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Author(s): Jonathan Wolff

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LIBERTARIANISM, UTILITY, AND ECONOMIC COMPETITION

*Jonathan Wolff**

INTRODUCTION

LIBERTARIANISM is commonly characterized both by its institutions and by its foundations. Institutionally, it is associated with the idea of a minimal state,¹ restricted to the narrow functions of protecting citizens from each other (and from non-citizens), and providing for the enforcement of private contracts. Typically, libertarians assume that this is necessarily accompanied by the economic institutions of a pure form of capitalism, including strong private property rights, low or no taxation, and free competition among potential producers of goods and services.²

Libertarianism can take various forms, but here I want to contrast what I shall call “deontological libertarianism,” and “consequentialist libertarianism.” Deontological libertarianism, pioneered by Robert Nozick, is based on a strict doctrine of natural rights, violation of which is never permitted, whatever the consequences.³ The justification for such a theory is claimed to be a particular rights-based theory of justice.⁴ Proponents of consequentialist libertarianism, by contrast, argue for the free market and strong individual rights to property, not on the basis of an antecedent the-

* University College London, Department of Philosophy. I am very grateful to Hillel Steiner, Chandran Kukathas, Roger Crisp, John O’Neill, Michael Otsuka, and the participants in the Symposium on Contemporary Political Theory and Private Law at the University of Virginia School of Law for their comments.

¹ Nozickian libertarianism, of course, allows people voluntarily to contract into a more than minimal state, if that is what they wish to do. See Robert Nozick, *Anarchy, State, and Utopia* 318–20 (1974). For present purposes I ignore “left-libertarianism,” which combines principles of individual liberty with restrictions on the type of property rights individuals may form. See Michael Otsuka, *Libertarianism Without Inequality* 114–31 (2003); Hillel Steiner, *An Essay on Rights* 268 (1994); Peter Vallentyne, Introduction: Left-Libertarianism—A Primer, in *Left-Libertarianism and Its Critics: The Contemporary Debate* 1, 15–16 (Peter Vallentyne & Hillel Steiner eds., 2000).

² Loren E. Lomasky, *Persons, Rights, and the Moral Community* 125–26 (1987).

³ See Nozick, *supra* note 1, at ix–xi.

⁴ See *id.* at 163.

ory of justice, but in terms of the beneficial consequences such as wealth creation and efficiency that such arrangements may bring. Pure consequentialist libertarianism is rare, if it exists at all, but there are hybrid forms of libertarianism that combine deontological and consequentialist reasoning.

Often, advocates of hybrid views are less theoretically self-conscious than their deontological colleagues, appealing to various considerations without investigating the relations between them or the further consequences of adopting the doctrines in question.⁵ Consequentialist libertarianism, whether consequentialist in whole or in part, thus offers a hostage to fortune and is open to lines of criticism based on the calculation of consequences. So, for example, if a new version of market socialism could be devised that had all the benefits of capitalism and some others as well, fully consequentialist libertarians would seem bound, in theory at least, to reject capitalism in favor of this alternative theory. Those holding a hybrid view would have to decide where their loyalties lie.

Thus, to those of a certain cast of mind, deontological libertarianism, with its austere ontology of moral premises, appears the more rigorous, appealing, and defensible version. My aim here is very simple; it is to argue that deontological libertarianism cannot easily deliver the defense of capitalism that it aspires to deliver, or at least not in a way that avoids begging the question. The case of economic competition will provide a helpful demonstration.

I should stress that I do not wish to argue that this is the most serious weakness of libertarianism, and I accept that there are other points where significant criticisms can be made. My point is only that this is a weakness that seems to have been overlooked. Nineteenth-century thinkers such as John Stuart Mill saw economic competition as a problem, and they used consequentialist arguments to defend it.⁶ Somehow we have lost sight of the problem since then, perhaps because we think Mill answered it. But, of course, those that reject consequentialist reasoning, such as deontological libertarians, are not entitled to avail themselves of Mill's

⁵ See generally Milton Friedman, *Capitalism and Freedom* (1962). Friedman uses a combination of arguments, some apparently based on fundamental principles of freedom, see *id.* at 12, and others based on consequentialist reasoning, see *id.* at 131–32.

⁶ John Stuart Mill, *On Liberty*, in *Utilitarianism and On Liberty* 163–64 (Mary Warnock ed., Blackwell Publishing 2d ed. 2003) (1859).

solution and so need an independent one of their own. It is this that has been lacking.

I. ECONOMIC COMPETITION

Free economic competition is essentially equivalent to the idea of “no entry barriers.” Anyone may, in principle, offer for sale any good or service. Of course, financial constraints may make it impossible in practice for someone to compete in particular areas, but a system of free competition places no legal restrictions on individuals producing or offering for sale any good or service. In any developed economy, economic competition takes a number of forms. H.B. Acton usefully distinguished four spheres of economic competition in a capitalist economy: (1) for contracts; (2) between suppliers of labor; (3) between employers of labor; and (4) to sell to consumers.⁷ Quite likely this is not an exhaustive (or, indeed, exclusive) classification, but it will serve to illustrate the scope of competition.

Economic competition is, of course, celebrated for a number of reasons. One set of considerations derives from ideas of freedom; simply the freedom to produce, buy, and sell what one wishes. Those who, for some reason, are prohibited from one or more of these activities may feel deeply frustrated. As Nozick famously put it, “The socialist society would have to forbid capitalist acts between consenting adults.”⁸ This thought can be taken in a number of directions: as a complaint against the suppression of liberty, for instance; or, perhaps, as a complaint against the violation of rights. In sum, however, the freedom arguments for competition focus on the rights and liberties of producers and sellers of goods.

A second set of considerations points to the economic advantages of competition. Free competition is the enemy of complacency. In a competitive environment, there is no opportunity to relax, for this may allow one’s competitors to innovate by either producing a better product or finding a cheaper way of producing or selling existing products. Competition thus keeps producers and retailers on their toes. The need for economic survival against

⁷ H.B. Acton, *The Morals of Markets and Related Essays* 71–79 (David Gordon & Jeremy Shearmur eds., Liberty Fund 1993) (1971).

⁸ See Nozick, *supra* note 1, at 163.

competition keeps prices down and quality up. This, quite obviously, is to the advantage of the consumer, and provides a very powerful consequentialist argument for competition.

Yet despite the common lauding of economic competition, historically the arguments have not all been one way. Economic competition, and competitive behavior in general, has been the object of moral concern for many reasons, although I think we can divide those reasons into four main groups: (1) that the competitive individual displays an unattractive character; (2) that social relations in a competitive society are in some way impoverished; (3) that competition involves treating people as means; and (4) that competition harms those who take part, and in particular those who lose.

For the purposes of this Essay, I want to discuss only the last of these categories.⁹ Here the general point is familiar. Economic competition will have at least three types of losers: (1) producers that find they can no longer sell their goods;¹⁰ (2) workers that lose their jobs owing to business failure or through direct or indirect competition with other workers (perhaps in low wage economies);¹¹ and (3) in different cases, consumers that find themselves “priced out of the market” (for example, the housing market).

Historically, of these groups the second has been of the most concern, and for very good reason. Thus Bentham, for example, when advocating the introduction of the printing press in Tripoli and Greece, warned that “care should be taken that the employment given to it should not be such as to throw out of employment any of the existing scribes, except in so far as other employment

⁹ Although there is much to be said on the other side, Acton competently argues that the alleged harms of the first two types are not significant. See Acton, *supra* note 7, at 67–71, 96–98. Acton does not discuss the third type. Elsewhere I have argued that economic competition can involve a form of exploitation: exploitation by consumers (who are also voters) of those engaged in competition. Jonathan Wolff, *The ethics of competition*, in 3 *The Legal and Moral Aspects of International Trade* 82, 93–95 (Asif Qureshi et al. eds., 1998).

¹⁰ This would also include retailers who find themselves holding stock they cannot sell.

¹¹ Direct competition is to compete for the same jobs; indirect competition is to offer oneself as a worker to a business that will eventually destroy the jobs of others through successful competition. It is possible that different moral considerations apply in these cases, but I will not pursue that here.

not less advantageous is found for them.”¹² For Bentham, care needs to be taken both to avoid the distress caused to the potentially unemployed and the likely hostility to innovation consequent on such distress.

Presumably, Bentham was thinking of scribes working in government service. But consider a private individual, running a copying service which employs scribes. Imagine now that another individual has access to greater funds and decides to set up a printing press in competition. In one stroke, let us suppose, this will destroy the hand-copying business. In the economic “survival of the fittest,” this business will die out, possibly with the consequent financial ruin of its proprietor in addition to the unemployment of the scribes. Like Bentham, we will be concerned about the now-unemployed scribes. Additionally, however, what, morally, should our attitude be to the loss, or even ruin, of the proprietor?

One likely response is that this is simply a fact of economic life. This could mean one of at least two things. First, it could be that there is no alternative to an economic system with effects of this nature. This seems to me highly doubtful (as I shall illustrate below¹³), but in any case it is something that needs to be shown, rather than assumed. Second, it could mean that this is simply a natural consequence of the economic rules we happen to have. While that may be true, the question is whether we should have those rules. Thus, the “fact of economic life” defense takes us nowhere.

No one can reasonably doubt that when a business fails, people suffer harm, often of a serious kind. Considering similar cases, Acton admits that, while the idea of the survival of the fittest applies to economic life as well as to evolutionary biology, there is an important disanalogy that makes it less serious in economics: losers in the biological struggle for survival face a drastic end, but when a form of economic life comes to an end, it does not necessarily involve the ending of biological life.¹⁴ Rather, it is merely the “cessa-

¹² Jeremy Bentham, *Securities Against Misrule and Other Constitutional Writings for Tripoli and Greece* 38 (Philip Schofield ed., Clarendon Press 1990) (1822). I thank Philip Schofield for drawing my attention to this text and to other writings on competition by Bentham.

¹³ See *infra* Part V.

¹⁴ Acton, *supra* note 7, at 72–73.

tion of some groupings and activities and the assumption and organisation of new ones.”¹⁵

However calm and reassuring this may sound, one cannot help but feel that Acton has evaded the main theoretical question. When the printing press is introduced, those businesses that do not convert to the new technology will cease trading, and perhaps face financial ruin. Their financial interests will be destroyed, just as surely as they would have been had a rival businessman burned down the premises,¹⁶ or if an employee disappeared with the year’s takings, or if an agent fraudulently diverted revenue into her own bank account. Thus, loss by competition, arson, theft, and fraud can, in principle, involve the same level and type of loss, at least from the point of view of the person who loses. This point is easily overlooked. We have somehow come to believe that a financial loss caused by fraud, theft, or arson is morally unacceptable, but a financial loss of the same magnitude resulting from economic competition is merely unfortunate.

It might be suggested that losses in economic competition differ in that the risks are voluntarily taken, whereas this is not the case for fraud, theft, and arson. Thus, those who draw a line between chance and choice, and consequently hold individuals responsible for the effects of their choices, may suppose they can explain the asymmetry. There may be some plausibility to this, although one possible reply is that the plausibility of such a distinction depends on falsely assimilating many different types of risk.¹⁷ A closer examination, however, reveals that this argument fails to explain fully the distinction between loss through economic competition and loss through other means. A person who knowingly moves to a high-crime area to take advantage of the lower property prices still has rights against theft; the businessman who, perhaps reasonably under the circumstances, fails to anticipate shifting technologies does not thereby gain rights of protection.

¹⁵ *Id.* at 73. He does, however, concede that it can lead to suicide or death by hunger. *Id.*

¹⁶ I ignore any issues of insurance or redress. In the case of arson, even if insurance or compensation is paid out, this does not show that arson is morally permissible.

¹⁷ See Kasper Lippert-Rasmussen, *Equality, Option Luck, and Responsibility*, 111 *Ethics* 548, 551–53 (2001); see also Michael Otsuka, *Liberty, Equality, Envy, and Abstraction*, in *Dworkin and His Critics* 70, 75 (Justine Burley ed., 2004).

Under capitalism, one is given rights against loss by fraud, theft, or arson, but not against loss by competition. This cries out for explanation. The fact that no one need die hardly explains why in one case the loss is considered a normal part of life, but not in the other three cases. No one need die in ordinary cases of fraud, theft, or arson (although they might, especially in the last), and the fact that people normally manage to carry on with some form of economic activity after suffering competitive losses hardly shows that those losses are not of significant moral concern. After all, fraud, theft, and arson do not bring the economy to a halt either.

II. THE LIBERTY ARGUMENT

One common attempted defense of free competition, from a liberal or deontological libertarian perspective, is to say that the right to engage in economic competition is a simple implication of the right to liberty.¹⁸ The right to liberty gives people a right to trade, buy, and sell as they wish. Hence competition is entirely unproblematic.

It should already be clear, though, what it is wrong with this argument. The right to liberty is never a right to act in all the ways one might wish, including ways that harm others. My right to liberty does not give me the right to choose exactly how I will use my automatic machine gun, or even my petrol and matches. Deontological libertarians accept that, in general, there is no liberty to act in ways that violate the rights of others.¹⁹ So, if economic competition does harm people, as John Stuart Mill argued, then no simple appeal to liberty will explain why it is permitted. What needs to be demonstrated is that this is a form of harm that does not violate rights, and this requires a deeper explanation than an appeal to liberty. Such an appeal presupposes precisely what needs to be shown: that no violation of rights takes place.

¹⁸ Or at least this is a common response to the arguments of this paper when it has been presented at conferences. There may be few, if any, published versions of this response, as economic competition is so rarely thought of as in need of defense.

¹⁹ See, e.g., Nozick, *supra* note 1, at 171.

III. THE CONSEQUENTIALIST ARGUMENT

No doubt the blindingly obvious thing to say is that we allow economic competition on consequentialist grounds, and indeed this is Mill's own argument. The unfortunate financial loss of those running an obsolete or inefficient business is the downside of a system with a lot of good to it, as discussed above. This is a reason for allowing competition: the economic analog of the "best of all possible worlds" defense to the problem of evil. Whether those that lose out should be given compensation, some sort of safety net, or nothing at all will depend on the further features of the consequentialist theory one holds, together with a calculation of the consequences. But giving people rights to be protected against economic competition—as distinct from rights to be given relief from the *worst effects* of economic competition—is bound to be inefficient in important ways, and thus it is not a viable option for a consequentialist. The benefits of capitalism—innovation and cheap, high quality goods—depend on competition, and so restricting economic competition is likely to lead to a very significant loss of these advantages.

My first main point can now easily be appreciated. We are owed an explanation of why contemporary capitalism provides rights against fraud, theft, and arson, but not rights against economic competition. Standard arguments appealing to considerations such as the advantages of economic efficiency are available only to those that can avail themselves of those arguments. This will include almost everyone except the pure deontological libertarian. This, I hope, is a surprising conclusion: those who (apparently) speak most in favor of the free market and free competition are, *prima facie*, in the worst possible position to defend it. It thus remains unclear, at this point, whether libertarians can even allow pure capitalism, still less that libertarianism provides a defense for it.

What else might be said to reconnect deontological libertarianism and capitalism? The only direct discussion of any relevance to the issue I have seen is by Richard Arneson.²⁰ In a discussion of Lockean self-ownership, Arneson is interested in the Lockean un-

²⁰ See Richard J. Arneson, *Lockean Self-Ownership: Towards a Demolition*, 39 *Pol. Stud.* 36 (1991).

derstanding of the concept of “harm to others.” He notes a number of nuances in the Lockean view, including that “[h]urts that come about by fair competition do not qualify as harms.”²¹ This is exactly the doctrine that deontological libertarianism needs. (While the consequentialist can allow that economic competition causes harm but argue that this harm is outweighed by the consequent benefits, the deontological libertarian cannot.) To defend this doctrine, Arneson points out that, in the absence of long-term contracts, customers have a right to withdraw their custom for any reason or no reason.²² Now, it is not clear from the context whether Arneson thinks this is a good defense, but it is also not entirely clear how this is supposed to function as a defense at all. Consider our case of the hand-copying business. Here the businessman complains that the printing press has harmed him by luring away customers. To this Arneson would reply that the customers could have left for other reasons if they had wanted to leave. This may be true, but it is far from clear that it is relevant. After all, it is not being claimed that the customers *did* leave for other reasons; merely that they *could have legitimately done so if they wanted*. But this does not answer the point that, in the circumstances as they are, harm has been caused by another person setting up a competing business.

Perhaps the argument is a different one. The operative claim may be that one cannot complain about the damage caused by economic competition, because the damage is exactly equivalent to damage that could have been caused by a means already acknowledged as perfectly legitimate: customers withdrawing their trade on a whim.

There are two possible types of reply to this argument. The first is that it is double edged; perhaps we should investigate whether it really should be legitimate for customers to withdraw their business just because they feel like it. (Certainly some people feel a moral obligation not to do so, especially, say, with regard to vulnerable small businesses.) But we need not go down that road, for the second reply is implicit in arguments already given. Consider the employee who absconds with the year’s profits. It is hardly a good defense to point out that exactly similar damage would have

²¹ *Id.* at 39.

²² *Id.*

been caused had all customers legitimately withdrawn their business this year. So it remains unclear how this argument shows that hurts caused by fair economic competition are not harms. Thus far, it appears that we will make no progress on this without appeal to consequentialist considerations: competition causes harm that is not different in kind to other sources of harm. Rather, it is different in its consequences, and it is these consequences that serve as its justification. If this is right, then deontological libertarianism is in serious trouble.

IV. THE SELF-OWNERSHIP ARGUMENT

Arneson's discussion of self-ownership, although critical in intent, nevertheless gives the libertarian a clue about how to develop an alternative approach. If a consequentialist libertarian appeals to beneficial consequences, then a deontological libertarian ought to appeal to rights—specifically, rights of self-ownership. Any form of deontological libertarianism needs a foundational set of rights if it is to be able to set out a theory of what counts as acceptable and unacceptable behavior. Some rights seem naturally to fall out of the libertarian concern for individual sovereignty, such as the right to life and to freedom from coercion by others. It appears, however, that a libertarian may set out his or her own catalog of the rights that constitute self-ownership. Any theory has to start somewhere, so a libertarian can start with a subtly nuanced portfolio of rights. It seems, in principle, that this catalog can contain a right to engage in economic competition, but no right to be protected against it.

Formally, there may appear to be one strong argument against this suggestion. Typically, libertarian rights of self-ownership are formulated as negative rights of non-interference: the right not to be assaulted, not to have one's property taken without consent (unless it has been forfeited through acts that interfere with other people's rights), or not to have one's freedom of thought limited. The question is whether the freedom to enter any branch of economic activity can be seen in the same way, and not as a positive right. This generates two, perhaps related, problems. The first is simply that it is out of philosophical character for a libertarian to appeal to positive rights or positive liberties. The second is that the great danger of positive rights and liberties is that they may clash

with the negative rights or liberties of others, and, within deontological libertarianism, there seems to be no way of adjudicating such disputes.

It may seem, on the face of it, that both problems have a ready answer. The libertarian objects to those positive rights that create positive duties for others. The right to engage in any branch of economic activity is not of this sort. Indeed, it may be better conceived as the right not to be stopped from engaging in any branch of economic activity, and thereby in essence it is a negative right. Formally, then, it seems possible to overcome the first objection. Yet this does not solve the second problem. As we saw, the exercise of such economic freedom commonly does do harm to others by diminishing their financial prospects. Is this not, then, a paradigm of the type of interference to which the libertarian objects? But, of course, the same appeal to a catalog of rights constituting self-ownership that sanctions free economic activity provides the answer: there never was a right to be protected against the effects of economic competition. So there is no right with which this permission (conceived, we saw, as a prohibition on people stopping me from engaging in economic activity) will conflict. Any potential conflict is resolved in favor of the economic innovator—the new competitor—at the ground-floor level of defining the rights of self-ownership.

Although setting rules for philosophical debate is always difficult, and can seem a rather arrogant pretension, this proposal, it seems to me, has all the benefits of theft over honest toil, to use Bertrand Russell's famous phrase. In this case the theft is from consequentialism. How remarkable it is that a deontological libertarian should, through the exercise of pure reason, derive a set of rights that, in its approval of the free market, coincides with what his or her consequentialist colleagues can defend on the basis of actual arguments! The proposal to encode or embed an acceptance of free competition into the foundational rights of self-ownership looks like the smuggling of consequentialist considerations into the very foundations of deontological libertarianism.

My argument, then, is not that I can refute the thesis that the rights of self-ownership automatically include the right to engage in economic competition, but rather that this is a somewhat disreputable claim, made in a purely ad hoc way, to make deontological

libertarianism appear far more “capitalism friendly” than it really is. Rather than answering the challenge of this paper, the self-ownership defense simply defines it out of existence. It fails to engage the problem.

V. THE “NO-ALTERNATIVE” RESPONSE

Nevertheless, I doubt that those who favor deontological libertarianism will feel much exercised by the arguments so far. In reply to the preceding argument, they may well say that any theory needs some undefended foundational assumptions, and these are the ones most suitable for deontological libertarianism (although I hope that they will have the grace to feel at least a little embarrassed in making this reply). Furthermore, they may say, what is the alternative to free competition except a centrally planned economy, in which spheres of economic activity are centrally allocated? If this is the only choice, it should not be too difficult to find deontological libertarian reasons, of a perfectly ordinary and non-question-begging form, for favoring free competition over planning.

There is, of course, a question of whether this is an adequate defense, even if it is true that there are deontological liberal reasons that speak in favor of free competition over central planning. As a preliminary matter, however, we can note that it is simply not true that these are the only two alternatives. We can posit a third alternative by considering how libertarians argue that property should be distributed.

Any theory of justice that does not suppose everything is commonly owned must answer the question of how property is to be placed in individual hands. This is the issue of first appropriation or initial acquisition of private property. Once more, a deontological libertarian will have a more restricted set of options than those who are prepared to accept consequentialist reasoning. There are various libertarian proposals, but at the core of a number of libertarian schemes resides essentially a single idea: the right of the first claimant, hedged, perhaps, by some other necessary conditions. Now, if libertarians are prepared to distribute land in this way, why not distribute forms of economic activity this way too? That is, whoever is the first to produce goods of a certain kind should have

an exclusive right to do so, just as the first person to work a piece of land is given the exclusive right to determine how that land is to be used.

Under this model, one of the rights to non-interference the minimal state would enforce would be the right not to have other people encroach on one's economic activity. This is a system little discussed in contemporary political philosophy, but well known to historians. It is called "feudalism." I do not, of course, mean serfdom, but rather the system of monopoly, by which the right to produce a certain type of good is protected.²³ This form of feudalism violates one of the key assumptions of the model of the perfectly competitive economy—no entry barriers. Indeed, it replaces it with the opposite: full entry barriers. Admittedly, in practice the point of such monopolies was to raise revenue for the king, or feudal lord, and so monopolies were granted only to those prepared to pay for the privilege. However, this does not detract from the main point, that it is perfectly possible to have a system where spheres of economic activity are granted to the first to claim them.²⁴ Indeed, we see vestiges of this in patent systems, to which we will return very shortly, as well as the granting of special licenses for such things as telecom bandwidth, casinos, postal services, regulated professions, and so on.

Clearly, there will be disadvantages with this system when generalized over the whole economy, especially from the point of view of the consumer; this, no doubt, is why feudalism died out. But whether these are disadvantages that can be based on reasons available to the pure deontological libertarian is a different question. Certainly, to repeat a point already made several times, for

²³ See, e.g., Christopher Hill, *The Century of Revolution 1603–1714*, at 25 (W.W. Norton & Co. 1982) (1961) ("It is difficult for us to picture to ourselves the life of a man living in a house built with monopoly bricks, with windows (if any) of monopoly glass; heated by monopoly coal (in Ireland monopoly timber), burning in a grate made of monopoly iron. His walls were lined with monopoly tapestries. He slept on monopoly feathers, did his hair with monopoly brushes and monopoly combs."). Hill's list goes on and on, incorporating soap, buttons, lobsters, lute-strings, candles, books, mousetraps, and many other items. *Id.* He notes that in 1621, there were said to be 700 such monopolies in England. *Id.* at 25–26.

²⁴ Clearly, some means of distinguishing spheres of economic activity will be necessary, but there is no reason to think that this is an insuperable difficulty.

such a libertarian, no justification starting from premises based on efficiency or utility can be employed.

I am not pretending that feudalism is a superior scheme to free competition. It is, however, interesting to note that it is superior in certain ways consonant with libertarian ideas, and with some strands of current economic practice. Note, though, that there are two quite different ways that a monopoly can be granted, and both are used in contemporary economic systems: patent systems and a pure monopoly. A patent system gives the owner the right to license others to produce that good, whereas a pure monopoly is not assignable. Both protect the monopoly holder from economic competition, but a patent system is consistent with competition between those that are licensed by the patent holder, at the discretion of the patent holder.

Consequently, we need to consider two alternatives to the free market and the centrally planned economy: (1) feudalism of patents, and (2) feudalism of pure monopoly. Such schemes have some intellectual attraction. If one thinks of the designer of a new scheme of economic activity as an inventor, then it may seem entirely appropriate to think that the inventor should have some sort of intellectual property right over what he or she has devised. If one can stake a claim at the land frontier, should not a libertarian allow one to stake his claim at the frontier of ideas? Indeed, if anything, the case looks stronger for intellectual property. In the case of land, something must change its status from no one's property to someone's property—a notoriously difficult transition. For intellectual property, however, no similar transition is needed.

There are vexed issues here. Take, for example, the modern discussion of gene-patenting. Mixed in are issues of public utility, incentives, rights of discoverers, rights of possessors, and others engaged in similar work. Nevertheless, the idea of intrinsic intellectual property rights is part of the discussion, and there seems to be some sort of natural justice to the idea that those who have made a discovery have a greater claim to exploit it than others. Or, at least, if anyone should say this, then a deontological libertarian should. Having said that, it is hard to see, for such a libertarian, what arguments there might be on the other side.

To recap, I have argued that the deontological libertarian owes an explanation of why we should have rights to protection against

theft and arson, but not to protection against similar damage caused by economic competition. No appeal can be made to consequentialist, efficiency, or, for that matter, social justice grounds. No simple appeal to liberty will help either. Plus, it cannot be said that we are unable to imagine a system that embodies such protections, for a system either of pure monopoly or of permanent patents would do the trick. I have further suggested that such a system seems to comport well with a libertarian view of private property. So we have the intermediate conclusion that deontological libertarians should have argued for a form of feudalism, rather than capitalism. This may seem absurd. But that is not my problem.

VI. THE LOCKEAN PROVISIO RESPONSE

The libertarian, however, still has at least one promising reply to this argument. Remember that the libertarian view of property, at least in Nozick's hands, is not merely the right of the first claimant: some version of the Lockean proviso is also necessary.²⁵ The counterargument, then, will be that the type of feudal monopoly under consideration violates the Lockean proviso in its adverse effects on those who do not find themselves with a lucrative monopoly, and if this is so, libertarianism is not consistent with the form of protected monopoly as discussed in this Essay. It is easy to see how the argument goes: while individual private property in land meets the Lockean proviso, individual private property in a sphere of economic activity fails to meet the proviso, and so arguments for monopoly cannot be modeled on arguments for land.

Clearly, it is important to investigate this in detail. The key question is whether the Lockean proviso can be formulated in such a way as to bring out this disanalogy. The Lockean proviso comes in various strengths and forms. Its strongest formulation, which may be stronger than even Locke intended, suggests that appropriation is only acceptable if each act of appropriation leaves "enough, and as good" for others to appropriate.²⁶ Such a strong form will be very rarely satisfied, however, especially on a strict reading of "as good," where geographical location such as proximity to markets is

²⁵ See Nozick, *supra* note 1, at 174–82 (discussing the Lockean proviso).

²⁶ John Locke, *Two Treatises of Government* 291 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

included as a factor. Thus, a weaker interpretation is needed if the proviso is not to backfire and rule out private property.

The most common response is to weaken the proviso so that it refers, ultimately, to the idea that appropriation must not make non-appropriators worse off. This leads us to the notorious problem of the baseline: worse off than what? Much discussion of this looks at the issue of whether it is possible to defend an account of the baseline that appears to be fair to non-appropriators.²⁷ However, given that I am presently engaged in exploring whether libertarian arguments can deliver libertarian institutions, external considerations of fairness are not the issue. Rather, we need to see if there is a version of the proviso that will protect the type of property rights libertarians generally favor. Hence we need to explore how libertarians can understand what it means to obey the proviso that people are to be made “no worse off.” This proviso is not violated merely by the fact that there is no land left to appropriate. It could be, for example, that the new opportunity to work as a day laborer leaves a landless person no worse off than they would have been with a small plot of land.

But still, we need to know: worse off than what? Here, the salient point is that there are two ways of understanding this comparison: the “local” and the “global.” The local reading is that *each individual appropriation must leave everyone else no worse off than they would have been without that particular appropriation*. If a farmer relies on a path over common land to take his goods to market, then he will be made worse off if part of this common land is appropriated and he now has to go the long way around.²⁸ The local reading provides a heavy burden, and may well prove difficult to meet. Anyone’s appropriation is likely to make a least one person worse off in an uncompensated way. The global reading, by contrast, is that each person must be no worse off than they would have been *had there been no system of individual appropriation at all*. In this case the farmer can hardly complain, since he receives great benefits from the system of private property. Hence if the Lockean proviso is not to rule out most, if not all, private property

²⁷ See Nozick, *supra* note 1, at 177; see also G.A. Cohen, *Self-Ownership, freedom, and equality* 80–91 (1995).

²⁸ For the purposes of this argument, I ignore the point that competition with a second farmer might cut into my revenue.

claims, it has to be interpreted in global fashion. The test is simply whether I am worse off for the general system of appropriation of land than I would have been without it. If I am worse off, then I have a justified complaint.²⁹

Accordingly, we need to exercise some care in applying the proviso to the case of monopoly of an economic sphere. Suppose I am the first person to work out how to cure leather, and thereby acquire a monopoly right over this activity. Would that violate the proviso? Applying the local proviso may render this problematic. Where there is a monopoly, prices will be higher than otherwise, and this will also frustrate others that wish to cure and sell leather. Hence the local proviso will be violated. Yet, as we have already seen, the local proviso cannot be the correct one to apply anyway, as it would also rule out private property. We must, therefore, explore whether the global version is also violated. That is, a libertarian may claim that, as many will be worse off for the existence of a monopoly as opposed to free entry to trade, the Lockean proviso is violated. Furthermore, a libertarian might argue that since compensation would be so broadly required and expensive, the only solution is to abolish monopolies altogether.

The opponent of libertarianism might respond that this is a dangerous argument for the libertarian to use. For what goes for professions must also go for land. If the Lockean proviso rules out monopolizing trade, then surely it must rule out monopolizing land. So, if I am worse off for being excluded from all occupied professions, then it seems likely that I will be worse off for being excluded from all occupied land. Conversely, then, if the libertarian tells the landless to work for the landed, we can say the same to those who are not permitted to trade in their own right: go and work for someone else.³⁰ Thus, it is hard to see why the issues of land ownership and sphere-of-economic-activity ownership should not run in parallel.

²⁹ For a defense of this paragraph as a reading of Nozick, see Jonathan Wolff, Robert Nozick: Property, Justice and the Minimal State 111–12 (1991).

³⁰ This assumes, of course, that “selling unskilled labor” is not a sphere of economic activity to which one person can claim an exclusive license. This general permissibility would seem derivable from rights of self-ownership. Highly skilled, or differentiated, labor may be a different case.

Once again, the libertarian may well have a response. The efficiency argument for individual private property can be used as an argument to show that it will make the worst off better off. But, in the case of monopolies of professions, it will be claimed, the efficiency considerations work the other way around: that is, efficiency speaks against monopolizing professions. This is a hard argument to assess. No one would now argue that a feudal system is more efficient in utilitarian terms than free competition, but that argument is not available to the deontological libertarian. The only question is whether a system of monopoly production makes the worst off worse off than they would be without it. And how would they be without it? In a system of free trade, we cannot say. This is because free trade involves economic competition, and economic competition harms the interests of those who lose. Therefore, we have come full circle. A system of free trade is not a neutral baseline for comparison. We cannot use the system involving economic competition as the baseline against which we judge whether monopoly makes people worse off when we lack any justification for economic competition. Hence it is simply unclear whether feudalism—monopoly production—follows from libertarian assumptions, or is ruled out by them.

CONCLUSION

Let us suppose that the libertarian is right that monopoly production is ruled out by the Lockean proviso. Where does this leave us? I have argued that the libertarian must show that the damage caused by economic competition is permissible, that it is not *real* harm. This, I suggested, could not be done without appeal to consequentialist reasoning. Nevertheless, I noted that the libertarian will not be much exercised by this, thinking that the only two alternatives are capitalism and central planning, and that the latter can easily be ruled out on libertarian grounds. I provisionally suggested that this was a mistake: there is a third option, feudalism, which appears to comport well with libertarianism. But we have now seen that it may well be that feudalism can also be ruled out on libertarian grounds. Does this mean, then, that the link between libertarianism and capitalism is re-established?

A moment's reflection makes clear that this is not the case. If libertarianism rules out central planning and feudalism, it does not

follow that this shows that it is consistent with free market capitalism. We have already seen, right from the beginning, that it is not: it has no resources for explaining why one type of damage is to be protected by law and another is not. So deontological libertarianism is not consistent with any sort of economy that we know. Even if, as is unclear, deontological libertarianism can rescue itself from entanglement with feudalism, this does not reconcile it with capitalism.

The key issue is to explain why we should not have rights to be protected from the losses consequent on economic competition. I have not found any explanation that a deontological libertarian can draw upon for support. Perhaps there are arguments I have missed. If so, I would like to see them. In their absence, however, I must conclude that deontological libertarians are unable to justify the libertarian institution of the free market; that is, unless they dishonestly smuggle consequentialist considerations into the definition of rights of self-ownership. Libertarian rights form a foundation for no known economic system.