LAND, LIBERTY AND THE EARLY HERBERT SPENCER†

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> Meanwhile we must not overlook the fact that, erroneous as are these poor-law and communist theories—these assertions of a man's right to a maintenance, and of his right to have work provided for him—they are, nevertheless, nearly related to a truth. They are unsuccessful efforts to express the fact, that whoso is born on this planet of ours thereby obtains some interest in it—may not be summarily dismissed again—may not have his existence ignored by those in possession. In other words, they are attempts to embody that thought which finds its legitimate utterance in the law—all men have equal rights to the use of the Earth.

Thus the early Herbert Spencer, in his first major published work.[1] In the present essay, I propose to do three things: (1) to examine Spencer's derivation of the principle from which he, in turn, derives the aforesaid right—the principle of equal liberty (ELP); (2) to review his derivation of the equal right to the earth (ERE) from ELP; and (3) to assess his prescriptions for the realization of this right.

I do not propose to consider, except incidentally and for purposes of clarification, the reasons for the later Spencer's abandonment of these prescriptions and the controversies in which he thereby embroiled himself. It appears to be the common fate of numerous eminent political philosophers—Locke, Hegel, Mill and Marx among them—to undergo a bisection into earlier and later selves, either at their own hands or those of their expositors. Explanations of these fissions are at best difficult and can, in any case, reasonably be regarded as projects in themselves. So I intend to confine my attention to the views of Spencer's earlier self and, more narrowly still, to the argument he advances in the first half of SS1.

The Derivation of ELP

It should, perhaps, be stated clearly at the outset that Spencer's derivation of the principle of equal liberty in SS1 is only partially successful. Writing

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[1] Herbert Spencer, *Social Statics* (London, 1st edn., 1851), p. 315; hereinafter designated as SS1.

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nearly forty years later, he was to acknowledge what he had been unaware of at the time of writing SS1: that Kant had already, in 1796, published a similar formulation of the principle, though he had arrived at it by a different route.[2] Kant's route proves, in the event, to be the more sagacious.[3] For Spencer's enquiry into the underlying foundations of justice develops from his search for the primary condition which must be fulfilled before the *greatest happiness* can be achieved by similar beings living in proximity to one another. How this Benthamite kind of quest is made to issue in a doctrine of natural rights—a doctrine which Bentham himself notoriously dismissed as 'nonsense upon stilts'—therefore warrants some consideration.

Certainly Spencer gets off on the right foot. The very first part of the introduction to SS1 consists in a vigorous attack on the 'expediency-philosophy'. In the search for a guide to conduct and policy, the rule of the greatest happiness to the greatest number is declared to be 'no rule at all, but rather an enunciation of the problem to be solved'.[4] His claim that 'no fact is more palpable than that the standard of happiness is infinitely variable'[5] is then and elsewhere supported with a wealth of historical, sociological and anthropological examples. 'So we may say, not only that every epoch and every people has its peculiar conceptions of happiness, but that no two men have like conceptions; and further, that in each man the conception is not the same at any two periods of life.'[6] One might thus reasonably be led to think that Spencer intends to look elsewhere for the foundations of moral and political judgment.

But this is not, or at least not yet, the case. For in the paragraph immediately following the previous quotation, he proceeds to offer what he takes to be a more perspicuous formulation of these foundations—one which significantly foreshadows the later fully developed doctrine of social evolution that was to play an increasingly central role in his thinking, and to do so at the expense (or so I would argue) of his theory of natural rights. 'Happiness', he observes,

[2] Herbert Spencer, *Justice: Part IV of the Principles of Ethics* (London, 1891), Appendix A.

[3] Though Kant subsequently falters, where Spencer does not, in perceiving the implications of ELP for property rights in land. See, Immanual Kant, *The Philosophy of Law*, ed. W. Hastie (Edinburgh, 1887), pp. 81–99.

[4] SS1, pp. 1–2.

[5] SS1, p. 3.

[6] SS1, p. 5.

> signifies a gratified state of all the faculties. The gratification of a faculty is produced by its exercise. To be agreeable that exercise must be proportionate to the power of the faculty; if it is insufficient discontent arises, and its excess produces weariness. Hence, to have complete felicity is to have all the faculties exerted in the ratio of their several developments; and an ideal arrangement of circumstances calculated to secure this constitutes the standard of 'greatest happiness'.[7]

It is not entirely clear as to which of these statements Spencer intends as definitional axioms, which as theorems derived from those axioms, and which as simple empirical generalizations. Evidently Bentham would not have agreed to the proposition which here presents itself as the most likely candidate for axiomatic status: that happiness consists in *faculty*-gratification. He would have insisted, rather, that it refers to *desire*-gratification. But leaving aside the question of how much Spencer's counter-argument to utilitarianism may thus depend upon counter-stipulative definitions, we can reasonably allow that his formulation of the standard of greatest happiness exhibits an admirable degree of precision and internal coherence.

Nor, however, does he consider it to have the effect of simply re-establishing utilitarianism on a firmer groundwork. For he quickly adds that 'the minds of no two individuals contain the same combination of elements. Duplicate men are not to be found'.[8] And there follows, again, a series of passages detailing the vastness and complexity of the variety of human aspirations. Particularly persuasive in this respect are Spencer's scornful dismissals of legislators' futile attempts to be guided by considerations of the greatest happiness. 'What is the statute-book but a record of such unhappy guesses?'[9] Each new measure along these lines almost invariably proves self-defeating and occasions the introduction of a bill 'entitled "An Act to amend an Act" '.[10]

And yet, what do these arguments finally amount to? Are they anything more than reasonably obvious inferences from the undisputed fact of man's imperfect knowledge? Do they furnish any grounds for believing that individual persons will succeed where governments have failed, in securing the conditions for maximizing their happiness, not only in the short term but over

[7] *Ibid.*

[8] *Ibid.*

[9] SS1, p. 10.

[10] SS1, p. 11.

'any two periods of life'? Spencer's epistemic nihilism here seems to carry him to a Pyrrhic victory over utilitarian defences of the interventionist state. For its defenders, or at least the more astute amongst them, have been ever-ready to concede the limitations of available data. And their, surely compelling, reply to such scepticism can readily take the form of pointing to an apparently unwarranted discrepancy between Spencer's counsels of futility to legislators and his unwillingness to admit the same effects, of insurmountable ignorance, on the projects of private persons. If, so to speak, '*caveat suffragator*' is good advice, why is it better advice than '*caveat emptor*'? More pointedly still, they would not go amiss to query Spencer's consistency in claiming that 'an agreement as to the meaning of "greatest happiness" [is] theoretically impossible',[11] given his previously quoted attempt to formulate just such a definition.

Spencer is on less weak, if still non-decisive, ground in suggesting that 'the expediency-philosophy . . . implies the eternity of government'.[12]

> See here then the predicament. A system of moral philosophy professes to be a code of correct rules for the control of human beings—fitted for the regulation of the best, as well as the worst members of the race—applicable, if true, to the guidance of humanity in its highest conceivable perfection. Government, however, is an institution originating in man's imperfection . . . one which might be dispensed with were the world peopled with the unselfish, the conscientious, the philanthropic. . . . How, then, can that be a true system of morality which adopts government as one of its premises?[13]

This is an ancient question and one which finds its not unrelated analogue in the query rightly put to those who regard its enforcement as the necessary and sufficient condition of a rule's legality: who enforces law on its enforcers? Yet answers to these questions have been forthcoming and, even if they betray an ultimately unacceptable degree of *ad hoc*-ery, Spencer fails to show conclusively that there is something essentially deficient in a moral theory which assigns an indispensable place to the state.

In moving on from these preliminary steps toward the derivation of ELP, we can safely omit discussion of the manner in which Spencer quite effectively disposes of the 'moral sense' theory of ethical judgment. What does warrant

[11] SS1, p. 7.

[12] SS1, p. 13.

[13] SS1, pp. 15–16.

brief attention, however—particularly in the light of his later change of view on the land question—is the forceful explication presented in Lemma II of the Introduction. For he there is at some pains to refute the popular maxim that 'there is no rule without an exception'. Remarking that physical laws are conceived to admit of no exceptions, and that apparent exceptions imply the inadequacy of our knowledge rather than the irregularity of the real world, Spencer asserts the same to be true of moral laws.[14] He will have none of

> this laboured examination into the propriety, or impropriety, of making exceptions to an ascertained ethical law. . . . For what does a man really mean by saying of a thing that it is 'theoretically just', or 'true in principle', or 'abstractedly right'? . . . When he admits that act is 'theoretically just', he admits it to be that which, in strict duty, should be done. By 'true in principle', he means in harmony with the conduct decreed for us. The course which he calls 'abstractedly right', he believes to be the appointed way to human happiness. There is no escape. The expressions mean this, or they mean nothing . . . no matter how seemingly inexpedient, dangerous, injurious even, may be the course which morality points out as 'abstractedly right', the highest wisdom is in perfect and fearless submission.[15]

The unbending strictness of the early Spencer's conception of moral judgment —frequently reiterated through SS1—would be hardly worth remarking, were it not for the fact that the later Spencer's modifications of ERE are made to turn, in large part, on his latterly conceived distinction between 'absolute and relative ethics'. For the author of SS1, however, 'There are but two propositions for us to choose between. It may either be asserted that morality is a code of rules for the behaviour of man as he *is* . . . or otherwise that it is a code of rules for the regulation of conduct amongst men as they *should* be.'[16] And he has no hesitation in reaching the verdict that the first alternative 'stands self-condemned'.[17]

How then do we get from these general contentions about what morality is and is not, to ELP, the principle of justice? Spencer advances by a series of fairly clearly defined moves. First we are told, in a formulation characteristic of both his early and later writings, that 'All evil results from the non-adaptation of constitution to conditions', that 'This is true of everything that

[14] SS1, pp. 39–40.

[15] SS1, pp. 49–51.

[16] SS1, p. 55.

[17] *Ibid.*

lives', and that 'No matter what the special nature of the evil, it is invariably referable to the one generic cause—want of congruity between the faculties and their spheres of action'.[18] And he carries this impressive anticipation of Darwin still further, observing that it is 'Equally true . . . that evil perpetually tends to disappear' and that 'this non-adaptation of an organism to its conditions is ever being rectified'.[19] Moreover, 'This universal law of physical modification, is the law of mental modification also'.[20]

But an obstacle to this progression is encountered when human organisms find themselves, of necessity, in a social state. For in this situation, the tendency of evil to disappear and of happiness to flourish, is said to require

> that each individual shall have such desires only, as may be fully satisfied without trenching upon the ability of other individuals to obtain like satisfaction. If the desires of each are not thus limited, then either all must have certain of their desires ungratified; or some must get gratification for them at the corresponding expense of others.[21]

Spencer's momentary lapse here, from faculty-gratification to Benthamite desire-gratification as the condition of happiness, need not detain us. His point is clear enough: that full adaptation to the social state is conditional upon a set of human desires which are mutually compatible, compossibly satisfiable. Resuming the language of faculty-gratification, Spencer reasonably suggests that an individual's happiness thus requires that he be possessed of a *sphere of activity*.[22] And, in a passage closely parallel to the one just quoted, he sets out what he takes to be the condition of justice:

> In this social state, the sphere of activity of each individual being limited by the spheres of activity of other individuals, it follows that the men who are to realize this greatest sum of happiness, must be men of whom each can obtain complete happiness without lessening the spheres of activity required for the acquisition of happiness by others.[23]

[18] SS1, p. 59.

[19] SS1, pp. 59–60.

[20] SS1, p. 61.

[21] SS1, pp. 62–3.

[22] SS1, pp. 64–5.

[23] SS1, p. 68.

Here we must pause to reflect on the course of Spencer's argument. For, as one cannot fail to notice, it displays a mounting tension between aggregative and distributive considerations with respect to the elimination of evil and the production of happiness. The condition of justice is said, at the same time, to be the condition of the greatest sum of happiness. An individual's greatest happiness, Spencer has claimed, consists in the complete gratification of his faculties (and, possibly, his desires). Their complete gratification, in turn, consists in their full exercise. And their full exercise requires a field of exertion, an appropriate sphere of activity. But in a social state, in a situation where individuals are necessarily in close proximity to one another, the spheres of activity they severally require for the full exercise of their respective sets of faculties may overlap.

The extent of a person's faculties, and the size of the sphere of activity required for their full exercise, are presumably matters of *natural fact* and not objects of *moral prescription*. If one individual's faculties are such that their full exercise requires a sphere larger than would leave any space for activity by another, it would seem that his greatest happiness could only be purchased at the latter's expense. Hence it is entirely possible that, over some societies, the only way to achieve the desiderated greatest sum of happiness is to allow some persons to enjoy spheres of activity of such scope as would exclude all others from any faculty-exercises whatever. We are thus left with no reason to believe that there exists an achievable set of spheres of activity that is both happiness-maximizing and of universal incidence.

It is only fair to remark that these, by now familiar, arguments do not go unperceived by Spencer. But he perceives them imperfectly. Accordingly, he suggests a number of supplementary conditions bearing on what we currently refer to as *externalities*. For he agrees that, even if individuals confine their faculty-exercises to their own (somehow exogenously delimited) spheres of activity, these activities are nevertheless capable of affecting the feelings of others, either painfully or pleasurably, and thereby affecting the extent of their happiness. Reverting thus again to Benthamite conceptions of happiness, he acknowledges that happiness-maximization also demands negative and positive beneficence. This requires that human desires be such that no one secures happiness in the course of causing unhappiness to others, and that each secures happiness from the happiness of others. However, Spencer wisely abandons any further development of this question-begging line of thought, and concludes this part of his book with an affirmation of his belief in the distinguishability of self- from other-regarding actions and of justice from beneficence, declaring his intention hereinafter to confine himself to the subject of public morality.[24]

[24] SS1, pp. 68–72.

Thus far, then, Spencer's strategy for reaching a principle of justice must be deemed misdirected. Having scored some sound points against utilitarianism, and correctly intuited that justice has to do with demarcating personal spheres of action, he hinders his advance by nevertheless clinging to the standard of happiness-maximization. This, in conjunction with the deterministically adaptational twist he gives to it, leads him to vacillate over whether a set of compossibly gratifiable faculties and/or desires is a condition of justice. But since the satisfaction of such a condition necessarily awaits nature's pleasure, rather than man's, the prescriptive import of Spencer's reasoning here is utterly elusive. Indeed, his failure so far might aptly be ascribed to his having insufficiently refined his own distinction between codes of rules for the behaviour of 'man as he is' and 'man as he should be'. Man as he should be—negatively and positively beneficent man—has no need of a principle of justice. For his exercise of his faculties could pose no threat to that of others, in whose happiness he would (on Spencer's definition) participate and whose happiness-maximizing spheres of activity would thus be spontaneously harmonized with his own, requiring no prescriptive demarcation in terms of rights. Justice, however, is precisely a rule for what man *should do* when he is not as he *should be*. When others act on values which accord with our own, we have no occasion to invoke the language of rights and the rule of justice which underlies them.[25] Accordingly, the formulation of this rule—to say nothing of its application—poses a task of a quite different order than that initially envisaged by Spencer.

Despite the fact that the next chapter, entitled 'Derivation of a First Principle', again rehearses the discussion of happiness and its connection to faculty-exercise, it does in fact constitute a fresh start—and a better one. Happiness, it is true, is still retained as the object of moral action, with faculty-exercise as its condition. But Spencer tacitly shifts his characterization of the latter from the end-state requirement of *full* exercise to the more ambivalent one of *due* exercise.[26] And he thence argues that, such exercise being the common feature of all moral obligations, these presuppose freedom of action and, more strongly, a right to liberty. However, because this 'is not the right of one but of all . . . there necessarily arises a limitation':

> then must the freedom of each be bounded by the similar freedom of all. When, in the pursuit of their respective ends, two individuals clash, the movements of the one remain free only in so far as they do not interfere with the like movements of the other. This sphere of existence into which we are thrown not affording room for the unrestrained activity of

[25] cf. Hillel Steiner, 'The Concept of Justice', *Ratio*, xvi (1974), pp. 206–25.

[26] SS1, pp. 75–6.

> all, and yet all possessing in virtue of their constitutions similar claims to such unrestrained activity, there is no course but to apportion out the unavoidable restraint equally.[27]

Answering belatedly to the objections raised in the previous three paragraphs, Spencer concedes that, confined within these spheres of equal liberty, the full exercise of one's faculties—or conversely, these restrictions on their full exercise—may indeed be *unavoidable* sources of unhappiness to others or to oneself. But, still not quite ready to bite the conceptual bullet, he contends that this production of evil arises from 'abnormalities' in the constitutions of individuals—either insensitivity or over-sensitivity to others—abnormalities of a kind destined to disappear when man becomes what he should be.[28] For the moment, however, negative externalities remain possible. Hence 'The evil must be borne by some one, and the question is by whom.'[29] Two alternative prescriptions can alone answer this question. Either we limit the liberty of each by the like liberty of all, or we limit the liberty of each by the necessity of not giving pain to the rest. The first errs in allowing some improper actions, while the second errs in disallowing some proper ones.[30]

Spencer's criterion of propriety here is ultimately obscure. If it were happiness-maximization, or rather unhappiness-minimization, the second prescription would clearly be favoured. But he rejects this aggregative rule (of negative beneficence) in favour of the distributive one (ELP), though his grounds for doing so are less than convincing. Chief among them is the fact that the limit imposed by the first is 'almost always possible of exact ascertainment', whereas with the second 'we find ourselves involved in complicated estimates of pleasures and pains, to the obvious peril of our conclusions'.[31] It is these latter complexities, and the imperfection of our knowledge, which imply the second prescription's liability to exclude proper, as well as improper, actions.

Further review of Spencer's anxious and painstaking exploration of the 'dilemma' posed by this choice of principles proves, in the event, to be unnecessary. Suffice it to say that, though his deliberations remain inconclusive, the upshot is definite enough: he decides that it is categorically worse

[27] SS1, pp. 77–8.

[28] SS1, pp. 78–80.

[29] SS1, p. 79.

[30] SS1, pp. 80–1.

[31] SS1, p. 82.

to disallow proper actions than to allow improper ones. And hence, the law of equal freedom is to be preferred.[32] In the final analysis, then, ELP is treated as a basic moral axiom which, as in Kant, can be founded neither on social utility nor general happiness nor the common good. Each individual's entitlement to equal liberty is of intrinsic, and not instrumental, moral worth.

The Derivation of ERE

It is the function of ELP to distinguish the realm of the permissible from that of the impermissible.

> Our aim must be to discover how far the territory of *may* extends, and where it borders upon that of *may not*. We shall have to consider of every deed, whether, in committing it, a man does or does not trespass upon the ordained freedom of his neighbour—whether, when placed side by side, the shares of liberty the two parties respectively assume are equal.[33]

This requirement, of compossible kinds of liberty,[34] is then applied to yield a series of rights some of which are traditionally less disputed than others. Amongst the former are rights not to be murdered or enslaved, rights of free speech and political rights. To these and all other rights women are as entitled as men. More controversially, perhaps, so are children. Similarly, all have a right to ignore the state: to relinquish their citizenship and thereby exempt themselves from the burdens and benefits of membership in any political society.[35]

We come now to a group of rights more directly linked to that with which we are here centrally concerned, namely ERE. These are the right to property and various other rights presumed to be corollary to it. All of them constitute kinds of entitlement that have been variously contested and remain the subjects of ideological and philosophical debate. They are said to include the right of property in ideas—rights to patents, copyrights and trademarks, and the right of property in character—rights against libel and slander.[36] Whether

[32] SS1, pp. 82–9.

[33] SS1, p. 110.

[34] cf. Hillel Steiner, 'The Structure of a Set of Compossible Rights', *Journal of Philosophy*, lxxiv (1977), pp. 767–&5, where it is argued that this condition of compossibility is satisfied only by a set of rights which are consistently specifiable as titles to objects, and not solely as entitlements to the performance (or others' forbearance) of certain kinds of action.

[35] SS1, chs. viii, xiv, xvi, xvii, xviii, xix.

[36] SS1, chs. xi, xii.

such rights are indeed fully compossible with the right of property (i.e. to material objects) prescribed by ELP is, it seems to me, an engaging question which regrettably cannot be examined here. The right of exchange, on the other hand, does not appear to violate any compossibility requirements and is clearly 'in complete conformity with the law of equal freedom'.[37]

> Observe, then, in respect of trade relationships, how much falls to the share of each. Evidently each is free to offer; each is free to accept; each is free to refuse; for each may do these to any extent without preventing his neighbour from doing the like to the same extent, and at the same time. But no one may do more; no one may force another to part with his goods; no one may force another to take a specified price; for no one can do so without assuming more liberty of action than the man whom he thus treats.[38]

This is surely unexceptionable. But what is equally certain is that we cannot even begin to identify those transactions which the right of exchange sanctions, until we have an explication of what is to be understood by the phrase 'his goods'. For there can be no right of exchange among thieves, and no title is thereby conveyed.

Spencer's most general statement on the right of property runs as follows:

> Our first principle requires, not that all shall have like shares of the things which minister to the gratification of the faculties, but that all shall have like freedom to pursue those things. . . . If, therefore, out of many starting with like fields of activity, one obtains, by his greater strength, greater ingenuity, or greater application, more gratifications and sources of gratification than the rest, and does this without in any way trenching upon the equal freedom of the rest, the moral law assigns him an exclusive right to all those extra gratifications and sources of gratification; nor can the rest take them from him without claiming for themselves greater liberty of action than he claims.[39]

Plainly, this passage cannot constitute the most fundamental part of a theory of property rights. Nor does Spencer so intend it. For it is evident that what can be obtained from nothing is nothing. Each individual's obtaining anything at all presupposes, as Spencer says, an initial field of activity and, moreover, one which is 'like' that of all others. Yet, once possessed of this sphere, each is at liberty to make of it what he can and none is entitled to the results of

[37] SS1, p. 146.

[38] SS1, pp. 146–7.

[39] SS1, pp. 131–2.

another's activities, save by virtue of free exchange or transfer. The above passage is thus more specifically directed against the threat to this right posed by proposals to confer upon each a right to an equal share of the *products* of everyone's activities.

Not only is this division of the produce a violation of ELP, but so too would be one which sought to entitle each to a share 'proportionate to the degree in which he has aided production'. For although this would be 'abstractedly just', it is in practice either superfluous or unjust. This is because it is impossible 'to ascertain the respective amounts of help given by different kinds of mental and bodily labourers' independently of the division of products actually consummated in the process of free production and exchange, as governed by the law of supply and demand.[40] And Proudhon's more radical challenge, that 'all property is robbery', is quickly dispatched by means of a *reductio*. For if this were true, argues Spencer via Locke, no one could have a right to the food he consumes and, hence, none could have a right to his own body which is built up from such nourishment.[41]

We have it, then, that the right of property both entitles each to what he can obtain from his own efforts (and from the unforced transfers of others), and presupposes an entitlement of each to an initial 'like field of activity'. Since this latter entitlement cannot be one to the products of labour, it must be one to natural resources. 'The right of property obtains a legitimate foundation' in a system of land-holding 'consistent with the equal claim of all men to the use of the earth'.[42] I take the liberty here of quoting Spencer's key passage in full:

> Equity, therefore, does not permit property in land. For if *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held; and eventually the *whole* of the earth's surface may be so held; and our planet may thus lapse altogether into private hands. Observe now the dilemma to which this leads. Supposing the entire habitable globe to be so enclosed, it follows that if the landowners have a valid right to its surface, all who are not landowners, have no right at all to its surface. Hence, such can exist on the earth by sufferance only. They are all trespassers. Save by permission of the lords of the soil, they can have no room for the soles of their feet. Nay, should the others think

[40] SS1, p. 132.

[41] SS1, pp. 133–4.

[42] SS1, p. 128.

> fit to deny them a resting-place, these landless men might equitably be expelled from the earth altogether. If, then, the assumption that land can be held as property, involves that the whole globe may become the private domain of a part of its inhabitants; and if, by consequence, the rest of its inhabitants can then exercise their faculties—can then exist even—only by consent of the landowners; it is manifest, that an exclusive possession of the soil necessitates an infringement of the law of equal freedom. For, men who cannot 'live and move and have their being' without the leave of others, cannot be equally free with those others.[43]

To have any rights at all, an individual must have a right not only to his own body, but also to terrestrial space: people are not 'floating wraiths'.[44] And if they have such a right, ELP implies that they have it equally.

The Application of ERE

A number of inferences follow readily from this finding; others, not so readily. Of the former, the illegitimacy of all existing titles to land is among the more important. The fact that these have, in the main, been acquired by their current owners through exercises of the right of exchange or unforced transfer is of not the slightest consequence.

> Violence, fraud, the prerogative of force, the claims of superior cunning —these are the sources to which those titles may be traced . . . Could valid claims be thus constituted? Hardly. And if not, what becomes of the pretensions of all subsequent holders of estates so obtained? Does sale or bequest generate a right where it did not previously exist? . . . Certainly not. And if one act of transfer can give no title, can many? No: though *nothing* be multiplied for ever, it will not produce *one*.[45]

Secondly, and the historical origins of current titles aside, 'it is impossible to discover any mode in which land *can* become private property'.[46] For even if

[43] SS1, pp. 114–15. This passage and, indeed, the entire chapter in which it appears—ch. ix, 'The Right to the Use of the Earth'—was deleted by Spencer from the second edition of *Social Statics*, published in 1891. His later and much altered discussion of this subject is to be found in chs. xi and xii, and in Appendix B, of *Justice: Part IV of the Principles of Ethics*, as well as in numerous journal articles and newspaper letters written in the course of the controversy occasioned by his change of view on 'the land question'.

[44] I borrow this phrase from Murray Rothbard, *For a New Liberty* (New York, 1973), p. 30, who paradoxically employs it in the course of an argument attacking ERE.

[45] SS1, p. 115.

[46] SS1, p. 116.

men were able to identify and agree upon a fair subdivision, 'what is to be done with those who come of age on the morrow' and with 'all who are to be born next year?'

> And what will be the fate of those whose fathers sell their estates and squander the proceeds? These portionless ones must constitute a class already described as having no right to a resting-place on earth . . . as being practically serfs . . . until it can be proved that God has given one charter of privileges to one generation, and another to the next—until we can demonstrate that men born after a certain date are doomed to slavery, we must consider that no such allotment is permissible.[47]

The fact of successive and overlapping generations puts paid to the possibility that any universally agreed set of private land titles can be consistent with ELP.

Nor will Spencer brook any intellectual backsliding from those who, having accepted his premises and arguments thus far, may balk at where they appear to lead, protesting that he is 'pushing to excess a doctrine applicable only within rational limits'. For these 'are people who hate anything in the shape of exact conclusions. . . . It is doubtful whether they would assent to the axiom that the whole is greater than its part, without making some qualification. . . . To meet their taste, Truth must always be spiced with a little Error'. Notwithstanding the ratiocinative proclivities of such people, it remains the case that 'Either men *have* a right to make the soil private property, or they *have not*'.[48]

> If they *have* such a right, then is there truth in that tenet of the ultra-Tory school, that the landowners are the only legitimate rulers of a country—that the people at large remain in it only by the landowners' permission, and ought consequently to submit to the landowners' rule, and respect whatever institutions the landowners set up. There is no escape from these inferences. They are necessary corollaries to the theory that the earth can become individual property.[49]

How then can ERE be applied, and thereby furnish the requisite foundation for the right of private property in things other than natural resources?

Spencer rejects the view that implementation of ERE requires either a return to a primitive economy or entrusting ourselves 'to the management of Messrs. Fourier, Owen, Louis Blanc, and Co.'.

[47] SS1, p. 120.

[48] SS1, pp. 120–1.

[49] SS1, pp. 121–2.

> The change required would simply be a change of landlords. Separate ownerships would merge into the joint-stock ownership of the public. . . . Instead of leasing his acres from an isolated proprietor, the farmer would lease them from the nation. . . . Stewards would be public officials instead of private ones; and tenancy the only land tenure. A state of things so ordered would be in perfect harmony with the moral law. Under it all men would be equally landlords; all men would be alike free to become tenants. . . . Clearly, therefore, on such a system, the earth might be inclosed, occupied, and cultivated, in entire subordination to the law of equal freedom.[50]

For the sake of completeness one should, of course, add miners, builders and all other direct users or extractors of natural resources, to the list of tenants Spencer envisages.

This proposal evidently raises a number of difficulties, only some of which are anticipated by Spencer. One which he appears not to have foreseen lies in his casual identification, in the passage just quoted, of 'public' with 'nation'. For if it is the case that no private individual can have an exclusive title to any portion of the earth, it would seem necessarily to follow that neither can any sub-group of private individuals—such as a nation—be possessed of such a right. Just how the joint-stock ownership of the public, properly identified, would thus be exercised, is an interesting though not necessarily insuperable problem. Presumably one modest step in this direction would be the abolition of all national restrictions on immigration (and emigration).

A second difficulty might appear to arise on grounds of Spencer's own urging. It will be recalled, from the first part of this essay, that one reason why utilitarianism stands condemned as a moral theory is said to be that it 'implies the eternity of government'. Are the stewards, as public officials who are empowered to collect all rents, a government? Here, I think, Spencer is on safe ground. For he in no way suggests that these stewards are to determine the amount of rent owed. Nor does his proposal imply that rent-collection need be located monopolistically in the hands of one agency.

But the amount of rent owed and, more generally, the terms under which land is leased, *do* have to be determined. How is this to be done, and upon what criteria are tenants to be chosen? Spencer's recommendation is that aspiring tenants would competitively bid for tenancies.[51] This is an interesting suggestion, made still more interesting by the fact that it is analogous to the

[50] SS1, p. 123.

[51] *Ibid.*

procedure more recently advocated for the allocation of capital under 'market socialism'. Nevertheless, it gives rise to a problem. For, assuming the existence of a public decision procedure whereby the highest bid for a tenancy is both identifiable and the one accepted, there remains the question of what is to be the *duration* of any tenancy.

Nor is this consideration one which can simply be treated as a variable in estimating the value of various competing bids. For the object of this implementation of ERE, and the reason why it underwrites private property rights in the products of human activity, is that it constitutes the contractual consent of all persons to the several uses made of the earth by private individuals and to the free disposition of what they thereby obtain. Acceptance of a bid for tenancy occurs at a particular moment in time. But, as was previously quoted, it is not the case 'that God has given one charter of privileges to one generation, and another to the next'. This consideration, which Spencer takes to rule out any universally agreed set of private land titles, would appear to tell with equal force against any universally agreed set of land tenancies *which are of long duration*. For it is bound to be the case that, in the interval between the commencement and expiry of any long tenancy, new members of the public will have appeared. And since what counts as a highest bid depends upon currently prevailing rates of return on other forms of capital—and since these, in turn, are functions of currently existing individuals' time-preferences —not even the hypothetical, much less the actual, consent of these later arrivals can be ascribed to previously contracted tenancies.

How long, then, is a long tenancy? To this, no definite numerical answer can be given. But a definite theoretical one can. A long tenancy is one whose duration extends beyond the moment a new arrival appears. The requirement of inter-generational justice which leads Spencer to reject universally agreed private land titles as an adequate embodiment of ERE, thus further implies that land tenancies must secure the assent of each and every person. In effect, then, each new arrival is originally possessed of a veto on any unexpired tenancy.

This is not to say, of course, that such a veto would or should be used often or ever. Presumably, the economically disruptive effects of its widespread use would usually redound to the disadvantage of its exerciser at least as muct as to others. Or, if not, they would find it in their interest to offer him terms which would deprive him of any incentive to exercise it. But that he has a *right* to do so is, I suggest, an inescapable consequence of ERE. Nor, from a broader perspective, is this a very surprising consequence. For *any* individual right, if respected, is a social decision rule conferring upon its owner an effective veto against some conceivable arrangement or practice which may well be of the utmost benefit to all other persons. It is the affirmation of social decision rules of this kind that distinguishes a natural rights theory from a

utilitarian one. To deny validity to any such rule is, indeed, to embrace utilitarianism.

Two further difficulties beset Spencer's proposal, and these he does anticipate. Both pertain to the question of the compensation owed to existing proprietors, in the transition to the establishment of ERE. And though sometimes conflated, the two can and should be analytically distinguished, and are so by Spencer himself. The first has to do with the fact that, in asserting its rightful ownership of the land, the public is unavoidably confiscating those improvements to it which are physically inseparable from it and which may be the results of existing proprietors' efforts. Denying, *contra* Locke, that their efforts confer upon them a title to the land itself, Spencer nevertheless concedes that 'This extra worth which your labour has imparted to it is fairly yours'.[52] An assessment of this remedy follows presently.

More difficult, in Spencer's view, is the problem of compensating existing proprietors for the public confiscation of the land itself. For this, he suggests, is one 'that perhaps cannot be settled in a strictly-equitable manner'.[53]

> Had we to deal with the parties who originally robbed the human race of its heritage, we might make short work of the matter. But, unfortunately, most of our present landowners are men who have . . . given for their estates, equivalents of honestly-earned wealth, believing that they were investing their savings in a legitimate manner. To justly estimate and liquidate the claims of such, is one of the most intricate problems society will one day have to solve.[54]

Is Spencer correct in seeing this as a problem or, at least, as a problem *for society*? Suppose that Red is one of 'the parties who originally robbed the human race of its heritage'. And suppose that he approaches Blue with an offer to sell him some land, tendering perhaps the famous advice of Mark Twain: 'Buy land. They aren't making it any more.'[55] Blue accepts, and conveys to Red some of his honestly-earned wealth. Against *whom* (if any) does Blue's claim lie, when shortly thereafter the human race reclaims its heritage? Does it lie against the human race, or against Red? If anyone doubts that it is Red, let him substitute the word 'book' for 'land', and 'White' for

[52] SS1, p. 119.

[53] SS1, p. 123.

[54] SS1, p. 124.

[55] See also Twain's entertaining essay, published as a Georgist pamphlet, and entitled *Archimedes* (London, n.d.).

'human race', in the preceding story, in order more clearly to see where any obligation to compensate would be located. Receiving stolen goods is, of course, not always a morally culpable offence. Nor, however, is it ordinarily regarded as creating rights on the part of the recipient. For Spencer, ERE is a *necessary moral* truth and not merely a *contingent empirical* one. Hence, anyone who invests his honestly-earned wealth in the purchase of land titles *must* be either morally uninformed or willing to gamble that others are. Neither case would appear to occasion a liability in the public when ERE is instituted.

It seems justifiable to apply the same line of reasoning in the matter of compensation owed for existing proprietors' improvements to the land, discussed previously. If Red steals White's book and sells it to Blue, who then repairs its torn cover, does White owe Blue compensation upon reclaiming it? Addressing an imaginary existing proprietor, Spencer allows that his improvements warrant compensation 'although you have, without leave, busied yourself in bettering what belongs to the community'.[56] Moral ignorance and an expectation of it in others, again appear to be the only alternative explanations of an existing proprietor's belief that the establishment of ERE entitles him to public compensation for his improvements.

To say this is not necessarily to deny that existing proprietors may be owed compensation (of either kind) by *someone*. Whether they are, is difficult to determine. For whether fraud is a violation of property rights is an issue on which Spencer is silent and, more generally, natural rights theorists are divided. Fraud entails an intention to deceive on the part of its perpetrator. Can individuals be said to have an obligation—correlative to a right in a compossible set of rights—to be honest? More imperspicuously, fraud also entails an element of ignorance on the part of its victim. And many of the uncertainties besetting it revolve around the question of whether that ignorance is culpable. Can moral ignorance be as inculpable as factual ignorance sometimes is? Is the ignorance, of one who does not 'know' that it is wrong to murder, inculpable? And if so, is he then entitled to murder, or to be compensated for any interference with his homicidal acts?

Whatever may be the answers to these questions, one thing that can definitely be said is that, on Spencer's reasoning, although the sale of a book *can* convey a moral title, the sale of land *cannot* do so. This might be taken to imply that, whereas the ignorance of a defrauded book purchaser may not be culpable—and thus his entitlement to compensation may be valid—the ignorance of a defrauded land purchaser is necessarily culpable. But whether

[56] SS1, p. 119.

it implies this or not, and even if the land purchaser is considered to be a victim (rather than an accomplice) in a rights-violation, it is clear that his remedy—like that of any other victim of fraud—must lie against his defrauder and not the public at large, who are themselves also the latter's victims. Nor does the probable fact, that it was not him but one of his vendor's ancestors (or his vendor's vendor's ancestors, etc.) who was the direct victim of a defrauder, have the consequence of converting a private liability into a public one. For, to repeat Spencer's terse remark on an analogous claim, 'though *nothing* be multiplied for ever, it will not produce *one*'.

Thus it is, perhaps, a matter of some regret that Spencer did not devote further reflection to the grounds of his belief that public compensation would be owed to existing proprietors of land. Nor is this regret alleviated by the fact that, forty years later, he was to see the problems of compensation as being so intractable as to warrant a complete reversal of his earlier commitment to the implementation of ERE. This reversal occasioned a bitter public controversy with Henry George and others—a controversy which, by all accounts, irreparably damaged Spencer's reputation as a consistent and principled thinker, making even more miserable the physical and mental anguish he suffered during his declining years.[57] His intellectual voyage over those forty years had taken him some considerable distance from the radical and optimistic views of his earlier self. For the Spencer of 1851, the problems of compensation, though real enough, promised eventual resolution.

> Meanwhile, we shall do well to recollect, that there are others besides the landed class to be considered. In our tender regard for the vested interests of the few, let us not forget that the rights of the many are in abeyance; and must remain so, as long as the earth is monopolised by individuals. Let us remember, too, that the injustice thus inflicted on the mass of mankind, is an injustice of the gravest nature. The fact that it is not so regarded, proves nothing. . . . It may by-and-by be perceived, that Equity utters dictates to which we have not yet listened; and men may then learn, that to deprive others of their rights to the use of the earth, is to commit a crime inferior only in wickedness to the crime of taking away their lives or personal liberties.[58]

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[57] cf. Henry George, *A Perplexed Philosopher* (London, 1892), and David Wiltshire, *The Social and Political Thought of Herbert Spencer* (Oxford, 1978), pp. 119–31.

[58] SS1, pp. 124–5.