reciprocally give up the *least* liberty that will be sufficient to assure peace, and that this means we would retain the maximum liberty we could accept given that it will be equally juridified for all by the sovereign.

Hobbes does not seem to consider the problem that one person might be willing to grant to others (and retain for himself) *less* equal liberties than another person would be willing to grant to others, in order to retain them for himself—i.e. that the liberties each would be willing to prescribe universally may diverge. His descriptions of the state of nature notwithstanding, then, Hobbes's approach presupposes that there is *already* some intuitive dividing line between the liberties each would give up and the liberties each would retain: he presupposes that I will give up a right to claim what is already in some intuitive sense 'yours' (perhaps since used by you or produced by you, as Locke later suggested), while you will give up a right to take what is 'mine' in the same intuitive sense. And thus, while his own theory about self-defense implies it, Hobbes never considers that the poor might not be willing to give up the natural liberty of any person to take from others whose basic needs are satisfied that which he or she needs to survive. Someone who can expect to be rich, however, would be happy to surrender this liberty and insist that others do likewise.

Contemporary libertarians have for the most part uncritically taken over the essence of this Hobbesian view without seeing the fundamental problem in it. Thus, in "Man's Rights," for example, Ayn Rand argues that the right of a person to advance his or her own interests is *the* basic liberty: the right of each to "his own life" is "the source of all rights," and extends to the right to do everything one must to promote one's own "fulfillment" and "enjoyment."[13] Yet it is hard

to see how her strong property rights follow from Rand's right to life: she argues that "the man who has no right to the product of his own effort has no means to sustain his life,"[14] but this would seem to show only that we must have a right to enough produce of our labors to satisfy our *basic needs*, rather than all our desires. Moreover, this "positive" right of each is supposed to generate the basic negative obligation each also has not to violate others' positive right. So this negative obligation towards others must limit what we can freely choose in the name of our own "life, liberty, and the pursuit of happiness," as Rand conveniently rephrases her fundamental liberty.[15] But like Hobbes, she does not give the principle for determining the *scope* of this positive liberty consistently with its correlate limiting obligations.

The implicit principle seems to be *L* again, as we see in Rand's sharp reaction to the "economic bill of rights" proposed in the Democratic party platform of 1960: these 'rights' are all spurious, she says, because "Any alleged "right" of one man, which necessitates the violation of the rights of another, is not and cannot be a right. . . .There can be no such thing as *"the right to enslave."*[16] Yet why couldn't such substantive rights to things like a home, job, medical care, and education be among the negative obligations that arise from the positive right to life and thus limit its scope? The only apparent reason is Rand's questionable empirical claim that such substantive rights could not be *equally juridified*: "since it is obviously impossible to provide every claimant with a job, a microphone or a newspaper column, *who* will determine the 'distribution' of 'economic rights'?"[17] Similarly, it must be because purely formal Lockean liberties are equally juridifiable in her view that they are included in the scope of the basic positive right: this is Rand's only possible basis for the claim that "A right does not include the material implementation of that right by other men; it includes only the freedom to earn that implementation by one's own effort."[18] She assumes that substantive rights to conditions for exercising one's formal liberties violate the very *meaning* of rights as universally equal entitlements for all.[19] Thus

there are really *two* strikes against all substantive rights for Rand: (1) they are (allegedly) not equally juridifiable, and (2) they are inconsistent with purely formal freedoms that *are* equally juridifiable. This result reflects the assumption that equal juridifiability is a consistent standard, i.e. that it is a principle *p* for determining the legitimacy of each liberty such that if any alleged liberty *l* is inconsistent with another liberty that is legitimate by *p*, then *l* is also illegitimate by *p* directly.

In his account, Robert Nozick suggests that one can argue from the general deontological meaning of norms as prescribable equally for all persons to Lockean liberties. In chapter III of *Anarchy, State, Utopia*, for example, Nozick argues from the common deontological premise that the Right is prior to the Good—or that there exist some moral side constraints representing persons as separate and not to be sacrificed for an "overall social good"—to the existence of "libertarian constraint" prohibiting aggression against others.[20] This case serves as an illustration of a method he sketches for testing the normativity of a proposed liberty:

> Thus we have a promising sketch of an argument from moral form to moral content: the form of morality includes *F* (moral side constraints); the best explanation of morality's being *F* is *p* (a strong statement of the distinctness of individuals); and from *p* follows a particular moral content, namely the libertarian constraint [on aggression].[21]

How exactly the particular liberty (or right against interference) *l* follows from *p* is not clarified here, but the idea seems to be the 'prescriptivist' one that if *l* can be equally applied to all persons as such (the form *F* which side-constraints embody) then *L* is justified as reflecting the individuality of personhood (*p*). If this is what he means, then Nozick's schema for justifying the normativity of a putative liberty is equivalent to *L* as I have interpreted it. Furthermore, in specifying the scope of the right to be free from aggression by others, Nozick says that persons who are "innocent threats, I think, are

another matter" and usually won't have this right.[22] This confirms Ian Shapiro's analysis that Nozick's criterion for the normative legitimacy of liberties is weaker than Kantian universalizability: "There are many possible actions that do not violate Nozick's injunction but do violate any reasonable interpretation of Kant's dictum."[23] Sacrificing innocent threats for one's own self-preservation would be clear cases in point.[24]

F. A. Hayek's theory of liberties is obviously a more complex case, but in its fundamental statements on justice and normativity (or 'nomos' as he calls it), it conforms to the above interpretation. In particular, in a crucial section of *Law, Legislation, and Liberty, Vol.II* titled "Not only the rules of just conduct, but also the test of their justice, are negative,"[25] Hayek argues in pseudo-Kantian fashion that in the "rule-connected open society (or nomocracy)," the rules that are the basis for interpersonal relations must shed all dependence on "concrete ends." He interprets this as follows:

> . . . so the legislator who undertakes to lay down rules for a Great Society must subject to the test of universalization what he wants to apply to such a society. The conception of justice as we understand it, that is, the principle of treating all under the same rules, did only gradually emerge in the course of this process; it then became the guide in the progressive approach to an Open Society of free individuals equal before the law.[26]

This makes clear that the kind of universalizability Hayek has in mind is simply the equal juridifiability of laws. The test of whether a putative right or liberty[27] could be given legal form as a rule for all citizens on equal terms is sufficient to determine whether it should be universally acceptable, on this account. Thus in modifying the inherited system of rules of just conduct, we must be on the lookout for "yet unarticulated but *generally acceptable* principles of justice," and apply to such potential principles "the negative test of universalizability, or the necessity of commitment to the *universal application* of the rule laid down . . ."[28] If the principle is such that it could be universally prescribed for all citizens, that is sufficient for its being a norm.[29]

Without going into too many details of Hayek's legal philosophy, we can see that he is confident that his universalizability test will yield Lockean liberties and not Rawlsian distributive justice. In his discussion of "Nomos: The Law of Liberty," for example, Hayek briefly considers the problem that "even rules which are perfectly general and abstract might still be serious and unnecessary restrictions of individual liberty."[30] He thinks this problem can be solved by realizing that the natural function or *telos* of law is to give pure procedural rules for "the formation of a spontaneous order of actions."[31] Rules that meet his universalizability criterion yet *restrict* liberties will be paternalistic and not in accord with the law's purely negative dispute-settling purpose: "such rules are not rules limiting conduct towards others or, as we shall define these, rules delimiting a protected domain of individuals."[32] This is an appeal, however, to precisely the alleged natural division between negative freedoms and end-state principles that Sterba's negative welfare liberty undermines, as we saw. NWL restricts "actions towards others" in Hayek's sense yet limits traditional Lockean liberties.

More specifically, Hayek argues that law has the epistemic purpose of minimizing inevitable conflicts between people's expectations about one another's actions: "The aim of the law is merely to prevent as much as possible, by drawing boundaries, the actions of different individuals from interfering with one another," thus giving us an "abstract order" that realizes the "maximal certainty of expectations."[33] This maximization principle gives Hayek his own theoretical basis for the other half of the Spencerian formula *L* which I quoted from Sterba above. We already saw that for Hayek, liberties must be universalizable in the weak sense that all citizens could have them in the same legal form; now we see why such universally equal liberty must also be maximized (as *L* stated).[34] From his premise, Hayek can argue that "the chance of as many expectations as possible being fulfilled will be most enhanced if some expectations are systematically disappointed,"[35] and from this "paradox" of the market's effectiveness in maximizing reliability of expectations[36] derives the

right of *property*, which is "the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict."[37] Thus Hayek's derivation of Lockean liberties depends on his empirical claim that this is the only way to distinguish between "legitimate expectations" the law will protect and "others which it must allow to be disappointed" (i.e. externalities that will not count as redressable *harms*) so as to "maximize the possibility of expectations in general being fulfilled." If this is the only relevant aim of law, then

> . . . the only method yet discovered of defining a range of expectations which will be thus protected, and thereby reducing the mutual interference of people's actions with each other's intentions, is to demarcate for every individual a range of permitted actions by designating . . . ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded. The range of actions in which each will be secured against the interference of others can be determined by *rules equally applicable to all* only if these rules make it possible to ascertain which particular objects each may command for his purposes.[38]

In other words, the joint aim of maximizing coordination between expectations and keeping rules legitimate according to the equal juridifiability standard of normativity requires *maximizing individual negative rights* of life, bodily integrity, and property—the standard Lockean liberties.[39] This shows conclusively that Hayek takes *L* to be the standard of acceptability for the ('first-phase') determination of which rights and liberties count as just. With the relevance of *L* established, we can now move on to evaluate the deontological principles which Sterba uses in his own critique of standard libertarian views.

IV. Sterba and Habermas: Metaethical vs Substantive Versions of Interpersonal Deontological Universalizability

As I indicated in §I, Sterba's L→W argument is interesting because it attempts to turn the apparent theoretical benefits of

libertarianism's weak set of assumptions about morality to the advantage of the welfarist. If he can derive a right to welfare from premises that are *weaker* than other deontological theories of justice (such as Rawlsian choice within the Original Position, for example) that reach similar welfarist conclusions, Sterba will get the same theoretical 'payoff' for a lesser 'price' in premises. Moreover, the L→W argument begins from the standpoint of "morality" that results from the first stage of Sterba's program: although he does not formally define what he means by "morality" at this stage, it is clear from his previous publications that Sterba wants to interpret "morality" as minimally as possible while still distinguishing it from rational egoism. "Morality" in Sterba's scheme is a placeholder for particular conceptions of the Right which meet the requirement that it is rational at least for *those holding the conception* to will that the norms implied by it are upheld equally by all. Sterba characterizes this requirement for conceptions of morality as follows:

> *The Universalizability Requirement*: It must be possible for the directives of a normative theory to be universally followed, and such a possibility must be acceptable to those who are committed to the theory.[40]

This principle *UR* is a 'universal prescriptivist' standard: it includes both a universal 'contradiction in concept' test and a 'contradiction in willing' test restricted to those advocating a particular conception of the right or those prescribing the institutions to be justified by the norms following from such a conception. Prisoner's dilemmas can be used to show that universal egoism fails this prescriptivist test,[41] but other unsatisfactory conceptions will pass the test and count as 'moral' in this minimal sense.[42] These will include a class of conceptions that I call 'apartheidic,' because they directly build in selective advantages for identifiable groups but nevertheless have implications which could in practice be followed equally by all—without necessarily being advocated or *willed* by everyone. In Kantian terms, everyone in a society can act *in accordance with* such an

'apartheidic' conception of norms, while only those benefitted by the norms can rationally act *for the sake of* this conception. In other words, the problem with UR is that it only requires a single person reflecting on a norm to consider whether he or she could will what I call its "equal juridification," following Habermas's terminology. To overcome this difficulty, Sterba argues that the standpoint of morality requires that moral conceptions of the Right satisfy at least one further essential condition:

> *The Requirement of Universal Acceptability:* The directives of a normative theory must be acceptable to everyone who would be affected by them if the theory were universally followed.[43]

This principle, which I will call *UA*, is stronger than UR since it requires that *everyone affected* be able to accept the implications of the theory of justice or conception of normativity. It is important to see why this principle embodies a fundamental advance in the Kantian tradition. The inadequacy of UR is similar to an inadequacy often alleged in Kant's own contradiction in willing test: a maxim fails this test only when "... although it is possible that a universal law of nature could subsist in harmony with this maxim, yet it is impossible to *will* that such a principle should hold everywhere as a law of nature."[44] The *monological* formulation of this test makes it look like a universal prescriptivist principle or 'golden rule': it seems to be satisfied if a single person can will that everyone act on her subjective principle. Thus a masochist can will a universal law of sadism, or a member of the ruling class can will that everyone act on her apartheidic conception of Right.[45] The UA principle represents an advance because it is an *interpersonal* formulation of universalizability: it requires that *every* affected person be able to will that everyone act according to such norms.

In his "Discourse Ethics," Jürgen Habermas emphasizes the same point in defending an explicitly intersubjective principle of universal acceptability for the justification of norms:

> (U) *All* affected can accept the consequences and the side effects [that a norm's] *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation).[46]

Habermas notes that unlike Rawls's operationalization of the "standpoint of impartiality" in the Original Position, he has formulated *U* "in a way that precludes a monological application of the principle."[47] Justifying a norm under *U* requires coordinating action through a communicative exchange of perspectives: "By entering into a process of moral argumentation, the participants continue their communicative action in a reflexive attitude with the aim of restoring a consensus that has been disrupted. . . .Agreement of this kind expresses a *common will*."[48] Thus *U* is similar in effect to Sterba's principle UA, because both *U* and UA require a new kind of universalization that can only be achieved by an *interpersonal* extension of the contradiction in willing test.[49]

Habermas's *U* differs from Sterba's UA only in requiring that the *motive* for intersubjective acceptance (or common will) be each person's recognition of *interests* of others, whereas Sterba's UA does not spell out what sense of "acceptable" is relevant for normativity. We may interpret Sterba to mean that people must be able *morally* to accept the implications following from the conception as normative,[50] where the sense of "morally acceptable" is to be filled in by each different conception of Right. So interpreted, Sterba's UA is a metaethical version of Habermas's *U*: *U* is UA filled out with intersubjective recognition of common interests as the necessary condition of moral acceptability. Habermas spells out *U* this way in order to distinguish it from a different substantive principle that "already contains the distinctive idea of an ethics of discourse:"

> (D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.[51]

This famous "Discourse Principle" (D) defines the substantive ideal of justice or moral acceptability Habermas develops from his trans-functionalist theory of communicative action and the "ideal of impartiality" that he finds in the "pragmatic presuppositions of argumentation as such." Legitimacy in this sense is something more than the compromise agreeable to everyone's subjective interests as called for by U: instead, D envisions normative validity or legitimacy as an ideal that can only be progressively approximated in practical discourse that aims at whatever norms are in the "common interest" in an ideally rational and communicative sense: they are reflectively justifiable to all possible interlocutors affected by the outcome of the practical discourse. This ideal (or "transcendental-pragmatic") sense of justification is implicit in the presuppositions of cooperative communicative action itself, according to Habermas. As he says:

> If normative rightness, like validity in general, is construed as the three-place relation 'validity-of-something-for-someone,' then the counterfactual meaning of rational acceptability cannot be reduced to that of [actual] acceptance within a community of interpreters. On the other hand, the idea of an ideally extended communication community is paradoxical in that every known community is limited . . .[52]

Thus *D* is a stronger principle than either *U* or UA taken by themselves: we might regard *D* as the result of filling out UA with the *discourse-ethical* conception of moral acceptability.

V. Sterba's Moral "Ought" implies "Can" Principle and UA

Thus Sterba's argument in "From Liberty to Welfare" is an attempt to reach a justification of welfare rights without appealing to a strong substantive deontological principle such as *D* or *U*. The core of his argument depends on only two fundamental premises. The first is the libertarian principle of equal juridifiability (*L*) and the second is a special "'ought' implies 'can' principle," which Sterba introduces as "common to all political perspectives:"

> The "ought" implies "can" principle: People are not morally required to do what they lack the power to do or what would involve so great a sacrifice that it would be unreasonable to ask them to perform such an action, and/or in the case of severe conflicts of interest, unreasonable to require them to perform such an action (p. 71).

As phrase "unreasonable to require . . ." suggests, what is special about *this* "'ought' implies 'can'" principle is that it refers to what requirements one rationally or *morally can* accept. Sterba is right that

> . . . there are good reasons for associating this linkage between reason and morality with the "ought" implies "can" principle, namely . . . the progression from logical, physical, and psychological possibility found in the traditional "ought" implies "can" principle to the notion of moral possibility (p. 72).

In other words, Sterba holds that it is a requirement of reason for theories of morality or Right that their implications conform not only to the traditional "ought" implies "can" principles, but also to the *reflexive* case where the modal operator for "can" is moral possibility (or 'acceptability'):

$$MOC: \neg(\Diamond_m)\alpha \rightarrow \neg(\Box_m)\alpha$$[53]

This matches Sterba's formulation: if α is not morally permissible (which he interprets as 'reasonable to expect the agent to accept'), then α is not morally required. This specifically *moral* "'ought' implies 'can'" principle (MOC) is not as unfamiliar as it might initially seem. The basic idea expressed in this principle is found in the argument, frequent in deontological moral theories, that one cannot use illegitimate means to otherwise good ends. This implies that α cannot be a moral requirement if the only possible means to α are *morally* unacceptable—even if these means are available or possible in other modal senses. From the premise that achieving α entails employing means β, we can thus infer, via MOC, the corollary that:

$$(\alpha \Rightarrow \beta) \rightarrow [\neg(\Diamond_m)\beta \rightarrow \neg(\Box_m)\alpha]$$

Note that this corollary is *similar* to what Alan Donagan calls the "Pauline Principle" that "It is impermissible to do evil that good may come of it."[54] Donagan interprets this principle to mean that it is impermissible to violate any "perfect" or absolute duties in pursuit of "imperfect" duties to promote "certain ends" related to well-being.[55] So interpreted, he regards this Pauline Principle as a fundamental precept of the "Hebrew-Christian common morality," which can be deduced from the same Kantian first principle of respect for human beings on which his whole system is based.[56]

This comparison shows that Sterba's "'ought' implies 'can'" principle is a *moral* precept that will impose considerable restrictions when applied to competing conceptions of Right. Yet MOC is still a metaethical principle that is neutral between different deontological conceptions of moral acceptability or legitimacy: thus, for example, it is only when we define moral acceptability in terms of non-violation of certain perfect duties that MOC takes on the specific sense of Donagan's Pauline Principle—a *Kantian instantiation* of MOC.

Nevertheless, since the constraint MOC imposes on any conception of morally legitimate rules and institutions is not merely logical, one might wonder whether libertarians could not protest when Sterba uses this principle to test possible implications of their own conception. The reason they cannot becomes clearer if we consider the principle that Sterba correctly identifies as the *contrapositive* of MOC:

> CR: The conflict resolution principle: What people are morally required to do is what is either reasonable to ask **everyone affected to accept or, in the case of severe** conflicts of interest, reasonable to require everyone to accept (p. 73).

This "Conflict Resolution Principle" (CR) means that (in a conflict) *if* persons are morally required to act according to a certain arrangement α, then α must be *morally permissible* in the sense that it is reasonable for all affected to accept it. Note that it does not necessarily follow from CR that if α is a resolution that is reasonable for all affected parties to

accept, then α is morally required.[57] To complete his L→W argument, as we saw, Sterba therefore had to formulate three possible resolutions to the conflict NWL and LL, and then argue that only one of these resolutions *does not* fail the CR test.

It is hard initially to see that CR is the contrapositive of MOC only because MOC seems to refer to what *individual persons* can be reasonably be expected to accept, while CR refers to what it is reasonable for *everyone affected* to accept. To make the equivalence of the principles more perspicuous, we must first *generalize* MOC:

> (In cases of conflict) individuals are not morally required to do what it would be unreasonable to ask or require *all affected persons* to accept.

To get this version of MOC, we have substituted the notion of what is morally acceptable to all affected parties for 'moral permissibility' in the original version: if α is not morally acceptable to every affected person, then α cannot be morally required.[58] Now this is clearly the contrapositive of CR, which says that if α is morally required, it must be acceptable to every affected party.[59]

This analysis shows that MOC is logically equivalent to CR as Sterba claims, but it also shows something he does not mention: that CR (and thus MOC as well) are in effect slightly more developed versions of UA, which says that norms or legitimate rules must be morally acceptable to all who would be affected by their implementation. In its generalized form, CR (and thus generalized MOC) is simply UA with 'moral acceptability to all' described in terms of what it would be "reasonable" for all affected to accept.[60] This interpretation is confirmed when Sterba asks if "Spencerian libertarians" could respond to his L→W argument by "hold[ing] that putting forth a moral resolution requires nothing more than being willing to universalize one's fundamental commitments" (p. 76). Sterba insists that they cannot, because it is *not* a moral resolution for the rich to universalize *their* commitment to strong property rights, nor for the poor to universalize a right to welfare (p. 76). The implicit

point here is that universal prescription in the *UR* sense is not enough—rather, a "moral" resolution is one acceptable from *every* concerned standpoint, as required by interpersonal formulation of universalizability in UA.

Sterba suggests that his formulation of MOC and CR in terms of what it is "reasonable" to expect people to accept expresses "the belief that (true) morality and (right) reason cannot conflict" (p. 72, note 11). But my analysis suggests *on the contrary* that MOC and CR leave open what is "reasonable" for persons to accept in the same way as UA leaves open what is morally permissible or acceptable. Like UA, the moral "Ought" implies "Can" principle and "Conflict Resolution Principle" must be seen as metaethical principles saying only that however a substantive conception of justice interprets what "morally or reasonably acceptable" means, it must require that for norms, this acceptability can be universalized in the interpersonal sense.

On this metaethical interpretation of CR and MOC, Sterba's argument in "From Liberty to Welfare" uses the libertarian conception of moral acceptability in *L* to fill out the meaning of MOC and CR. Through this combination, the L→W argument attempts to derive welfare rights from the weakest or most minimal particular moral ideal or conception of the Right that *apparently* satisfies UA. And indeed libertarians cannot reject MOC and CR as *metaethical* principles, for they implicitly appeal to notions of universal acceptability such as UA in their arguments about the justice of liberties; since CR is effectively equivalent to UA, CR (and thus MOC) are implicit in the libertarian approach to morality as well. But our prior analysis of *L* suggests a deep problem in libertarianism that does not come to Sterba's attention: if libertarians hold that a liberty ought to be regarded as acceptable to anyone if it is equally juridifiable, then libertarianism fills in the meaning of UA in a way that effectively *reduces it to UR*. In other words, a norm is deemed universally *acceptable* to all if it is universally prescribable in law: thus if my absolute right to my property acquired by unlimited market exchanges is equally juridifiable, then contrary to Sterba, it is in *that sense* morally

acceptable to the poor as well. It was therefore overly optimistic to think that CR (or its equivalents) will leave only one universally acceptable resolution to the conflict of potential liberties. CR and MOC cannot adjudicate this conflict, because when they are interpreted in terms of *L*, the ideal of interpersonal acceptability they embody is effectively reduced to universal prescribability again.

VI. The Antinomy of Libertarianism

A natural approach to this antinomy begins with a seemingly minor problem in step (2) of Sterba's L→W argument. Against the negative liberty for welfare (NWL) introduced in step (2), the libertarian might argue that to be well-formed, a liberty must be capable of being formally equal for all, and therefore cannot mention proper names *nor specific groups* of persons. As formulated by Sterba, the "right *of the poor*" not to be interfered with when appropriating luxury resources of the wealthy to satisfy their basic needs seems to violate syntactic requirements for equal juridifiability.[61]

But in fact, the *L* requirement that a liberty be formally applicable in the same way to all is satisfied by NWL. Sterba's formulation of NWL could easily be rephrased to prevent it from sounding like a right that the rich could not have on the same formal (or legal) basis as the poor. We could easily replace Sterba's characterization of NWL with the following:

> NWL: 'the right *of any person* to take what is necessary for her basic needs from the surplus possessions of those whose basic needs are secured, when there is no other (morally permissible) way she has at her disposal to satisfy her basic needs.'

LL can also be reformulated so that formally speaking, it can be had by everyone—even those who actually have no luxury resources.

This revision does more than preempt a libertarian objection, however: it helps clarify that if NWL and LL count as *potential* liberties, then in their modified forms they will *both* pass the test in the Spencerian criterion *L*. For, as reformulated, both NWL and LL are

equally juridifiable for all persons. This means that as constitutional 'rights,' they would give every citizen the same legal permissions.

Thus contrary to Sterba's further argument in steps (2) and (3), the libertarian criterion of justice or moral acceptability as I interpret it does *not* require a resolution between NWL and LL. Unfortunately for the libertarian, the conflict between NWL and LL is not a conflict that involves any violation of *L* by either potential liberty. Against Sterba's conclusion, when reformulated as I have suggested, we see that the universal right of each person not to be prevented from using whatever surplus resources she has for her own personal preferences is "commensurate with the same liberty for all:" thus, *L actually justifies LL* as a real liberty, just as it justifies the equally juridifiable version of NWL. Since on my interpretation *L* applies to potential liberties individually, it does not rule out such conflicting results. So, for example, recognizing an unlimited LL is acceptable even if this means repealing NWL, because this result is still *formally equal* for all: it would deny to the rich the same right to take surplus resources from others as it denies to the poor. Similarly, recognizing the non-quiddative version of NWL would limit LL in an equally juridifiable fashion as well. Such a mere formal equality in rights may strike one as a hopelessly inadequate measure for justice, but I hold that it is all a libertarian can consistently require for a norm to be acceptable to all concerned.

If we cannot reach the conclusion of Sterba's step (2), however, we must reassess what the further steps may demonstrate. Sterba believes that *L* requires a resolution of the conflict, but does not by itself provide it: it is the requirement of universal acceptability construed in terms of the MOC and CR principles that resolves the conflict by showing that the only "morally acceptable" resolution is to admit the negative welfare liberty of the poor and thereby limit the luxury-liberty of the rich (or for the Lockean, to adopt a constrained basic property right, thereby excluding the unconstrained right). But even if *L* did require a resolution one way or another, MOC and CR cannot provide it if they are understood as metaethical principles as I have suggested.

Sterba's argument in steps (3) through (4) do not go through: we cannot rule out resolution II (in which LL is granted and NWL is not) as unacceptable, because *moral acceptability itself* is still conceived in terms of *L*, and the liberty of each person to keep his or her resources for luxury purposes passes the test in *L*, despite the fact that it conflicts with NWL. Hence, if CR borrows its specific sense of 'moral acceptability' from *L*, applying it to the conflict does no good: we cannot use the difference between basic needs and non-basic preferences to gauge which resolution is *more* acceptable according to CR, because *L* takes no account of this difference in defining acceptability.

The libertarian, as I understand her, therefore cannot use the metaethical principle of UA (or its near-equivalents CR and MOC) to determine which of the 'real liberties' should have a place in the coherent complete scheme of liberties. This is impossible, because it would mean using UA (or CR) to prove the *unacceptability* of a potential liberty that *L* tells us *is* morally acceptable. Since I interpreted UA (or CR and MOC) as *metaethical* constraints, when their sense is filled out by *L* as the definition of moral acceptability, UA *cannot* conflict with the deliverance of *L*, because its sense is defined by *L*. In other words, if *L* entails that certain rights are morally acceptable to all parties even though they conflict, then this contradiction will necessarily *infect* judgments employing UA or CR. Unlike Habermas's *D*, which is a stronger substantive intersubjective standard of normativity, UA cannot serve as a principled basis for reconciling conflicts among potential liberties.

The root of the problem is that the standard of "moral acceptability" in *L* is weak enough that it actually allows conflicting potential liberties to pass as morally acceptable and thus to count as real norms by the metaethical standard in UA: since all they have to be is formally equal, contradictory formally equal liberties are justified by *L*. Moreover, *L* does not seem to provide *any* principled way of resolving these conflicts by adjusting the scopes of the various real liberties and excluding some in favor of others. The libertarian has no principled way to devise from *L* and CR what John Rawls calls a consistent,

"complete scheme of liberties."[62]

It is especially revealing to contrast this libertarian dilemma with the approach Rawls takes in his *Tanner Lecture* on "The Basic Liberties and their Priority." In this lecture, Rawls explains in much more detail than he provided in *A Theory of Justice* how the ideal of justice as fairness not only provides grounds for deriving a set of basic liberties, but also for a principled way of balancing and adjusting the scope of these derived liberties to form a consistent system. Rawls proposes to determine this complete scheme of liberties according to a principle (let us call it *S*) for determining the "significance" of various 'potential' liberties, where *S* itself follows from the *same* principles capturing his ideal of Right that determine what the 'candidate' or potential liberties are.[63] But the libertarian cannot do anything like this, since for him, *L* itself already plays the role that *S* plays for Rawls: it tells us that potential liberties satisfying a certain formal standard are *fully acceptable* without further qualification, and thus attain actual normative status. And incredible as it may seem, one thing *L* tells us is that a potential right to hold onto all one's luxury resources is *acceptable* to all concerned because it is equally juridifiable; therefore, it is a real liberty, or *justifiably* enforced as positive law. This shows why we cannot turn libertarianism into a two-stage procedural justification in which potential liberties first pass the test in *L*, and then CR is used to resolve conflicts between these *L*-justified liberties: the distinction between the stages collapses if CR is understood as a metaethical principle.

There is one alternative that is worth mentioning, since Sterba's wording sometimes suggests it. If CR (or its cognates UA and MOC) are read as saying that a norm is not morally necessary unless it is *rationally* possible to accept it, where the sense of rational acceptability is intuitive but *independent* of other principles of moral acceptability such as *L*, then perhaps this intuitive version of CR could restrict the set of *L*-acceptable liberties sufficiently to bring about consistency? But if this interpretation were tried, we would still reach an impasse: if CR were to tell us that a liberty (such as LL) that is justified according to *L*

cannot be part of the complete scheme of real liberties, CR would be *contradicting* *L*, not supplementing it. This result would show, contrary to Sterba's contention, that moral acceptability and rational acceptability *do not* coincide, at least when *L* is the criterion of moral acceptability.[64] The internal antinomy of libertarianism can therefore be summarized as follows:

(A) If libertarianism is not modified by some further substantive principle of moral acceptability, it cannot justify a maximally coherent scheme of liberties, because *L* unmodified entails contradictions: it justifies conflicting potential liberties as real liberties.

(B) But if we attempt to use principles such as UA and CR to supplement *L*, the problem remains:

B1: If MOC and CR are metaethical principles like UA, then rather than resolving the conflict between potential liberties LL and NWL, MOC and CR will approve both liberties because each is justified by *L* itself as morally acceptable to all.

B2: Alternatively, if MOC and CR are read as intuitive rational restrictions independent of how moral acceptability is defined, then they will contradict *L*: CR will entail that certain potential liberties are rationally unacceptable on these independent grounds when they are morally acceptable on moral grounds, according to *L*. The libertarian will be forced to reject MOC and CR in these forms, and will once again be left with conflicting morally acceptable liberties.

I have put the antinomy this way to show that all three options lead to the same formal contradiction. But there is room to consider a fourth alternative, as the phrasing of horn A was supposed to indicate: the libertarian can admit that *L* unmodified is unacceptable, and seek to modify it with a further substantive principle of moral acceptability which would be sufficient to prevent two or more conflicting potential liberties from counting as morally acceptable. The further conditions specified by the new substantive principle would have to be distinct

from *L* to avoid the result in (B1), and the implications of its joint operation with *L* would have to be consistent, to avoid the result in (B2).

Yet there are obvious limits to the kind of principle the libertarian could import to supplement *L*, without this being the same, in effect, as giving up libertarianism for one of the rival views. For example, if the libertarian adopted a *substantive* version of UA, which used universal rational acceptability to define moral acceptability itself, as we have seen this would be equivalent to 'supplementing' *L* with the equivalent of Habermas's discourse principle *D*. And it is not evident, as I will argue in the next section, that there is any supplementary substantive principle that does the job while remaining within the spirit of libertarian limits. In sum, a metaethical version of UA is no help, a version of UA as an independent rational constraint will contradict *L* rather than supplement it, and a version of UA as a substantive definition of moral legitimacy will make *L* otiose.

VII. Libertarianism is incompatible with a Maximally Consistent Set of Liberties Ideal

The antinomy of libertarianism demonstrates the formal inconsistency that results from taking *L* as I have interpreted it together with UA as a complete conception of Right. Therefore, to have a coherent moral theory, one must either retreat to Sterba's UR as the only deontic requirement for norms—and thus give up all pretense of standing at a principled distance from advocates of 'apartheidic' conceptions of justice—or advance to a principle of Right stronger than mere equal juridifiability, such as Rawls's Original Position or Habermas's discourse ethics, which will imply *substantively* democratic principles of justice, including substantial limits on the permissible inequalities of wealth and political power.

If this analysis of libertarianism has been correct, then Sterba's L→W argument does not succeed in its appointed task of justifying a right to welfare starting only from *L* and UA. Therefore, in order to

justify a right to the satisfactions of basic needs, which will allow him to proceed with his program, Sterba will have to reject libertarianism entirely in favor of a Rawlsian or Habermasian basis for his program. To date, however, Sterba has resisted this inevitability on the conviction that there are ways to restate the libertarian theory of justice more rigorously so as to avoid the implication that contradictory liberties are equally legitimate. In a recent exchange on this topic, Sterba pointed out that in responding to his argument, libertarian critics such as Tibor Machan, Jan Narveson, and Douglas Rasmussen "all assume that the libertarian ideal is defending a compatible set of liberties." Thus I have allegedly misrepresented the libertarian position on this important point:

> A compatibility condition is generally recognized to be an important desiderata of a libertarian perspective, and I see no good reason to interpret *L*, a basic principle of their view, as not imposing such a condition on the specification of "real liberties."[65]

As we saw in §II, however, several leading libertarians do use *L* in the pure equal juridifiability sense as their principle for justifying liberties. To be fair, Hayek at least does seem to assume a consistency condition in Volume II of *Law, Legislation, and Liberty*: in addition to applying his "negative test of universalizability," he says we must endeavor "to modify and supplement the existing rules so as to eliminate all conflict between them (or with yet unarticulated but generally acceptable principles of justice)."[66] Yet Hayek clearly conceives of this coherence condition as realized by a *jurisprudential process*, in which judges will always have to start in a particular situation with some principles as accepted in order to evaluate potentially conflicting new ones. It is hard to see, however, how judges could resolve the contradiction between liberties such as LL and NWL in a principled manner. Hayek says they are "not to impose their unfettered will," but gives us no sense of what principles the justices may appeal to in order to overcome inconsistencies. Unfortunately, in fact, Hayek really assumes that the basic maxim to *maximize liberty*

will sufficiently guide this process, for he says "It will occasionally be necessary to reject some accepted rules in light of *more general principles*:"[67] "more general" here alludes to his idea that progress consists in further abstraction of the rules from all material content. He notes that his negative equal juridifiability condition at least allows us to rule out many rules of conduct as unjust or coercive, and therefore adds, "Such a test of injustice may be sufficient to tell us in what direction we must develop an established system of law . . . "[68] Thus we approach a just system negatively by eliminating the unjust.[69] The great problem with this suggestion, however, is that it cannot even assure consistency, let alone maximal liberty in any clear sense: for two or more conflicting rules of conduct may *fail* to be eliminated by the negative test.

Libertarians in the past have thus tended to take equal juridifiability as a sufficient negative test for normativity. And Professor Sterba agrees that if libertarians can do no better than *L* in this sense, then libertarianism is defeated. But he suggests that it may be possible to improve on these past formulations of libertarianism by adding a new consistency principle, so that *L* applies not to liberties one at a time, but to possible groups of liberties taken together:

> . . . The problem with *L*, so interpreted [as a bare equal juridifiability condition], is that it justifies all these competing liberties and provides no way of assigning priorities among them, and so provides no coherent way to institutionalize a libertarian society. But why should we think that *L* applies to liberties individually rather than collectively? After all, *L* does tell us to bring about the greatest amount of liberty which does seem to require some type of collective evaluation. There are at least two ways that this collective evaluation might take place: either by requiring the greatest number of compatible liberties commensurate with the same number of compatible liberties for all, or by requiring the greatest measure of liberty, and so preferring more significant compatible liberties to less significant compatible liberties, again commensurate with the same measure of liberty to all. So understood, to say that X amount of liberty is greater than Y means either that X has more compatible liberties than Y or that X has more significant compatible liberties than Y.[70]

In other words, Sterba proposes to reinterpret libertarianism in terms of a principle of maximal liberty (*ML*): morally acceptable liberties are those that figure in the *maximally coherent set of liberties* equally juridifiable for all. He also proposes two ways of interpreting the notion of maximality involved in this modified principle *ML*. Unfortunately for libertarians, however, I believe neither of the options Sterba offers on their behalf will work: in fact, the problems with them bring out in clear relief just how dire a situation libertarianism is really in.

Notice that the first numeric interpretation of maximality would make Sterba's revised libertarian principle sound very much like Rawls's first principle of justice, as it was originally formulated in *A Theory of Justice*, rather than as it was modified in *The Basic Liberties and Their Priority*: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar liberty for all."[71] Since the consistency of the system of liberties is implicit in this formulation, it means that each citizen is to have the maximally consistent set of equally juridifiable liberties. If the aim is to preserve libertarianism, however, we would have to reconceive *L* this way without appealing to premises for which a Rawlsian or Habermasian principle of Right is requisite. But even if the libertarian could adopt Rawls's first principle of justice in its original formulation without having to derive it from the Original Position as a conception of Right, then she would be open to all the criticisms H. L. A. Hart and others made of this formulation, which forced Rawls himself to realize that extensions in the scopes of liberties cannot be balanced in a kind of marginal exchange aimed at 'liberty-maximization.' This led Rawls to rethink his approach to liberties almost completely in *The Basic Liberties and their Priority* by drawing on the deeper resources of his position.

These deeper resources, however, are unavailable to the

libertarian. This creates a problem for Sterba's second suggestion, which draws on Rawls's new account of a maximally *significant* set of liberties. The problem is that the libertarian cannot conceive the relative "significance" of competing extensions of liberties as Rawls does, since as we saw earlier, Rawls's approach to evaluating significance depends squarely on the very assumptions of his theory—such as the two highest-order moral powers of the person—which themselves ground the Original Position as a now-political conception of moral acceptability in terms of an information-restricted, risk-averse strategic choice. But accepting this conception, like Habermas's principle *D*, means giving up libertarianism. In general, defining maximality in terms of the *significance* of liberties requires a way of weighing the importance of liberties that is *prior* to any specification (either in *L* or *ML*) of the basic libertarian principle. The kinds of considerations on which Rawls grounds deliberation about the significance of a particular liberty (or extensions thereof) also entail a stronger conception of universalizability than libertarianism can accommodate. So let us turn back to the problems with the first option in more detail.

The Lost Advantage of *L*. Sterba's proposal requires a notion of the maximal extent of liberty which is *independent* of the equal juridifiability test. Yet it is not apparent that any such measure of maximality is available. Despite its woeful inadequacy, the case-by-case testing *L* required had this advantage: one could define the maximal set of liberties in terms of the 'real liberties' by equating it with the *sum* of all those liberties that pass the test of equal juridifiability in *L*. In a maximal consistency version of libertarianism such as Sterba's *ML*, however, this advantage is lost: maximality cannot be defined as the mereological sum of the justified liberties, since maximality is now *mentioned* in the criterion of normativity itself.

Maximality. Without a prior deontological standard for the significance of liberties, the libertarian is stuck with some numerical quantification of liberty to define maximality. But this is inconsistent with the very hermeneutics required for interpreting the meaning of

liberties. Note that even if we could in some naive fashion 'add up' liberties in one practically consistent scheme versus another—e.g. our Bill of Rights has ten and yours only has nine!—then there would be widely divergent practically consistent sets of equally juridifiable liberties, with *equal numbers* of liberties (in these naive terms). For example, the set with NWL rather than LL might be 'equal in number' to the set with LL rather than NWL. And the 'maximal-liberty' libertarian would have no way whatsoever to decide between them. Moreover, the metaethical principles of UA, MOC and CR will be of no help in breaking such ties, because until they are broken, we don't know which liberties are morally 'acceptable' or legitimate and which aren't—and we need to know *that* to apply UA, MOC, and CR, as I've shown.

So the libertarian should be glad to accept that the scope or 'extent' of liberty granted by a system cannot be quantified in such a naive sense. In hermeneutic terms, liberties are nexuses whose full meaning always exceeds any algorithm for deciding the particular cases they cover, or any rule for determining how the sub-liberties they 'include' are to be articulated. For example, are we to say that "freedom of speech" is one liberty, or many? It includes the freedom of the press, the freedom to articulate one's political views free from charges of sedition, etc. We cannot say *how* many sub-liberties "freedom of speech" includes, because its scope is always subject to further interpretation. Moreover, each of its parts themselves have parts: freedom of political expression may include the right to speak during an allotted time at a local meaning, or to have access to one's elected representatives, etc. The 'number' of subparts, of course, depends on where we find it relevant to draw distinctions and name different sub-liberties, which, while not wholly subjective, also cannot be decided by an algorithmic rule. As a result, we cannot even say that the general liberty of speech, in its canonical form, 'includes' the sub-parts of its parts in any additive sense. The inclusion is rather *hermeneutic or intensional*: the purpose of a liberty guides casuistical or jurisprudential interpretation of its boundaries, the relevant subparts

that are identifiable in their own right, and the radiating 'directions' in which these might be extended. Therefore the relation between the scope of a liberty and the scope of their subparts is thus not a mereological one. This brief analysis should show that any hope of quantifying the scope of liberties granted by different systems, so that one could be said to include *more* liberties than another, is forlorn. The notion of an objective measure for a maximal quantity of liberty is therefore also illusory.

The *ML*-libertarian could try to retreat to purely ordinal comparability, according to which we would say that one system 'dominates' another in an objective sense if the first has all the liberties of the second, plus some others that are clearly distinct. But this will be no help in the most relevant problem-cases, where each opposed party proposes their favorite system of liberties as the maximally coherent one, and neither of these systems dominates the other in this ordinal sense, since they contain alternative combinations (e.g. one with LL and one with NWL).

Thus, in sum, the justification of potential liberties cannot depend on their inclusion in a system that is consistent, equally juridifiable, and maximal in liberty in any quantifiable sense. But as we have seen, consistency and equal juridifiability by themselves are not enough either. Yet the only *meaningful* notion of maximality compatible with libertarianism is just the one that defines maximality in terms of legitimacy: maximal liberty is the set of *all* the legitimate or morally permissible liberties. On this approach, legitimacy itself must have a consistent set of outcomes. For the libertarian who embraces *L*, this becomes: 'the maximal set of liberties is the set of all the *equally juridifiable* liberties.' But then, since inconsistent liberties are equally juridifiable, we might try: 'the maximal set of liberties = the consistent equally juridifiable liberties.' Yet this also fails, for since there are several *consistent* such sets (as we've seen), this redefinition would imply that many different incompatible arrangements each counts as maximal, and the problem of adjudicating the conflict would remain unsolved.

There is thus no way out of the conundrum for the libertarian. She is stuck if she defines maximality in terms of either the equal juridifiability or the consistency of sets of proposed liberties, or even in terms of both together. But she has no *other* way of defining maximality that makes any sense when applied to liberties. *ML* as a modified version of *L* thus fails: the libertarian cannot, in fact, come up with a principle any better than mere equal juridifiability (*L*). As an interpretation of normativity, then, libertarianism fares as well as *L* does, and that, as we saw, was not very well.

* * * * *

In conclusion, current libertarian approaches to justice (including Sterba's 'welfare libertarianism') attempt to occupy an impossible middle position between substantive deontological conceptions of the Right and the rational egoist's rejection of any standard of universalizability stronger than Sterba's UR. Since the classical libertarian position is therefore conceptually unstable, adherents of deontology who want to remain at a moral distance from apartheidic conceptions of Right—i.e. who want to distinguish their conception of justice from the UR standard—will have to adopt a stronger standard of universalizability than a monological judgment of equal juridifiability. In this situation, libertarians must make a choice between (1) rejecting the notion of a Right prior to the Good altogether and (2) a substantive conception of normativity like those offered by Rawls's Original Position or Habermas's discourse principle of moral legitimacy. This result helps show why, as Habermas has argued, coherent deontological conceptions of justice must reveal the underlying connections between the moral validity of basic 'negative; individual liberties, 'positive' rights of democratic participation and popular sovereignty, and substantive measures of background justice assuring the *worth* of liberties.

ENDNOTES

1. An earlier version of this paper was presented at the 12th International Social Philosophy Conference, held at Colby College, Waterville, Maine (August 10-13, 1995). My thanks is due to Jim Sterba, both for encouraging the development of this paper, and for his own detailed response at the conference.

2. There are many powerful *external* critiques of libertarianism, such Alasdair MacIntyre's critique based on neo-Aristotelian virtue theory, David Haslett's arguments from indirect utilitarianism, and John Rawls's objections that libertarian pure procedural justice fails to address background injustice arising (in part) from the natural lottery. For reasons of space, I do not review these arguments here, but each of them for important reasons starts from fundamentally non-libertarian conceptions of justice in basic political institutions.

3. James P. Sterba, "From Liberty to Welfare," *Ethics*, 105.1 (October, 1994): 64-98. All further references to this article will be given parenthetically by page number in the main text.

4. The complete version of his overarching project is soon to appear in Sterba's forthcoming book, *Justice for Here and Now*, which begins with the argument "From Rationality to Morality," then gives the argument presented in *Ethics* from libertarianism to welfare rights, and then extends the basic-needs minimum to distant peoples and future generations. This constrains the acceptable implications of all the further theories considered, allowing them to be practically reconciled with 'welfarist libertarianism' (although the step from anthropocentric theories to a non-anthropocentric 'earth ethic' involves further fundamental considerations).

5. Sterba does not use this distinction between *potential* liberties whose normative status must be decided and *real* or justified liberties, but simply says that libertarians must "recognize the existence of such a liberty" of the poor to welfare, which will form part of a "conflict of liberties." I think it is clearer to say that the negative liberty Sterba has in mind is a *potential* liberty, and that the libertarian faces a conflict of potential liberties.

6. This is not precisely how Sterba explains the Lockean libertarian approach, but I think my formulation explains more clearly how both the Spencerian and Lockean appeal to the same fundamental principle *L*. However, Sterba's L→W argument brings out the fact that *L* cannot by itself give us a principled way of deciding between conflicting possible *extensions* of basic liberties, where each of these extensions of liberties is universally prescribable in and of themselves. As I will argue in the last section, the libertarian has no principled way of answering the question of how to fill out the preferred *system* of liberties.

7. See Habermas's discussion of the five categories of basic rights that emerge from the Discourse Principle taken in conjunction with the idea of law in *Between Fact and Norm*, tr. William Rehg (MIT Press, 1996), ch.3, §III. Habermas uses "equal juridification" for the meta-right to legal permissions that are *formally* equal and extended to all citizens. For example, the right to "equal juridification of the communicative liberty of all legal consociates" is included in political liberty (see the discussion of the rights-category 4 in chapter III). Thus universal prescribability and equal juridifiability express the same condition in different fashions.

8. On this point, see Ian Shapiro's response to Robert Nozick in Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge University Press, 1986), p. 161.

9. Sterba does not say this explicitly in his *Ethics* article or other published versions of his *L→W* argument, but he made it clear in his response to my paper (see the last section of this essay).

10. However, this implicit appeal to a utilitarian comparison seems unlikely to persuade libertarians, and what things could count as "needs" rather than desires is hard to decide on objective grounds neutral between conceptions of the good.

11. Sterba then goes on in the article to combine this conclusion with considerations about distant peoples and future generations to generate a right to equal opportunity (p. 82-88). Since this is part of the next basic stage in Sterba's general program following the L→W argument, I do not consider it here.

12. Thomas Hobbes, *Leviathan*, ed. & int. C.B. MacPherson (London, UK: Penguin Books, 1981), Part I ch. 14, p. 190.

13. Rand, "Man's Rights," *The Virtue of Selfishness* (Penguin Books/Objectivist Newsletter, 1964) p. 94.

14. Ibid.

15. Ibid., p. 94.

16. Ibid., p. 96.

17. Ibid., p. 99.

18. Ibid., pp. 96-97.

19. Similarly, in the next essay titled "Collectivized 'Right'," Rand argues: "The notion of 'collective right' (the notion that rights belong to groups, not to individuals) means that 'rights' belong to some men, but not to others" (*The Virtue of Selfishness*, p. 102). In other words, collective rights (which will include all substantive rights to conditions of implementation) are illegitimate because they are supposedly not equally juridifiable.

20. Nozick, p. 33.

21. Ibid., p. 34.

22. Ibid., p. 35.

23. Shapiro, *Evolution*, pp. 161-2. The case Shapiro has in mind is "sexual leering,"

which Nozick treats as a moral question outside the subject matter for political *recht*. In his more recent book, Shapiro uses this point to make the more general criticism that Nozick enlarges the private sphere by taking a naively narrow view of the political. See Shapiro, *Political Criticism* (Berkeley, CA: University of California Press, 1990), p. 215.

24. For several arguments defending the view the Kantian morality permits hardly any exceptions to the rule that innocents are never to be killed for any purpose, see Alan Donagan, *The Theory of Morality*, ch.6.

25. F. A. Hayek, *Law, Legislation, and Liberty, Vol. II: The Mirage of Social Justice* (Chicago, IL: University of Chicago Press, 1976), ch.8: "The Quest for Justice," p. 38 (the line appears in italics as a section title in the original).

26. Ibid., p. 39.

27. As phrased, Hayek even seems to extend this test to all kinds of law—but the context makes clear that he is referring to "rules of just conduct." Yet he assumes (unsoundly) that legislation which aims to bring about patterned social ends would always make impermissible "reference to particular facts or effects" (p. 39).

28. Ibid., p. 40, my italics.

29. To his credit, Hayek does specifically note that what counts for us as a norm in his sense because "we are prepared to commit ourselves to apply it universally" is always revisable, because new cases can show us that our judgment that it was universally applicable was wrong (Ibid, pp. 41-2). Still, the terms he uses reveal that Hayek still has in mind what I will call a *monological* or merely prescriptivist form of universalizability, based on *one* person's willingness, from his or her perspective, to prescribe a principle for equal application to all.

30. F. A. Hayek, *Law, Legislation, and Liberty, Volume I: Rules and Order* (Chicago, IL: The University of Chicago Press, 1973), ch.5, p. 101

31. Ibid., p. 112. This is Hayek's rationalization for giving priority to what I called the 'first-phase' consideration of liberties against others and the state, before 'second-phase' laws pursuing collective goals.

32. Ibid., p. 101.

33. Ibid., p. 108.

34. In other words, where Spencerians treat this as a premise, Hayek goes one step deeper and attempts to derive it from his theory of the anthropology of law and its sense in which it should facilitate order.

35. Ibid., p. 102.

36. Ibid., p. 104.

37. Ibid., p. 107.

38. Ibid., p. 107, my italics.

39. In fact, Hayek refers directly to Locke at this point, and then criticizes the Rousseauian "constructivist approach of socialism" (p. 107-8), which has questioned the necessity of the widest possible property rights for this maximization of coordinated expectations. He then makes the *very dubious* assertion that anthropology has proven beyond doubt that "the recognition of property preceded the rise of even the most primitive cultures" (p. 108). However, even if state-of-nature theories are fictions, no plausible interpretation of the evidence or intelligible philosophy of history can make sense of the claim that 'In the beginning, there was property.'

40. Sterba, *The Demands of Justice*, p. 23.

41. As Professor Sterba follows others in arguing in "From Rationality to Morality," ch. 2 of his forthcoming book *Justice Here and Now*. For several different arguments for a similar conclusion, see Jody Kraus, *The Limits of Hobbesian Contractarianism* (New York: Cambridge University Press, 1994).

42. See *The Demands of Justice*, p. 25: "the requirement does not exclude, for example, commitment to normative theories which are based on race or slavery, for those who belong to the 'superior' race, or are slaveholders, may well have good reason to favor universal adherence to the particular normative theory."

43. Sterba, *The Demands of Justice*, p. 25.

44. Immanuel Kant, *Groundwork of the Metaphysic of Morals*, tr. H. J. Paton (Harper Torchbooks, 1964), p. 91, Ak.423.

45. See, however, Onora O'Neill, "Universal Laws And Ends-in-Themselves," *The Monist*, 72.3 (July 1989), 341-361, p. 346: "This is often misconstrued as a claim that morally worthy maxims must be ones that we are willing, i.e. want to see universally adopted." O'Neill reads the principle to mean that a practical contradiction occurs whenever we will anything that destroys or undercuts the agent-capacities of persons (p. 347-8), as if it arises because in willing *any* maxim, we implicitly approve the flourishing of free rational agency. So read, it turns out to be equivalent to the Formula of Ends-in-Themselves, which is clearly closer in meaning to *UA*.

46. Jürgen Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification," in *Moral Consciousness and Communicative Action*, tr. Christian Lenhardt and Shierry Weber Nicholsen, int. Thomas McCarthy (MIT Press, 1990), p. 66. The original German version was: *Moralbewußtein und kommunikatives Handeln* (Suhrkamp Verlag, 1983). Note that Habermas's original publication of the argument for (U) and (D) in "Discourse Ethics" came three years *after* Sterba's *The Demands of Justice*.

47. Habermas, "Discourse Ethics," p. 66.

48. Habermas, "Discourse Ethics," p. 67. He also suggests that this sort of acceptability is the true meaning of Rousseau's concept of the "general will" (p. 63).

49. As Habermas says, monological universalization is never enough: "The intuition expressed in the idea of the generalizability of maxims intends something more than this, namely that valid norms must *deserve* recognition by *all* concerned. It is not sufficient, therefore, for one person to test whether he can will the adoption of a contested norm after considering the consequences and side effects that would occur if all persons followed that norm or whether every other person *in an identical position* [italics added] could will the adoption of such a norm. In both cases the process of judging is relative to the vantage point and perspective of *some* and not *all* concerned" ("Discourse Ethics," p. 65). Rather, what (U) requires is that norms be valid for the interests of every person in their situation, and therefore "perceptibly embody an interest common to all affected." Habermas credits Kurt Baier, Bernard Gert, Marcus Singer, and George Herbert Mead with this insight. Since Sterba was a student of Baier's, the relevance of comparing his UA with Habermas's *U* is clear.

50. Otherwise, UA would fail to rule out, for example, a group of *masochistic* egoists (or spiteful non-egoists) who contract together to abide by norms that will encourage the greatest amount of cruelty by each towards the others, compatible with their continued co-existence. In such a case, everyone affected by the norms might be able to accept them, but not *morally* to accept them in any intuitively appealing sense.

51. Habermas, "Discourse Ethics," p. 66.

52. See Jürgen Habermas, "Remarks on Discourse Ethics," in *Justification and Application: Remarks on Discourse Ethics*, tr. Ciaran Cronin (MIT Press, 1993), p. 54. This remark does much to dispel the illusion that Habermas's notion of normative validity is defined in terms of *actual* consensus, like that of Rawlsian "overlapping consensus" or existing "wide and general reflective equilibrium." To be 'discursively acceptable' in Habermas's practical sense has the ideal meaning of being justifiable over the *modal* range of all possible interpreters. Unlike the Original Position, however, this hypothetical standard is not a 'decision principle:' it cannot be used by the philosopher to *decide* the justice of institutions in abstract. It can only be applied in actual deliberative process that will never more than approximate the ideal.

53. Read this as saying: 'If α is not morally possible, then α is not morally necessary.' I believe this formula should be a tautology in any standard deontic logic.

54. Alan Donagan, *The Theory of Morality* (University of Chicago Press, 1977), p. 149.

55. Donagan, p. 153.

56. Donagan, p. 154-5. See my discussion of this principle in "Deontology and Alan Donagan's problem of exception-rules," *Analysis* 55.4 (October, 1995), pp. 261-270.

57. This principle CCR, which is the converse of CR, would establish a *positive* substantive account of moral legitimacy like that intended in Habermas's Discourse Principle *D*. Similarly, the contrapositive of CCR—that if α is not morally required then is it not reasonable for all affected parties to accept α—is the converse of Sterba's MOC, which only says that if α is morally required, then α is reasonable for all affected to accept.

58. Formalized, this is: where A is an individual who would be affected by α, $\neg(\forall AA(\Diamond_m)\alpha) \rightarrow \neg(\Box_m)\alpha$.

59. Which is formalized by $(\Box_m)\alpha \rightarrow (\forall AA(\Diamond_m)\alpha)$, where A is anyone who would be affected by α.

60. Sterba admits that "while major figures in the history of philosophy, and most philosophers today, including virtually all libertarian philosophers, accept this linkage between reason and morality, this linkage is not usually conceived to be part of the 'ought' implies 'can' principle" (p. 71-2).

61. Note that this is the same mistaken objection Rand thought would apply to any 'collective' right or entitlement enhancing equity in the worth of formal liberties. See note 19.

62. See John Rawls, "The Basic Liberties and Their Priority," *Tanner Lectures on Human Values* (April, 1981); a new version of this lecture now forms the final chapter of *Political Liberalism* (Columbia University Press, 1994). I defend this point in detail in the last section of the paper.

63. There is no need to spell out *S* here, but it involves measuring the relevance of each extension of the various potential liberties to what Rawls calls two "fundamental cases" which are in turn derived from a person's two highest order "interests" as described in Rawls's political conception of the person. By favorably comparing Rawls's solution to the libertarian's, however, I do not mean to suggest that I accept the approach Rawls outlines in "The Basic Liberties and Their Priority"—in fact, I think that are *serious* problems with it, which ultimately show that the Habermasian approach is superior. However, for all its problems, Rawls's account is far superior to the position of a libertarian who subscribes to *L*.

64. For reasons of space, I omit the demonstration that the Lockean libertarian is no better off in this regard.

65. Jim Sterba, "Reply to Davenport," presented in response to my paper at the *12th International Social Philosophy Conference*. I am thankful to Professor Sterba for permission to reproduce his remarks, which were very helpful in the improvement of this paper. Both this section VII and section III on Rand, Nozick, and Hayek were added after the version from which Professor Sterba derived his response to me.

66. Hayek, *Law, Legislation, and Liberty: The Mirage of Social Justice*, p. 40.

67. Ibid., p. 41, my italics.

68. Ibid., p. 42.

69. Ibid., p. 43.

70. Sterba, "Reply to Davenport," *12th International Social Philosophy Conference*, Maine (August, 1995).

71. See Rawls, *Theory*, p. 302.