

Chapter 5

Distributive justice

In this chapter we shall address the problem of distributive justice, the vexed issue of how wealth and income, goods and services should be distributed or allocated amongst the population of a state. There are many candidate principles that may be applied, some of which I discuss explicitly in what follows, but before we advance any further, I should bring to your attention a restriction which I have placed on this investigation which you may well judge to be arbitrary. For many, the problem of social justice amounts in practice to the social question of how a society should cope with poverty, assuming that the poor are always with us, that even in the richest nations pockets of seemingly uneradicable poverty exist alongside extremes of wealth. This was noticed by the earliest philosophers to observe the social mechanics of developing capitalism. Hegel, to take one example, tells us that ‘civil society affords a spectacle of extravagance and misery as well as of the physical and ethical corruption common to both’.¹

But if the co-existence of great wealth and deep poverty is a problem within states, it is a much greater problem between states

or between the peoples of different states. In the face of these dismal facts, one important philosophical question is this: are these different problems – one of social justice, say, the other of global or international justice – or are we confronted by the same problem arising in different contexts? Relatedly, are the philosophical principles which one might employ to judge the justice of these different manifestations of radical inequality the same in each case or are different principles needed to address them and to prescribe redistribution where that is deemed necessary? It is fair to say that the problems of international distributive justice are in their academic infancy, though already one can identify utilitarian, Kantian and contractualist approaches.² With great reluctance, I shall put these questions to one side, trusting, perhaps naïvely, that one will have made a start to the consideration of them if one has deliberated carefully about social justice within states.

I shall begin the discussion by investigating one of the latest entries to the field of competing theories, the entitlement theory of Robert Nozick. I begin here, anachronistically, because I believe Nozick's account is the simplest and most straightforward account of social justice; if not the best-founded, it most readily captures our untutored intuitions concerning who can validly claim the right to what property. As we shall see, these intuitions will need to be corrected.

Entitlement

With luck, you will own the book you are presently reading. Let me assume so. How do you vindicate your claims of ownership if these are challenged? 'Is that your copy?', someone may ask. If you are careful and well-organized, the issue of proper ownership will likely be settled as soon as you produce a receipt. This may not fully allay the enquirer's worries. She may be investigating your earnings and wonder how you acquired the wherewithal for this expensive purchase. So you bring out your pay-slips and bank statement and show that the item was purchased within your publicly declared means. What more can you be expected to do? The challenge was made and met. You have shown that you are entitled

to the copy you possess. You have demonstrated that it is your private property.

Nozick's theory of entitlement

Concealed in this episode is a theory of entitlement, associated in recent times with Robert Nozick. On Nozick's account, a distribution of holdings is just if it meets three conditions:

- (1) *Justice in Acquisition*: 'A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.'
- (2) *Justice in Transfer*: 'A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.'
- (3) *Rectification of Injustice*: 'No one is entitled to a holding except by (repeated) applications of (1) and (2).'

The principles of just acquisition concern the 'legitimate first moves'. Acquisition, here, means first or original acquisition of goods which are owned either by nobody, or else inclusively, by everyone in common. The principles of just transfer concern 'the legitimate means of moving from one distribution to another'; standard examples would include sale or gift. Principles of rectification operate when holdings are illegitimate in respect of acquisition or transfer. They would require, for example, that stolen goods be returned to the legitimate owner. If we apply the bones of this entitlement theory to the episode described above, where your possession of this book was challenged, you vindicate your possession by application of the principles of justice in transfer when you give evidence of purchase. Had the book turned out to be stolen or kept following a loan, restitution to the owner would be prescribed by application of justice in rectification. As Nozick points out, 'the entitlement theory of justice in distribution is *historical*; whether a distribution is just depends upon how it came about'.⁴

Nozick's entitlement theory serves as a mighty critical instrument. All manner of theories of distribution are rejected as they

are revealed to be inconsistent with it, as we shall see later. The oddity of his presentation is that, having given a general outline of the form of the entitlement theory, he should do so little to give it substance by way of a detailed specification and defence of the three principles. 'I shall not attempt that task here',⁵ he tells us, and to my knowledge he has never returned to it. What he does have to say concerning the first principle, for example, is a repudiation of Locke's attempt to vindicate original acquisition. Nonetheless, if there is a default position concerning the justice of any particular distribution of private property, Nozick has evidently given us the structure of it. Any theory of distributive justice must, when fully articulated and consistently applied, give rise to a specification of who owns what property which can be adjudicated by reference to the legitimacy of the transactions which produced the given distribution. Whether these transactions amount to the private agreements on which Nozick concentrates, i.e. gifts, bequests, sales etc. or government transfers, which Nozick deems illegitimate, e.g. social security grants or payments, state pensions or whatever, *some* story must be available to be recited when holdings are challenged. If a system of private property is held to be unjust, this must entail that some members of a community are not entitled, *vis-à-vis* the range of *permissible* stories which may be told, to the goods that they claim.⁶ Justice will be done when the goods are reallocated in accordance with an appropriate scheme of rectification.

The glamour of Nozick's proposal derived from its link to common-sense intuitions governing who owns what, as exemplified by my story concerning your book, together with its promise to undercut reams of published debate on the subject of justice. All readers will be familiar with the thought that a just distribution is an equal distribution. Some may have moved on to the thought that we can improve on equality if the worst off in a society with an unequal distribution are better off than they would be under conditions of equality. Others will insist that a just distribution will be responsive to claims of need; others, still, may require that desert and merit be recognized. Philosophically tainted contributors to the debate will argue that no distribution can be just which does not maximize utility.

Nozick himself was well aware of the power of his entitlement

theory to counter theories developed from intuitions or theoretical stances of the kind rehearsed above. He contrasts his *historical* conception of justice with *current time-slice* principles which employ a structural principle to determine whether a distribution is just. A current time-slice principle will ask not: How has this distribution come about? but: Does this distribution achieve a specific goal or *end-state*, does it exemplify a specific *pattern*? Any theory of the sort that begins: 'from each according to his _____' and concludes: 'to each according to his _____', is a patterned theory, as is equality of wealth and income.

An unusual example of a patterned principle is the one Hume deemed hopeless, if well-meaning: 'to each according to his moral virtue.' Nozick's point is that such a principle commits us to an inspection of the current distribution of goods to individuals to see whether or not it accords with this principle. If it does – the more virtue a person displays, the more goods they hold in comparison to others of lesser virtue – the distribution is just, *regardless of how that distribution came about*. If we find persons of lesser virtue holding more goods than the more virtuous, the distribution is unjust, again *regardless of the provenance of that distribution*. Nozick now goes on to reveal what he takes to be a systematic weakness in principles of this form.

He proposes a thought-experiment. Take your favoured pattern of just distribution (D1) – not wealth proportionate to virtue, but, say (more familiar, if equally implausible) strict equality of wealth – and suppose it is exemplified. Now, Wilt Chamberlain signs for a basketball team that will pay him twenty-five cents for each fan admitted to home games and so collects \$250,000 by the end of the season from the million fans who have willingly turned up to watch him. (Multiply the total by twenty or more to make it realistic in terms of current prices and earnings.) Is he entitled to these earnings? Clearly, the resulting distribution (D2) is unjust as measured by the principle of equality. Each fan has \$25 less and Wilt has \$250,000 more. Yet 'each of these persons *chose* to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review*.'⁷ The implication of patterned theories of justice is that, since this society has moved from a just to an unjust pattern of holdings, this position needs to be rectified:

most easily by confiscating Chamberlain's earnings and restoring them to the willing punters. Nozick's conclusion looks devastating: 'The general point illustrated by the Wilt Chamberlain example . . . is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives.'⁸ Liberty upsets patterns.

This conclusion should not be judged to be as iconoclastic as Nozick would have it. Those who value liberty may be disturbed at the prospect of 'continuous interference with people's lives'. But if they reflect that the form taken by interference is likely to be taxation and that, for most folks, 'continuous' means every time they receive a pay-slip or purchase a meal, they may judge that they do not experience this continuous interference as a significant loss of liberty. The value of keeping one's pre-tax earnings may not be negligible, the payment of income or sales taxes may be a burden, but most folks get used to it. Perhaps they notice that it is those who earn much the most who gripe the most – and who are most likely to emigrate to some tax-haven. For many people, the pain of paying their tax bills is as irritating as the pain of traffic lights switching to red whenever they are in a hurry, of pedestrians appearing on a zebra crossing just as they are about to drive across it. They see tax cuts as a notable gain rather than an insignificant reduction of an unjustified impost. As we discovered when thinking about liberty, not every restriction or impediment or interference weighs significantly on the scales.

Of course, those who are sanguine about taxation, seeing it, alongside death, as the fate of all mortals, may be underestimating the moral iniquity of their predicament. They may be the sort of victims of a prevailing ideology that a quick dose of smart philosophy may cure. They may read and think, and recognize Nozick as a philosophical faith-healer. 'Taxation of earnings from labor is on a par with forced labor', Nozick tells us.⁹ I doubt it. What's more, I think it would be seriously impertinent to ask those who *have* undertaken forced labour – in the Gulag, in Nazi factories, in the Cultural Revolution in China, in the fields of Cambodia – whether they agree.

It's fair to combat rhetoric with rhetoric. But if an argument reads as truly sinister in the light of one's antecedent political

commitments, the philosopher should cough discreetly and get down to the business of exposing its weaknesses. One should put the rhetoric to one side and concentrate on the detail of the arguments. There are good arguments against Nozick's position and they should be carefully rehearsed.

The best way to start is to take up the entitlement theory. Its first element is the theory of just acquisition. Acquirers are first holders, first occupants. What was the status of, say, land before it was first taken into possession? There are two answers to this question, each of which makes first occupancy a puzzle. The first answer is that the land belonged to no one. Anyone could legitimately walk across it or pick mushrooms from it. The first acquirer then has a singular moral power. Suppose, as Locke thought, property is acquired by mixing one's labour, by working on the unowned land. We now have the possibility that agents may, by their diligent pursuit of their own interest, create obligations for all others which hitherto did not exist. A right of ownership having been acquired by proper means, everyone else is now under a duty to respect the owner's exclusive possession.¹⁰ What can be the source of such a radical moral power?

The same question arises even more pointedly when the normative background is not a state of no-ownership, but rather one of co-ownership. Locke believed that God had granted the world to mankind in common. Everyone, originally, had *inclusive* property rights to the earth, its fruits and its beasts: 'this being supposed, it seems to some a very great difficulty, how anyone should ever come to have a *Property* in any thing'.¹¹ It does indeed, not least since those who have acquired an obligation in place of a previous inclusive liberty right have demonstrably *lost* a moral right they could legitimately claim hitherto. Locke throws a battery of arguments at the reader to justify a right of original acquisition. Famously, that property which one has in one's own person is somehow annexed to the portion of the world with which one has mixed one's labour. Rights of self-ownership are fuelled into the possessions one has created. The metaphors are normatively impotent as many commentators have seen, including, ironically, Nozick who asks: 'why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?'.¹² If I add value to the land, why do I gain the land rather than just the

added value? Locke's argument can be read as a claim of desert. The digger with dirty hands has earned the right to make exclusive claims. Maybe, but what can justify the losses that everyone else undertakes? They have done nothing to deserve these. Locke's condition, that there be 'enough, and as good left in common for others', counters this objection, but if the 'others' are to include all future possible claimants (and why not?) that condition can never be met. Distinctively consequentialist arguments are suggested by Locke, too. Had there been no private property (strictly, had the consent of all the co-owners been required to legitimize acquisition), mankind would have starved, notwithstanding the original plenty. Further, private property is a condition for industriousness from which everyone benefits. These arguments are promising, but we shall keep them up our sleeve, since if they do justify original acquisition they may also serve to justify redistribution and the taxation of Wilt Chamberlain.

The most obvious objection to the employment of arguments concerning original acquisition to justify present holdings is the obvious fact that, even if there were arguments strong enough to justify the would-be property owners simultaneously benefiting themselves and dumping the costs of their acquisition on others, it would be quite impossible to track down episodes of original acquisition with respect to most of the goods of this earth. Provenance has vanished. Original acquisition is shrouded behind the same mists that conceal the Original Contract. If the entitlement argument is to be taken seriously in the way Nozick suggests, acquisition refers to literally first occupancy, first ownership, first title to land and the fruits of it. And no one has a clue about such ancestral claims.

Suppose we ignore the possibility of claims of justice originating in acquisition. Why can't we just draw a blank over disputes that take us back beyond, say, 1750, assuming the legitimacy of ownership claims at that point and legitimating the present in terms of legitimate transfers, supposing these are properly recorded after that date? To simplify massively, suppose further we are concerned solely with transactions classified as wages, gifts, sales and bequests. We must not suppose that transactions of each of these kinds represent legitimate transfers so long as parties to them are fully informed and the executions are voluntary and

properly registered. Take gift, for example. This may look simple, but there are alternative and incompatible rules in the field. One says: all transfers by gift are legitimate. Another says: transfers by gift up to the value of £ x are legitimate; gifts above that value are legitimate only if y per cent of the value of the goods is paid by recipients to the government. Exactly the same structure of alternatives can be articulated in respect of wages, sales and bequests. How is one to decide which transfer principles are best? One can say: all subventions from gifts are confiscations, all reallocations of sales receipts are theft, all reapportionment of bequests is grave-robbing, as one can say that all taxation of earnings from labour is on a par with forced labour – but saying these things doesn't make it so.

The Scots, in a recent constitutional settlement, voted both to institute a devolved Parliament in Edinburgh and to give that Parliament tax-raising powers in addition to those assumed by Westminster. Does this mean that the Scots are (illegitimately?) forcing themselves to labour for the benefit of those amongst them who receive the public services which the taxation funds? Of course, the fact that a majority of those voting in a referendum supports a policy of granting their representatives the power to tax does not settle the philosophical issue. If all taxation violates rights, and if rights are side-constraints on government action, then no taxation is justified. But not even Nozick believes this. Taxation for the purposes of the nightwatchman, to guard the city walls (defence expenditure), to keep safe the city streets and protect citizens in their private homes (law and order), is justified – and provision for tax collection must be made.

It follows that one cannot simply wave the flags of the separateness of persons and the importance of autonomous lives to those who have only one life to lead and watch the proponents of compulsory taxation give up the fight. The substantive issues concern the *boundaries* of legitimate compulsory taxation and one cannot expect these to be derived *a priori* from foundational moral principles.

The specification of rules of transfer for any given society will be the work of centuries of careful adjustment to the circumstances of production, distribution and exchange, to the demands of existent patterns of domesticity and family life, and to the

details of specific constitutions governing hierarchies of local and national political institutions. We can expect these arrangements to be vindicated by a range of values. We can expect the detailed rights concerning transfer to cut across one another. Rights of bequest and rights of inheritance qualify each other. We can expect the general utility of specific arrangements to recommend their institution as rights. What else could vindicate a state's right of compulsory purchase as required for the provision of a public good? We are likely to find a distinct value in private property – which leads us to notice another real weakness in Nozick's argument.¹³

His core intuitions concern the separateness of persons and the value to each of them of their leading an autonomous life. Respect for persons on the Kantian model requires us to treat persons as ends, not as means merely, to echo the *Groundwork*.¹⁴ This is a vague demand, but assume it can be put to work in central cases. It evidently proscribes slavery, rape and other non-consensual ways of using other persons and their bodies to one's own advantage. Kant was quite clear that this principle does not govern the way that we treat the earth, the fruits of the earth and the beasts of the field. These do not possess that rational will which is a necessary and sufficient condition for treating agents as autonomous beings.¹⁵ Your autonomy is violated if I take one of your kidneys without your consent, but what rule do I violate if I saw a branch off a tree or quarry rocks from a mountain? The tree and the hillside have to be attached to someone as property before any harm or injury is done, and then it is the owner who is wronged, not the tree or the mountain. So we need to understand property as a mode of attachment, a relation between persons and things. And we need to justify the claims that persons make who stand in such a relation.

One interesting theory in the field is that of Hegel. His argument in defence of private property is that private property is necessary for persons to be free.¹⁶ The story is complex, but the core idea is that personal freedom – which is but one dimension of freedom for Hegel – is achieved when the will of agents is embodied in the objects they individually possess. Property enables the will to be projected in a fashion which permits it to be intelligible to the owner and to others – and intelligibility,

self-understanding in a sphere of public meaning, is a condition of freedom. When we look at our friends' bookshelves, we may be interested in the books, but just as likely we are interested in our friends in a way that supposes they themselves understand how their choices may be read by those who recognize the titles. Freedom entails interpretation – which licenses subterfuge. We all know what's going on when the novelist portrays the parvenu buying a whole library at auction.

I caricature Hegel's arguments with scandalous brevity, but consider the upshot. If we understand private property as an expression of freedom, and if personal freedom is a distinctive and universal value, oughtn't everyone to have some? It is a matter of difficult textual exegesis to determine whether Hegel accepted this conclusion. In *The Philosophy of Right*, at §49, he denies that his account of private property has any distributional implications, though in an appended note he is reported as saying that everyone should have some property and, at §§240–5, he suggests that poverty is a moral affront, depriving citizens of their personal integrity. Whatever the nuances of his published views, he ought to have stated firmly that the lack of all property is a personal disaster in a society which recognizes private property as central to freedom.

Exactly the same charge may be made against Nozick. Whatever grounds are advanced as foundations for a right to private property are likely to have some implications concerning the distribution of it. The greater the importance private property assumes, the more necessary it is that some canons of distribution be acknowledged.

In Nozick's case, we must guess what the groundings of a value of private property might be. Presumably property is necessary if individuals are to live their lives as separate autonomous agents. This makes sense; without property in a propertied society individuals are driven from pillar to post. One doesn't need to endorse all the details of the Hegelian story to understand this. In which case, it is necessary to work out how much private property, and of what kind, is necessary for an autonomous life. Ignore the difficulties of this task for the moment. My conclusion is formal. If *stuff*, things, bits and pieces of physical matter, cannot be treated as means merely, by anybody, this can only be because they are the

private property of someone else, because in treating things in this way we are failing to respect some person's property rights. Whatever account we give – of how using things can be damaging people – it will stress the value to people of the things they claim to own. If ownership is of some such value, some measure of private property should be accorded to everyone. What measure? Who knows? But whatever the measure that emerges from a philosophical investigation of the value of property, it will be applied in a *patterned* theory of justice. If private property is a condition of a free and truly autonomous life, we should work to make everyone autonomous. We should make sure they all have enough property to live a life of value. The pattern that freedom necessitates may indeed require that freedom (in the specific respect, say, of being in command of all of one's earnings) be compromised – and compromised continually in the fashion of regular taxation – but I can think of no defence of private property that does not yield this consequence. To be blunt: if private property is *that* important, everybody had better have some and enough of it.

F.A. Hayek

This lesson is worth reiterating against another theory (or non-theory) of social justice – that of F.A. Hayek. Hayek's published work is a distinctive amalgam of studies in economics, politics and public administration. In an age when political philosophy was proclaimed to have died the death, a seminal work such as *The Constitution of Liberty* (1960) had the appearance of an academic dinosaur lumbering around fields now devoted to the cultivation of other interests. Then, spectacularly, Hayek lived long enough to see his work taken up by powerful and determined politicians, notably Keith Joseph and Margaret Thatcher in the United Kingdom in the 1970s and 1980s, as a new orthodoxy to which 'there is no alternative'. Dying in 1992, he lived long enough, too, to see some of the misery and social disintegration caused by his disciples.¹⁷

Hayek is a sceptic concerning the value of social or distributive justice. The term 'social justice' is 'empty and meaningless', a 'hollow incantation'; he perceives that the 'Emperor has no clothes', that the ideal of social justice is a mirage.¹⁸ One element of his

scepticism derives from an argument that should carry no weight. Justice, he insists, is a negative value expressed by conformity to a system of rules that have the logical form of Nozick's side-constraints: 'Do not. . . .' Injustice is witnessed only when one individual intentionally and illegitimately coerces another.¹⁹

Suppose a pattern of ownership emerges from voluntary inter-personal transactions of the sort imagined in Nozick's Wilt Chamberlain example. This new array of holdings cannot be deemed unjust because it was intended by no one; it is the unintended (though perhaps anticipated – by clever Wilt) outcome of thousands of independently taken decisions. Wilt is lucky that his skills elicit such a response. My mother's skill at dominoes, though equally distinctive, has earned her little. Expand this example so that all sorts of free market transactions are included. The pattern of holdings that results, willy-nilly, from thousands and thousands of market transactions cannot be deemed unjust because no one intended their realization, however well-off the winners and however poor the losers. Michael sells his council house, purchased for £5,000 in Lewisham in 1984 for £300,000 and retires to Spain; Judy finds that she cannot keep up the payments on hers and is forced into repossession. John starts a business and fails, losing his house in the process. Bridget offers the same services, five years on, and finds an eager market. She's rich. This is the diet of awful warnings and splendid examples that feed our gossip and fill the commercial pages of local newspapers. Good news – bad news. No one was coerced or fiddled. The outcomes are not unjust however uneven the pattern of wealth and income and however discrepant it may be with persons' skills, efforts or qualities of character.

We can see the logic of this conclusion, but should reject it nonetheless since its premise is tendentious. If we were operating with a concept of justice so clear and uncontentious that the derivative concept of social justice were an evident solecism, Hayek's argument would be decisive. But we aren't. As things stand, it's as though one were to argue that since promises are transactions between persons and treaties are supposed to be promises effected between states, no treaties are binding since states cannot, by definition, make promises. We don't disallow the concepts of social justice and international treaties. We go back to

the drawing-board and articulate our concepts in a way that permits further discussion.

One notion behind Hayek's dismissal of social justice is the thought that the targets of moral judgements can only be individual persons and their activities. It's bad luck but not unfair if one is born with cerebral palsy or a severe learning disability. It is not a condition of injustice that some (most) persons are mobile and others not, that some (most) can learn to read and write and earn their own living and others not. In the absence of a God who has intentionally portioned these goods unequally, states of affairs such as these are not subject to moral judgement. They are the product of misfortune. This point must be conceded. So far as the origin of these states of affairs are concerned, they are not unjust.

So far as the maintenance of these states are concerned, they well may be. It's bad luck that Jim was born with palsy, but this should not be thought to settle the issue of justice with respect to his continued immobility or with respect to his inability to cope with the physical demands of a normal schooling. If practical remedies exist, and nowadays they do, then the question of whether social provision should be made for them in the name of justice is open (and will be considered later). Is the same true in respect of the outcome of market transactions? I don't see why not. If markets collapse and whole industries go under, large numbers of people may be unemployed and unable to find gainful work through no fault of their own. Their resultant poverty is not the product of injustice, but their continuance in a state where they do not have the resources to fend for themselves may well present a moral issue to the society in which such structural unemployment has occurred and it is natural to use the language of justice to frame the demands of the poor for assistance. Social justice, the sort of justice that requires the redistribution of goods within a society, does not have to be understood as the remedy for intended injustice, as though injustice has to be demonstrated before the demand for justice has any purchase. The examples I have been using suggest that the fact of dire need will serve.

Hayek denies this, believing that the concept of need is tainted by the normativity of the variety of conceptions of human nature that are employed to specify its content, but now, of course, the argument has moved on (and we shall review this objection to

arguments from needs later). He does not deny that all persons should be guaranteed a minimum level of subsistence represented as a minimum level of income but insists that this is not a matter of justice. Often it will be a socially prudent safeguard against the possibility of serious social unrest.²⁰ At other times it may be a socially organized charitable response to the embarrassingly in-your-face challenge of widespread indigence. In point of fact, responses to desperate poverty or conspicuous health needs may be of these kinds and may be justified in these ways, but the contingent availability of other reasons for redistributing wealth and income does not disallow the claims of justice.

The crucial weakness of Hayek's denial of social justice is exactly the same as Nozick's. He must assume the legitimacy of some starting point from which a pattern of market-based holdings can emerge. In Nozick's case we postulated some quasi-Kantian doctrine of rights deriving from persons' autonomy as the candidate justification most consonant with his moral outlook, and then insisted that any such doctrine must issue in at least a minimally patterned theory of justice in holdings: that everyone should possess sufficient property and receive sufficient income to live an autonomous life. Hayek shows no inclination to follow such an abstract route. By contrast, but to the same effect, he supposes along with David Hume that the institutions of property, the rules and practices which dictate who owns what in a modern capitalist society have evolved as an efficient solution to the problems of the allocation of goods. He supposes that the rules governing property acquisition and exchange must have a functional utility, otherwise they would have been jettisoned hitherto.

This is a perfectly cogent line of argument. Indeed we noticed this brand of conservative utilitarianism earlier. But it is important to realize that it yields only a default position. If justice amounts to the assumption of utility in the rules of the market, then those rules are open to amendment and change in the name of justice if utility can be better served by amending them. On this account, social justice is not distinct from utility, but as a derivative principle it should not be thought to be idle. It may well provide the sort of bulwark against widespread social experimentation that Hayek insists upon, but equally it may license the challenge that social justice is violated by extreme disparities of

wealth and income or the fact of debilitating need. *Whatever* principle is employed to defend the distribution of income and wealth prior to the sequence of market transactions must be available for judgement on the outcome. That the outcome was not anticipated, that the consequences were not intended, that the resultant pattern was not designed: none of these claims (and we can grant their truth) are to the point if the upshot is inconsistent with the principles of justice employed to vindicate the initial set of holdings.

I said earlier that this discussion of Hayek would amount to crude surgery. Followers of Hayek will no doubt call it butchery. So be it. It certainly does no justice to Hayek's positive defence of the free market as against regimes of central planning (but one can deny that the only way of recognizing demands of social justice is by establishing the bureaucracy of the pre-1989 Soviet-style planned economy or through the acceptance of institutions which irrevocably lead in that or other totalitarian directions) and it does not address Hayek's philosophical criticisms of specific conceptions of social justice. It does not discuss his conception of the rule of law (except to insist that the law of property must be justified in accordance with principles that find application in the moral judgement of states of affairs that issue from the observance of such laws) and it does not examine his anguished discussion of constitutional law-making (fuelled by a distrust of the common people who are at once citizens of a democracy and members of trades unions). What I claim (to a readership whom, I suppose, can easily identify my hostility to Hayek's views) is that social justice is not a value that can be dumped in the rubbish bin of philosophical fairy-stories or pseudo-concepts as a consequence of Hayek's assaults, but must be carefully articulated and investigated.

Private property

My conclusion is that, in considering the problem of justice in the distribution of goods, the first step must always be the articulation of a theory of property. We need to know what principles can be advanced to legitimate a system of holdings. Thus far we have been

assuming that what is at stake is private property. This is because, in following Nozick's treatment of justice, we have been concerned with the allocation of property to individuals, with individual claim rights to property. But as we noticed in Chapter 4, there may be group rights as well as individual rights, and we are perfectly familiar with groups or collectives, as well as individuals, claiming exclusive property rights. There may be family property, university property, church property, company property, village, city, county or regional property, the property of the state and, indeed, of international associations. These may give rise to inclusive property rights, in virtue of which group members claim access, or they may not. A crofter may put his cow to graze the common land of the township, but a citizen cannot wander over state property at will. In addition, there are arguments of principle concerning which sort of ownership is most apt for which type of good. Are the means of production, distribution and exchange best owned by individuals or groups? If groups, which groups – those who work on or with the means of production, or the state?

Definitions at this point are hazardous. We can imagine someone arguing that all property is private – private, that is, to the agency which claims exclusive rights over the domain, private though the agency is a collective, private in the sense that the collective agency asserts rights against other agencies or individuals who are not members of it. Contrariwise, one may claim that all ownership is group ownership, since every domain will be regulated by rules of use and access which are ultimately legislated for by the state. The sovereign, insists Hobbes, has 'the whole power of prescribing the Rules, whereby every man may know what Goods he may enjoy and what Actions he may doe, without being molested by any of his fellow Subjects: and this is it men call *Propriety*'.²¹

Two hundred years of argument concerning private versus public ownership, capitalism versus socialism or communism, can be organized around stipulated definitions of private versus public property which are deployed in debates over justice. My focus in this chapter will be on private ownership in the utterly conventional sense of ownership by individual persons or families. I confess that this decision may seem to beg questions and to preempt contributions from collectivist traditions which emphasize group membership or interpersonal solidarity as an integral

element in the identity of all persons. It may be that in the course of this enquiry we ignore our species being, the fact of our humanity, as we must take Marx to mean,²² or perhaps we fail to recognize fundamental features of our relatedness to others (our equality or our fraternity or solidarity as compromised by class antagonism) in virtue of our standing in respect of the way production of commodities is organized in the societies we inhabit. Oh well – we can't fight all our battles on the same terrain. At bottom, I shall assume, all of us live and die as discrete individual persons: a poor, meagre truth, but irrefutable. As individuals we require the goods of this earth to feed, shelter and otherwise sustain us. And so we must, as individuals, make claims against others for sufficient access to the bare necessities. We all of us require that the earth sustain us. Clean air, nourishing food, unpolluted water, clothing, whatever materials are necessary for warmth and shelter: such goods are all earthly, all are the product of our natural environment, and each of us would (or should) claim access to them in circumstances where they are denied or unavailable. At the point where the food and the fingers meet the mouth of the starving child, no one can deny her access. The object of property is centrally physical, a portion of the natural world.²³

There may be a range of schemes which aim to deliver the necessary goods to the individuals who require them. At the extremes we have respectively, private ownership and collective, but inclusive, ownership. In the middle, there are a myriad of combinations of each and we can expect political parties to fight amongst themselves for the optimal division. My intuition is this: in circumstances where the goods of the earth can be so apportioned that no one may die (or be subject to extreme discomfort whilst others prosper) as a result of an ill division, any distribution of these goods which has these dreadful consequences is unjust.

In conclusion, I deem the debate between private and public property to be peripheral to the issue of personal rights to the means of subsistence. This debate concerns the means of production and exchange rather than the rights which govern allocation. Issues concerning which is the optimum system for organizing production, which is the most efficient means of distribution, are secondary to questions of who requires which goods in order to live – and live commodiously, as Hobbes would put it. At bottom,

individuals, who live and may perish, are the subjects of moral claims. To suggest that philosophical problems concerning production and exchange are secondary is not to say such problems are insignificant, or to hint that the socialist agenda is to be cast aside following the triumph of the free market. That would be silly. After all it may emerge that a collective (socialist) system of ownership, production and exchange is required in order that persons be free as well as fit for a decent life. But these are questions we shall have to put aside for the moment. The first thing that we should address is the bottom line my argument has put into the foreground of discussion: what are our human needs?

Human needs

Suppose we have in place a property system governed by rules of entitlement and transfer concerning income and wealth. We can expect, following Hume, that all sorts of curious principles will find a place, given the contingencies of history, as mankind in our locality have responded to opportunities for finding mutual advantage and perspicuous general utility.²⁴ This will give us an inventory of who owns which goods. The rules of this game, explicit in the law, will likely be formulated in terms of rights of the different varieties charted in Chapter 4. A theory of justice will approach the detail of any given property system, whatever the story of its origins, as a standard, a test that the system must pass if it is to be judged legitimate and granted moral approval. Many such tests have been proposed, and we can consider only a few here. Arguably the most familiar, and probably the most contentious amongst philosophers, is the test of need. Does the property system that we are appraising meet distinctive human needs? So much social policy is predicated on the satisfaction of needs that one must suppose that a correct employment of the term is often sufficient to decide arguments concerning just distribution. In practice, and as with arguments concerning liberty and human rights, once contending parties come to agree that such and such a policy meets an evident need, policy disputes are concluded. But philosophical debates often begin at the point where political disagreements are settled. The very prominence of the concept of needs, its obvious appeal as