

ECONOMIC RIGHTS AS GROUP RIGHTS

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This article considers the moral claim that all persons have a human right to the material necessities of life, and that governments are obligated to assure them to individuals who have no other way to obtain them. It assesses that claim by exploring three questions. First, does the redistribution potentially required by even the most minimal economic right violate other rights, as libertarians say it does? Second, if redistribution is not barred by libertarian constraints, is a state obligated to provide a safety net against severe deprivation, or may it elect whether to do so? And finally, if there is a human right to the necessities of life, what are its parameters? I conclude that there is a human right to material necessities, but that typical formulations of the right misconstrue it. Economic rights are commonly described and promulgated as individual rights analogous to liberty rights. The arguments herein endeavor to show that, on the contrary, an economic right makes moral and practical sense only when framed as a group right by which the worst-off group collectively has a claim to essential resources that, with limited exceptions, prevails over any alternative, non-essential individual or societal use.

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INTRODUCTION

All human rights, whatever their content, share certain characteristics. They assert that the interest protected should prevail over the collective will and welfare, at least in the usual case. They claim application everywhere, regardless of the contrary views of any particular culture. And because they belong to every person, they suggest that all human beings share some qualities

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that give rise to these rights.

These are very strong claims. We should expect that, given the great variety of personal values, ambitions, and ways of life in the world, only a small subset of individual interests would be shared universally, and that very few of these would be so morally compelling as to trump the competing interests of the community as a whole. Your rights to life, bodily integrity, and religious liberty reflect such fundamental interests; here I consider whether economic security also counts as the kind of interest that generates rights to adequate nutrition, shelter, health care, and other basic necessities.

To answer that question, I will explore three issues. First, does the redistribution potentially required by even the most minimal economic right violate other moral rights, including rights to property and to the fruits of one's labor, as libertarians say it does? Second, if redistribution is not barred by libertarian constraints, is a state obligated to provide a safety net against severe deprivation, or may it elect whether to do so? And third, if there is a human right to the necessities of life, what are its parameters? I conclude that there is such a right, but that it cannot be understood as an individual right analogous to liberty rights. To make moral and practical sense, an economic right must be understood as a group right, according to which the worst-off group collectively has a priority claim to essential resources that, with limited exceptions, prevails over any alternative, non-essential individual or societal use.

I. THE LIBERTARIAN OBJECTION TO ECONOMIC RIGHTS

The cardinal human right is the right to life, a right that guarantees that one's survival is not determined by utilitarian calculations, market value, or majority rule. If it were subject to such external factors, we would be stripped of the moral status that is rightfully ours, the status of personhood. The right to life recognizes that each of us is an autonomous person who belongs to himself, not merely a fungible social resource. Respect for personal autonomy, and the self-ownership it implies, also leads directly to individual rights protecting freedom of speech, religious liberty, security of the person, and other "negative" liberty rights that keep us free from state interference.

Libertarians (or more precisely, libertarians of the right)¹ take an extremely expansive view of self-ownership. They believe that autonomy-based liberty rights apply as fully to our economic activities as our political and personal ones, and dismiss asserted rights to adequate nutrition, shelter, and other necessities on this basis.² In their account, rights exist in order to

¹ For simplicity, in this article I use the term "libertarianism" as it is most commonly understood, to connote libertarianism of the right. But there are also theorists like Noam Chomsky, Michael Albert and Robin Hahnel who identify themselves as libertarian socialists and reject the views ascribed to "libertarianism" in this article. Their definition of liberty is not confined to negative liberties, rejects absolute rights to private property, and includes worker self-management and other rights quite alien to right-libertarianism. See, e.g., ROBIN HAHNEL & MICHAEL ALBERT, QUIET REVOLUTION IN WELFARE ECONOMICS (1990); MICHAEL ALBERT & ROBIN HAHNEL, THE POLITICAL ECONOMY OF PARTICIPATORY ECONOMICS (1991). As an exemplar of right-libertarianism, I invoke the version Robert Nozick presented in his seminal book *Anarchy, State and Utopia*. Thirty-five years after its publication, that book remains the most prominent rendition of the libertarian view by an academic philosopher. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

² See, e.g., NOZICK, *supra* note 1, at ix (arguing that the only aid to the poor that is morally permissible is voluntary charity). This book set out Nozick's "entitlement theory," by which whoever "makes something, having bought or contracted for all other held resources used in the process . . . is entitled to it." *Id.* at 160. In contrast to this theory, Nozick criticizes "end-state" principles of distributive justice, which instead would impose redistribution of holdings to

guarantee self-ownership, and self-ownership more readily suggests a right to be left alone than a right to state assistance. Indeed, they say the former *rules out* the latter, since state assistance to some will generally require coercive taxation of others. For libertarians, the right to be left alone, and the specific negative rights that comprise it, leave the state with little role other than to defend its people and protect each person's opportunity to pursue the kind of life he chooses for himself.³ As I write these words, the libertarian objection to redistribution is center stage in American political discourse, thanks to the sudden rise of both the Tea Party and Occupy Wall Street movements.

Putting the objection most strongly, the libertarian philosopher Robert Nozick famously wrote that redistributive taxation is "on a par with forced labor."⁴ For staunch libertarians, taking some of the fruits of your labor so someone else can eat is no different *in principle* than extracting one of your kidneys so someone else can live: each destroys self-ownership by appropriating your body for another's benefit. Rights to one's property and to freedom of contract are the legal instruments that reflect and protect the moral entitlements to keep, sell or donate the fruits of our own labor, as we wish. It is worth noting that this philosophy has only partial salience to real-world conditions: it applies only to holdings that result from a continuous history of purely voluntary exchanges untainted by theft, fraud, force, war, or slavery, and, as Nozick admits, the record of unjust transactions in history could justify substantial redistributive rectification by a temporarily activist state.⁵ We can put that problem aside, however, because our focus here is on the libertarian principle, whatever its application.

The libertarian objection to redistribution is not self-evident and suffers from two weaknesses. It (1) overstates the liberties that respect for autonomy demands, and (2) shortchanges distributive justice because its vision of justice is almost exclusively procedural. The following two sections address these problems, followed by a third devoted to the nature of economic rights and the unconventional terms necessary to reflect it.

II. A LIBERTY-BASED COUNTERCLAIM

Regarding the first problem: whether autonomy rights must guarantee maximal freedom, or something less, cannot be determined without considering the proper scope of self-governance and self-ownership—the aspects of ourselves to which the libertarian principle should apply. We

achieve a favored pattern such as equality, or holdings proportional to effort. According to Nozick, such redistributive theories "institute (partial) ownership by others of people and their actions and labor." *Id.* at 172.

³ See, e.g., *id.* at 297 ("No state more extensive than the minimal state can be justified"); *Uncommon Knowledge, Take it to the Limits: Milton Friedman on Libertarianism* (American Public Television broadcast Feb. 10, 1999), available at <http://www.uncommonknowledge.org/99winter/324.html> (discussing the libertarian economist Milton Friedman's argument for the smallest government possible so as to afford "maximum freedom for each individual to follow his own ways, his own values, as long as he doesn't interfere with anybody else who's doing the same").

⁴ NOZICK, *supra* note 1, at 169. Nozick acknowledges that people are not compelled to work and can thereby avoid taxes, but says that by threatening force, the state limits their choice to paying taxes or living a life of bare subsistence. This "makes the taxation system one of forced labor and distinguishes it from other cases of limited choices which are not forcings." *Id.* He also argues that the system does not treat people equally by discriminating between people based on their tastes, since the person who prefers leisure to work pays no taxes but the person who prefers the opposite does. "Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures?" *Id.* at 170.

⁵ *Id.* at 231.

can fully subscribe to the libertarian thesis of individual sovereignty—and should, because each person indeed does have certain fundamental interests that must be immune from state interference and under his exclusive control—but that does not commit us to the view that these fundamental interests include total ownership and control over every object one has acquired or produced.

Each of us has a realm of sovereignty over our life, mind and body that is virtually absolute,⁶ a moral right that prohibits the state from deciding how long we may live, what we may read, and whether one of our kidneys should be confiscated to save another's life. But it is also obvious that this individual sovereignty does not afford us a moral right to do anything we want; it doesn't license me to go through a red light, pollute a river that flows through my land, deny shelter to someone in emergency conditions or fail to feed my child.⁷ The point of these examples is that the sovereign rights to self-ownership and self-governance are not self-applying. We must first determine the realm to which they properly apply.⁸ That step is missing in the libertarian argument that one's right to self-ownership necessarily entails a right to retain all the fruits of one's labor.

One description of the limits of individual sovereignty, associated with the utilitarian John Stuart Mill but routinely invoked by libertarians, is that we are free to act in any way we choose, so long as we don't inflict harm on others.⁹ This principle gives some content to the idea of self-ownership, and has great intuitive appeal because it is the most persuasive instance of the more general idea that decisions should be made by those who have the most at stake. The problem is that the "harm principle" depends crucially on what counts as harm to others. Some claim, with Mill, that it violates the harm principle to prosecute "victimless crimes," among which they would include laws criminalizing intoxication, possession of pornography, and failing to use seatbelts.¹⁰ But that conclusion depends on a definition of "harm to others" that excludes indirect and unintended effects. If we include such effects—counting, for example, the effect of seat belt

⁶ Or nearly so, granting that there may be an exception in catastrophic circumstances, as Nozick himself admits. *Id.* at 29 n.*.

⁷ At least, this is the prevailing view in both law and morals. *See, e.g.,* NOZICK, *supra* note 1, at 180 ("an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser"); Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978) (arguing that a desperate mountain climber has a right to break into an unoccupied cabin for safety); *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456 (1910) (holding that where defendant's boat remained docked without permission for protection from a storm, the defendant cannot be held liable for trespass due to private necessity, but is liable for resulting damages to the dock); C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 353, at 329-30 (6th ed. 1967) (explaining that ships in distress have long-standing right of entry into the waters of coastal states).

⁸ According to John Rawls, self-ownership may not even apply to all of your personal attributes. On his account, the distribution of talents among people is largely a matter of luck, "arbitrary from a moral point of view" given the influences of nurture and nature, so one's native talents should be deemed communal rather than individual assets. Therefore, "there is no more reason to permit the distribution of income and wealth by the distribution of natural assets than by historical and social fortune." JOHN RAWLS, *THEORY OF JUSTICE* 64 (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*]. *See also* John Rawls, *Reply to Alexander and Musgrave*, 88 Q. J. OF ECON. 633, 647 (1974). This claim is hard to swallow for those who feel responsible for their failures and successes, even while recognizing them as partly the luck of the genetic draw. Although Rawls' picture of the self is probably impossible for most people to accept (and actually bears some similarity to the unrealistically utopian utilitarian imperative that we owe strangers as much consideration as our own families), it is not so difficult to exclude other personal attributes, such as HIV status or physical addiction.

⁹ JOHN STUART MILL, *ON LIBERTY* 80-81 (David Bromwich & George Kateb eds., 2003).

¹⁰ *See, e.g., id.* at 159-62.

violations on medical insurance costs, or the cumulative effects of pornography on families and on the status of women—we will conclude that in the long run these activities do cause or threaten harm to others.¹¹

This problem is compounded by the fact that *so many* of our economic transactions potentially have harmful spillover effects on others (“externalities” in economic terms). The libertarian’s idealized picture of purely voluntary market transactions, between “consenting adults” who bear all the consequences of their exchange, ignores the damaging impact on third parties who have never agreed to or benefitted from them—for example, on Haitians whose soil was long ago plundered and depleted, on workers from corporate outsourcing agreements, on so many Americans from Wall Street’s severely under-collateralized derivatives and other failed deals, and, ultimately, on the livelihood of much of the world’s population (and even the survival of some nations) from global greenhouse emissions.¹² As the last example shows, spillover damage is the rule, not the exception. That presents a problem the harm principle alone cannot solve: if it counts such downstream damage as cognizable harm, the space left to individual decision will be negligible and intuitively unjust; yet the wholesale exclusion of such damage will also be unjust when third parties lose too much to be justified by only marginally symbolic liberties.

This is no reason to reject the harm principle, only to recognize that it is incomplete as a means of identifying where individual sovereignty must give way to collective interests. The harm principle handles the simple cases of *directly harmful* conduct and *fully harmless* conduct well. Both libertarians and their opponents agree that you have no liberty right to hit another, and for the most part agree that you should be free to act in any way that doesn’t threaten others (some paternalists and moralists excepted).¹³ But in the third case of conduct that has damaging downstream consequences for others, the harm principle alone is inadequate. We can best understand the argument between right-libertarians and their opponents as driven by this gap; the vituperative debate now raging about what the anti-government Tea Party calls “Obamacare” is an example.¹⁴

¹¹ There is another level at which it is argued that such harms are placed outside the harm principle, other than their distended chain of causation. The claim is that such harms do not violate the rights of others, and only harms that do violate the harm principle. But this just means we have to find a different criterion than the harm principle to demarcate the limits of self-ownership and self-rule, since the rights of others cannot be delineated by reference to the harm principle itself on pains of circularity.

¹² Daniel Hausman notes that although externalities are usually condemned by economists for their inefficiency (because those acting do not bear the costs of their action), they also raise issues of justice in that they inflict damage on others without their consent. He rejects the idea, just noted, that only externalities that infringe another’s rights implicate justice concerns, arguing that agreements that place third parties in a devastating economic position do as well. On that basis, in Hausman’s view, unjust externalities are not the exception but the rule in market exchanges, and justice claims based on the “consenting adults” conception of a victimless free market economy are based on unsupportable premises. See Daniel Hausman, *When Jack and Jill Make a Deal*, 9 SOC. PHIL. & POL’Y 95 (2001).

¹³ Those who believe that the state should enforce personal morality, or act to protect people from themselves, are of course exceptions, and a dwindling minority even among non-libertarians.

¹⁴ The law requires each of us to purchase health insurance in order to prevent the indirect burdens on others that result when large numbers don’t buy insurance (including the costs stemming from emergency room care for uninsured indigents, an unhealthier-than-average risk pool and insufficient preventive care). This “individual mandate” has libertarians up in arms and federal courts thus far divided. See *Judicial Scorecard*, N.Y. TIMES (Aug. 21, 2011), <http://graphics8.nytimes.com/images/2011/08/21/opinion/sunday/21editorial-stateofplay/21editorial-stateofplay-popup.gif> (summarizing the court decisions about the constitutionality of the healthcare mandate).

Some additional criterion is required to determine whether one has a right to engage in particular conduct that has an indirect but damaging impact on others. To discern it, I believe we must look to the value that a protected zone of liberty serves, the reason it is so important to us. Let us leave aside the societal benefits that accrue from liberty's "marketplace of ideas" and "experiments in living," which argue for a "liberty policy" but do not establish why a right to liberty attaches to each individual. What *does* give rise to an individual's right is rational and moral agency: given our capacity and resolve for making our own reasoned judgments about how we ought to live and who we ought to be, we are entitled to be free to do so. The moral right is to direct and shape one's own life. Liberty is the political corollary that respects this right.

The Supreme Court adopted something like this reasoning in its 2003 opinion in *Lawrence v. Texas*, describing a liberty right rooted in an autonomy of self that protects, not only our homes and our thoughts, but also "respects our private lives" and "personal decisions"¹⁵ In its opinion striking down a statute criminalizing homosexual sex, the Court identified the "heart of liberty [as] the right to define one's own concept of existence. . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."¹⁶

Lawrence is among the most libertarian of Supreme Court opinions, treating the right to self-rule as central and a matter of right; but, it also may be read as a standard for deciding to which activities the right to self-rule applies. On this standard, the right to self-rule protects those activities related to the "attributes of personhood."¹⁷ As the Court ruled, these attributes of personhood are diminished by denying people the freedom to choose their intimate relations. Certainly they are also devalued if the state restricts our freedom of thought and speech, or if it orders us to donate "spare" organs that would keep others alive.¹⁸ These violations all deny the intrinsic value of the individual as a self-directing agent. Is it at all plausible to claim that requiring people to pay taxes undermines or disdains the attributes of personhood in any remotely comparable sense?

The philosopher Charles Taylor has argued that the idea of liberty cannot even be *understood* without implicit background understandings of significance.¹⁹ His excellent illustration is the contrast between a ban on religious worship and a red light: each interferes with our freedom of action, but only the religious restriction is thought to infringe liberty.²⁰ If we don't recognize the qualitative difference between significant and trivial restrictions, he says, we end up

¹⁵ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

¹⁶ *Id.*

¹⁷ What about conduct that on anyone's view is not harmful in any way? One would think this a matter of individual sovereignty on harm principle grounds, whether or not the conduct disdains or diminishes the attributes of personhood. Although the *Lawrence* opinion does not mention the harm principle, it implicitly moves a large step towards the principle when it says that the majority cannot "use the power of the State to enforce [their own moral views] on the whole society through operation of the criminal law." *Id.* at 571.

¹⁸ Elsewhere I have discussed in detail why the right to life cannot justly be subject to such decisions, invoking as illustrative not the organ transplant case but the hypothetical example of state executions which predictably deter more killings than they inflict. See Eric Blumenson, *Killing in Good Conscience: What's Wrong with Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and other Human Rights Violations*, 10 NEW CRIM. L. REV. 209 (2007).

¹⁹ Charles Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN* 175, 176-77 (Alan Ryan ed. 1979).

²⁰ *Id.* at 182.

saying Communist Albania was a freer country than Britain because, with so many more traffic lights, the English presumably were restricted in their actions many more times a day than were all the Albanian drivers and religious believers combined.²¹ Thus, liberty cannot be defined as simply the absence of external constraint, but must also factor in the significance of the activities at issue.

The line I have drawn singles out for protection the activities that ensure we can each pursue the kind of life and identity we value. Only such activities give rise to the liberties that are ours by right as autonomous beings. These liberties must be extensive to guarantee us the area of individual sovereignty required to make the kind of decisions that significantly define our lives; they include the liberties to develop not only our own beliefs and values, but the kinds of family life, friendships, career, sexuality, talents, creations, and experiences we will pursue. These are choices that help form the “self” we have a right to control.

By contrast, a law that requires us to pay taxes (or obey traffic lights, or wear seatbelts, or maintain a safe workplace) compels us to do something without limiting our autonomy in any of these areas, unless set at an unreasonably exorbitant level. The libertarian objection to it asserts no more than a right to do what you want, a right that applies no matter how trivial the conduct it protects.²² That alone should not be enough to justify an economic system that unnecessarily damages a large segment of society, however indirectly, or prohibit policies to rectify it.

If this is correct, there is room for some degree of redistribution without abridging the liberties that safeguard autonomy, and governments need not be passive observers of dire economic privation or extreme inequality. This argument does not establish any contrary duty to alleviate these ills, merely that the state has the right to do so. But further reflection on the libertarian’s concern for autonomy, agency, and freedom arguably suggests such a state obligation.

Let us begin by accepting, as we should, the same core beliefs on which the libertarian objection to redistribution rests: the intrinsic value of leading one’s own life, and the self-ownership this implies. The redistributionist claim here builds on this same foundation, but it asserts that respect for personal autonomy gives rise not only to the liberties that allow one to exercise it, but to certain economic rights as well. Here is President Franklin Roosevelt’s version, from his celebrated 1944 State of the Union address proposing a “Second Bill of Rights” to guarantee economic security:

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. As our nation has grown in size and stature, however—as our industrial economy expanded—

²¹ *Id.* Taylor goes much further in rejecting what he calls the “crude” negative liberty theory that is concerned exclusively with freedom from external interference, arguing that liberty is properly understood as an “exercise-concept,” not merely an “opportunity-concept.” The exercise is self-realization. On his account, we are un-free not simply by virtue of external obstacles to doing what we want, but by obstacles to our own self-realization, including such internal obstacles as false consciousness and compulsions we wish we did not have.

²² *See, e.g.,* Jan Narveson, *Collective Rights*, 4 CANADIAN J. L. & JURIS. 329, 338 (1991) (“To hold that individuals may do as they please is necessarily to hold that they may do so with bits of the external world that they have in one way or another come to involve in their activities.”).

these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.²³

Poverty is said to erode freedom in a number of ways. Witnessing the rise of Hitler and Mussolini in devastated post-war Europe, Roosevelt saw poverty as an incubator of dictatorships. He may also have deemed poverty to constitute its own form of tyranny, by so drastically limiting an indigent's opportunities to control her life and imagine a better one, let alone realize it. But to restrict ourselves to libertarian premises, as this argument aims to do, let us focus on the narrower but related argument that the freedoms libertarians honor truly exist only when a person has the means to avail herself of them. Is this true?

Many people believe that we remain "free to do X" so long as we are not subject to government interference, and that whether we use, or have the means or capacity to use, that freedom is a different issue.²⁴ To this, others say that poverty constrains our freedom of action and subjects us to state interference as well: why should we discount in advance the interference with an indigent's freedom of movement when a shop owner (and, if called upon, the state) prevents him from entering a store? (Marxists, of course, argued that the institution of private property "misrepresents social relations of constraint as people lacking things."²⁵) Still others think non-interference is not a rich or realistic enough conception of freedom. Freedom can be conceived instead as non-domination, a view that may sometimes require state intervention to

²³ Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16518#axzz1aUJVH7b6>. Roosevelt's proposed Second Bill of Rights was not intended to amend the constitution, but to be enacted as law. His proposed economic rights were the following:

(1) The right to a useful and remunerative job in the industries or shops or farms or mines of the nation; (2) The right to earn enough to provide adequate food and clothing and recreation; (3) The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; (4) The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; (5) The right of every family to a decent home; (6) The right to adequate medical care and the opportunity to achieve and enjoy good health; (7) The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and (8) The right to a good education.

Id.

²⁴ See, e.g., ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* liii (1969) (distinguishing between negative liberty and the conditions of its exercise); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); RAWLS, *THEORY OF JUSTICE*, *supra* note 8, at 204-05.

²⁵ G. A. Cohen, *Freedom and Money*, <http://www.howardism.org/appendix/Cohen.pdf>, at 14. Cohen argued that "a property distribution just is . . . a distribution of rights of interference. . . . The right profess to be hostile to interference, as such, but they do not really oppose interference as such. They oppose interference with the rights of private property, but they support interference with access by the poor to that same private property, and they consequently . . . cannot defend property rights by invoking the value of freedom, in the sense of non-interference." *Id.* at 13, 25.

If one disputes Cohen on grounds that the kind of interference that counts is interference with one's moral rights, the issue then becomes whether individuals have a moral right to keep everything they have acquired or produced, or rather a moral right to economic security – the very question at issue. In either case, a definition of freedom as non-interference does not by itself resolve the merits of the libertarian objection to redistribution.

foster the institutional conditions that support a level playing field.²⁶ It has also been conceived as self-mastery, as the idea that we are only free when we are in control of our own lives. On this account, laws, poverty, and internal compulsions all may count as denials of freedom.²⁷

On any account, however, the value of freedom is reduced without the ability to use it. So the relationship between freedom and resources can't be denied, whether it is the *existence* or the *value* of freedom that is at stake. There are countless examples. The defendant's right to defend himself at a fair trial is likely to be unrealized if he cannot afford a lawyer to represent him. The First Amendment guarantees the right to read virtually anything, but that right means less to a person without access to an education. The right to property is less valuable to someone who has none. As to freedom of contract, a desperate person's "voluntary" agreement may be more aptly described as an unwelcome submission to exploitation. In all these cases, we cannot avail ourselves of our liberties without the means to do so.

There is also a deeper connection. If, as I have said, liberties constitute human rights because they guarantee rational human beings their due—the freedom to shape their own lives according to their autonomous choices—then the value of these liberties is in part proportional to the autonomous capacity of the person they protect. Severe deprivation saps the value of liberty because, at the least, autonomy requires a rational and deliberative capacity that is greatly diminished when a person is so impoverished that his life is consumed with desperate attempts to satisfy basic needs. At the extreme, as Henry Shue argues, "malnutrition, or fever due to exposure, that causes severe and irreversible brain damage . . . can effectively prevent the exercise of any right requiring clear thought."²⁸

With this relationship in mind, it is worth revisiting Nozick's entitlement theory to note one additional implication. If human rights serve to protect the exercise and development of one's autonomous capacities, and if we accept the plausible claim that there is a level of welfare necessary to allow a person to utilize these capacities, an unfettered and untaxed free market does not afford the full respect for personal autonomy that Nozick suggests. Some degree of redistribution does, however, because eliminating severe material deprivation allows the worst-off to live self-defined lives without taking away that ability from the best-off.²⁹ Only then do the voluntary exchanges of property and labor that Nozick valorizes become truly available to a pauper who can't find work.

III. A DISTRIBUTIVE JUSTICE COUNTERCLAIM

I now want to return to the libertarian objection, but this time from a non-libertarian viewpoint, the viewpoint of distributive justice. As we have seen, this perspective is suspect to right-libertarians. On their view, self-ownership rights are matters of justice that impose virtually absolute constraints on what we are free to do, most especially including redistribution. Nozick

²⁶ See, e.g., Iris Marion Young, *Two Concepts of Self-Determination*, in *ETHNICITY, NATIONALISM, AND MINORITY RIGHTS* 177, 187 (Stephen May et al. eds., 2001).

²⁷ Isaiah Berlin labeled this concept "positive liberty," which he distinguished from the negative liberty of non-interference. BERLIN, *supra* note 24, at liii. See also Taylor, *supra* note 19, at 213.

²⁸ HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 24-25 (1996).

²⁹ This is true so long as the transfer of wealth pulls the worst-off above that level without pushing the best-off below it. But suppose we accept Nozick's view that *any* restrictions on private property and freedom of contract violate the autonomy rights of the affluent. Even so, the claims of the poor would still outweigh the claims of the rich because the autonomy-enhancing impact of a resource is greatest for the worst-off.

asserts,

No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over. . . . Since no neatly contoured right to achieve a goal will avoid incompatibility with this substructure, no such rights exist. The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition.³⁰

But that conclusion assumes, rather than demonstrates, that the inequalities and poverty that may result raise no comparable issues of justice, for if they do, there remains the question of which claim should prevail.³¹ One cannot assess the libertarian objection without also considering the distributive justice claim and the relative strength of each.

We know at least how a *laissez faire* free market system is likely to distribute wealth. Its formal equality in law, by which every person has the right to contract, will be matched by immense inequalities in fact. However equal the starting point, over time income and wealth will flow away from some and towards others. To some degree, they will flow to the most diligent workers, but mostly they will flow to the lucky ones – the people who have the greatest physical or mental proficiency, or particular talents that happen to be in demand, or investments that pan out. And as their children are afforded educational advantages and inherited wealth, the rich will get richer and the poor poorer, some of them to the point of life-threatening destitution.

On the libertarian view, the poverty and inequality resulting from the operations of a free market economy may be awful, but they are not unjust. Provided these operations were themselves mutually voluntarily – not based on coercion, fraud, or the like – no one has done anything wrong, in deed or thought; all they have done is contract with others to exchanges that each believed would be in their own interest. No one can blame the Boston Celtics for hiring the tallest players, or the parents who buy the best education they can afford for their daughter. Since poverty and inequality may result from nothing more venal than the cumulative impact of countless such decisions, libertarians say, the unintended suffering it produces is analogous to the suffering caused by a hurricane – bad but not unjust. If economic “domination of some persons by others arises by a series of legitimate steps, via voluntary exchanges, from an initial situation that is not unjust, it itself is not unjust, Nozick says.”³²

Many others, however, rightly find a great deal of injustice in the state’s refusal to regulate or reform a system that, as a whole, foreseeably produces inequality and poverty (even assuming the fiction that present inequalities have arisen solely from a continuous history of voluntary transactions). Implicit in this view are two points of disagreement with the libertarian claim. First, it rejects the view that the voluntariness of the exchange is the only yardstick of justice applicable to economic life. Why not also say, with Rousseau, that it is unjust for the few

³⁰ NOZICK, *supra* note 1, at 238.

³¹ This difficulty arises in many contexts, of course, because equalitarianism and other varieties of distributive justice inherently crosscut non-comparative forms of justice. We see this in American death penalty jurisprudence where many argue that racially disparate rates of execution warrant suspending executions entirely on equality grounds; but some death penalty advocates argue that when someone deserves the death penalty, failing to inflict it because others who deserve it are unjustly being spared simply compounds the injustice.

³² NOZICK, *supra* note 1, at 283. For Nozick, justice is “historical” —it concerns only the history of exchanges and other human actions, not the distributive pattern that results.

“to gorge themselves on superfluities while the starving multitude lacks necessities”?³³ Dire poverty and inequality also raise issues of fairness; there is nothing incoherent in saying that a high school valedictorian who can’t afford college is likely to suffer an undeserved and unjust lifetime disadvantage compared to his less diligent classmates. The consequences of impeccably voluntary free market exchanges may implicate these and other concerns of justice not included in a metric limited to such procedural criteria as voluntariness, coercion, fraud, and theft.³⁴

The second point of disagreement is this: even assuming injustice requires an intentional wrongdoer, unequal opportunity and destitution are not simply the inevitable and unavoidable results of blameless individual choices, as the libertarian assumes. They may also be traced to the government’s decision not to alter those foreseeable results (or, what I shall not argue here, its decision to institute and enforce such a system to begin with by classifying essential resources as privately held property rather than owned in common or entitlements of citizenship). On this view, justice is not confined to the *rectification* of wrongdoing; a government’s decision to ignore desperate hurricane survivors it could help would indeed be wrongful and unjust, for example. The libertarian’s contrary position depends on an additional, quite questionable claim: that the concerns of justice exclude the state’s failure to act no matter how dire the consequences or how easy it would be to avert them.

If inequality or poverty implicates matters of justice, does this imply that every person has a human right to some level of welfare, and every society an obligation to deliver it? The Universal Declaration of Human Rights treats the provision of nutrition, housing, health care and other goods in this way. But most states address poverty, if at all, as a question of policy, not rights, to be decided by elections (as does the United States, which for decades has been bitterly divided over taxing some to help others).³⁵ Is this a denial of justice, or rather a means of doing

³³ Jean-Jacques Rousseau, *Discourse on the Origins of Inequality*, in CLASSICS OF MORAL AND POLITICAL THEORY 847, 891 (Michael L. Morgan ed., 2d ed. 1996).

³⁴ Even Nozick’s resolute proceduralism must admit to one exception: he allows interference with fully voluntary transactions that corner the market—monopoly-creating transactions—on grounds that they leave everyone else worse-off. Nozick extrapolates this conclusion from the “Lockean Proviso.” Locke held that in a state of nature, individuals may mix their labor with an un-owned resource and thereby make it one’s own. But—and this is the “proviso”—this may be done only so long as there is “enough and as good left in common for others.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT Treatise 2 § 27 (Peter Laslett ed., 1967). Nozick applies the proviso to transfers as well as original acquisitions: “If the proviso excludes someone’s appropriating all the drinkable water in the world, it also excludes his purchasing it all. . . . Once it is known that someone’s ownership runs afoul of the Lockean proviso there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) ‘his property.’” NOZICK, *supra* note 1, at 179-80.

This is an odd position for Nozick to take. If the ground for limiting monopolistic transactions is that it makes third parties worse off, why is that ground insufficient to bar any kind of transaction that does so? Nozick says the proviso will rarely come into play in market societies, but that implausibly assumes that transactions rarely inflict detrimental externalities on third parties. If harmful spillover effects are as prevalent as I have argued, the Lockean proviso would constitute an exception that swallows the rule.

³⁵ The United States Supreme Court has repeatedly held that the Due Process Clause generally affords protection only against unwarranted government interference, not an affirmative right to government assistance “even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *DeShaney v. Winnebago Cty.* DSS, 489 U.S. 189, 194-97 (1989) (state’s failure to protect an individual against private violence generally does not violate the Due Process Clause); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (no constitutional obligation to fund abortions even though the right to abortion is constitutionally protected); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no constitutional obligation to provide adequate housing).

Other nations have constitutionalized economic rights, but that does not necessarily imply that they regard the

justice through policy-making?³⁶

Of course, I have already argued that justice, in the sense of respect for autonomy, plausibly supports not only liberty rights but also economic rights that are instrumentally connected to liberty. Here I just note briefly why *at least* a subsistence right may be required as a matter of distributive justice.

The previous liberty-based claim proceeded through a foundational argument starting from a premise no reader assessing it can plausibly deny, the value of thinking and choosing for ourselves. But there is a sense in which grounding economic rights in this derivative way may miss the main point. However sound the argument may be, it seems to bear little correlation to the immediate response we have when confronted with heart-rending scenes of material deprivation and suffering. If we think there is something morally wrong with such conditions, we are less likely to be thinking about self-rule and liberty than about the suffering of other human beings. The main point, for many advocates of economic rights, is that a person's material needs and vulnerabilities directly create an obligation on those with much more than they need, regardless of the relationship between economic deprivation and liberty. They might say, with Bentham, that the "question is not, Can they reason? nor Can they talk? but, Can they suffer?"³⁷

There are some complications with basing economic rights claims on the suffering that afflicts those whose basic material needs go unmet that the autonomy argument may be thought to avoid, notwithstanding the universality of this vulnerability. One is that an argument of this kind seems to support, not a human right against suffering, but a right attaching to all sentient beings. Even those who would re-conceive certain human rights as rights belonging to the much larger class of beings who suffer when pain is inflicted—whether by Abu Ghraib's prison guards, leghold traps, or factory farms—would not include economic rights among them; no one could possibly think we have a positive obligation to feed or provide care to animals in the wild. So to avoid charges of "speciesism," an argument based on the prevention of suffering must show why human beings are entitled to aid while animals are not. This, it seems to me, is a philosophical problem that should be addressed,³⁸ but not by holding that suffering does not morally matter.

promulgation of such rights as a human rights obligation. Some may instead deem their economic rights provisions to be the product of a discretionary political choice, not a human rights obligation.

³⁶ This difference formed part of the ideological backdrop of the Cold War, of course, resulting early on in the scrapping of plans for a single human rights treaty that combined both political liberties and economic rights and the substitution of separate treaties allowing countries to endorse one set of rights while rejecting the other.

³⁷ The passage from which this statement is taken asserts the parallel some of today's animal rights activists make, between racism and what they sometimes call speciesism, but four centuries earlier:

The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized that the number of legs, the villosity of the skin, or the termination of the *os sacrum* are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? . . . The question is not, Can they reason? nor Can they talk? but, Can they suffer?

JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 n.b (J.H. Burns & H.L.A. Hart eds., 1970).

³⁸ For example: some theorists might argue that a significant part of the suffering that human beings experience when their material survival is not assured is insecurity about the future, an aspect of suffering that does not apply to (all?) non-human animals. Others may hold that we owe duties only to fellow members of the "moral community" composed of those who are themselves moral agents (a position that in my view begs the question).

A second complication is that suffering must be defined in non-subjective terms because people experience deprivation differently: a millionaire may suffer if reduced to living in a tenement that slum-dwellers find unexceptional. To address this, the material deprivation to be remedied might be confined to that which would inflict physiological suffering on any well functioning human being; but note that economic rights based on this kind of suffering will be subsistence rights and far less extensive than those justified in the previous autonomy-based argument. They would be extremely modest, since at the limit one can avoid physiological suffering with only a few square feet of housing, tasteless but balanced nutrients, and other conditions that are far from what we would consider a minimally decent human life. An argument that the collective owes each individual the latter, however, requires a very different kind of basis, and also resists a global definition that can encompass the very different expectations of societies at all stages of development.

Hume interposed another difficulty with his famous claim that “[t]is not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”³⁹ Let us defer the meta-ethical issue underlying Hume’s objection—his view that reason is purely instrumental, a “slave to the passions” —and first recognize that impartiality is a given for governments that exist to serve the interests of all equally. That raises the question of how they may do so in the economic sphere, and reasoning, even on Hume’s view of reason as instrumental, may provide some answers. If the state is to treat all constituents impartially, is it not obligated to prevent suffering afflicting some of its constituents, at least when it can do so without morally significant loss to its better-off constituents? Dworkin makes this point in his recent argument against a *laissez-faire* economy. Anyone impoverished through that system, he says, “is entitled to ask: ‘There are other, more regulatory and redistributive, sets of laws that would put me in a better position. How can government claim that this system shows equal concern for me?’”⁴⁰ It is possible to flesh this out in social contractarian terms, as a claim that a right to economic security will emerge as an *outcome of*, if not a prerequisite to, the exercise of rational agency. On this view, rational individuals setting the terms of a cooperative society would agree to institute a social safety net, given that its benefits in bad times would far outweigh its burdens in good times.

³⁹ For Hume, all reason can do is tell us how to further our particular desires most efficiently. A pure hedonist who cares neither about his own interests or other people’s interests has no reason to act prudently or morally:

‘Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. ‘Tis not contrary to reason to choose my total ruin to prevent the least uneasiness of an Indian, or a person wholly unknown to me. ‘Tis as little contrary to reason to prefer even my own acknowledged lesser good to my greater.

DAVID HUME, *A TREATISE OF HUMAN NATURE* 2.3.3 (David Fate Norton & Mary J. Norton eds., 2000). The liberty-based argument offered earlier avoids part of this problem by justifying economic rights instrumentally—as a value-neutral means that allows each individual to pursue the ends she chooses for herself—but cannot easily avoid the value choice between egoism and moral concern for others.

Kant disputed Hume on this issue, of course, and it is worth noting his position that reason would converge on *some* obligation to the suffering—although perhaps an imperfect obligation in his terms, which allows the actor to choose when and to whom to provide aid. Discussing the case of an individual who could easily help someone in great danger but does nothing because he does not care, Kant wrote that although it is possible to universalize such a principle of selfishness,

it is impossible to *will* that such a principle should hold everywhere as a law of nature. For a will that resolved in this way would contradict itself, inasmuch as cases might often arise in which one would have need of the love and sympathy of others and in which he would deprive himself, by such a law of nature springing from his own will, of all hope of the aid he wants for himself.

IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 32 (James W. Ellington trans., 3d ed. 1993).

⁴⁰ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 2-3 (2011).

Rawls provides a partial example,⁴¹ arguing in *A Theory of Justice* that people without knowledge of their circumstances in society—under the “veil of ignorance” he imposed so that self-interested bargaining would approximate the impartiality associated with justice—would be risk averse and adopt principles to protect the least advantaged, one of whom they might turn out to be. Rawls thought the contractors would settle on an egalitarian principle by which inequalities can be justified only if they benefit the worst off. It is at least arguable, however, that, on both precautionary and efficiency grounds, they would prefer to adopt a right to a social minimum.⁴²

In the end, however, we should also acknowledge the power of our pre-reflective moral convictions. This the Humean dichotomy between idiosyncratic sentiments and objective reasoning does not do; it excludes the possibility that some moral knowledge may be grasped directly rather than derived through reason. We know from experience that there is some such knowledge in many domains—knowledge that is so complex or contextual as to be irreducible to general principles, or so basic that it can only be recognized, not explained in other terms.⁴³ Two examples of the latter, claims which Peter Singer thought so self-evident that no argument was necessary or even available, are (1) that suffering and death from lack of food, shelter, and medical care are bad, and (2) if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.⁴⁴ This does not exclude the possibility that there may be other moral concerns that could

⁴¹ “Partial” because Rawls’ maximin principle is different from the economic right argued for here, and also because the distributed goods are “primary goods” that are themselves justified as necessary to the pursuit of any individuals’ self-defined ends.

⁴² Jeremy Waldron argues that this is a more plausible outcome in *Social Economic Rights and Theories of Justice*, (Nov. 2010), <http://ssrn.com/abstract=1699898>.

⁴³ Clearly knowledge can be fully objective yet not based on articulable grounds. As young children, for example, we know how to speak the language grammatically, but the basis of our knowledge is unconscious. We draw on types of intuitive knowledge when we speak, recognize a family resemblance, or anticipate a musical progression. In these cases, there *are* correct rules but they are so context-dependent or naturally hard-wired that they can only be intuitively applied case-by-case. Some moral knowledge could be like this, and at the least we must remain open to that possibility. Indeed, if I have a strong moral intuition that resists reasoned analysis, it is still more rational to be guided by it than to presume it false.

Philosophically, it is difficult to entirely discount the objectivity of intuited moral convictions because reasoning must start somewhere, and its role is often to achieve a reconciliation between pre-reflective convictions and theoretical explanations in which each of them is adjusted until consistent with the other. Leaving aside the metaphysical claims of non-natural qualities discernable by an intuitionist faculty that were popular a century ago, moral intuitions play a part in the theories of numerous modern moral philosophers. One theory, which Rawls describes as “intuitionism in [a] broad sense,” holds that there are plural and conflicting first principles that may apply to a specific situation, and no priority rules for choosing among them; we must simply strike a balance on intuition. RAWLS, *THEORY OF JUSTICE*, *supra* note 8, at 34. Some other conceptions of moral knowledge as at least partly intuitive, non-rational or perceptual are developed in John McDowell, *Virtue and Reason*, 62 *MONIST* 331 (1979) (arguing that ethics is based on perceptual sensitivities that cannot be reduced to rules or principles); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 138-55 (1986); W.D. ROSS, *THE RIGHT AND THE GOOD* (photo. reprint 1946) (1930).

⁴⁴ Justifying his reliance on intuition to argue for a qualified obligation to relieve suffering, Singer says that:

most people will agree about this, although one may reach the same view by different routes. I shall not argue for this view. People can hold all sorts of eccentric positions, and perhaps from some of them it would not follow that death by starvation is in itself bad. It is difficult, perhaps impossible, to refute such positions, and so for brevity I will henceforth take this assumption as accepted.

Peter Singer, *Famine, Affluence and Morality*, 1 *PHIL. & PUB. AFF.* 229, 231 (1972).

outweigh these moral imperatives, but that would have to be shown.

IV. A PLAUSIBLE FORMULATION: ECONOMIC RIGHTS AS GROUP PRIORITY RIGHTS

If the set of moral human rights includes a positive right to protection against severe economic deprivation—whether on distributive justice or autonomy grounds—what are the terms of the right?

My aim here is to describe the right in a way that corresponds to the complex moral entitlement it reflects (leaving aside the revisions that legal codification would require).⁴⁵ Many economic rights claims fail that test because they deploy a single, broadly abstract criterion that fails to give conflicting moral values their due, or to distinguish circumstances where a right is near-absolute from circumstances where it isn't. As discussed earlier, *liberty rights* are much more compelling when they protect your life or your thoughts than when some manageable portion of your earnings is at stake, since the latter is much more removed from the value of autonomy that liberty rights serve. This is also true of *equality*: an impoverished underclass raises compelling inequality concerns that are not present in a society where the worst-off families can afford two cars while the best-off have their own airplanes. Inequalities also may not be so troubling when they have resulted from personal choices, like refusing to work or incessant gambling.⁴⁶ Moreover, equality of welfare, by itself, prefers a world where everyone is destitute to one in which only some are destitute and others have more than enough to meet the necessities of life.⁴⁷ To equalize welfare in any of these cases might indeed make taxation seem more like theft.

We might then be tempted to base the right on *need alone*, and define it as an economic right to material necessities. But again, this is too un-nuanced to adequately capture the basis of the moral claim. In a universally destitute world, material deprivation would imply neither

⁴⁵ In specifying the terms of right, I aim to reflect the moral claim underlying it. The terms of a legal right would need to be modified to reflect additional important factors, specifically including its practicality as an action guiding norm, sufficient specificity to comply with the principle of legality, and the role it was intended to play in international affairs. Rawls actually defines human rights by the latter feature; for him, a human right signifies a right which, if violated, would justify international intervention. JOHN RAWLS, *THE LAW OF PEOPLES* 79-80 (1999). On most accounts, however, legal human rights should accurately reflect the moral right they seek to protect, and that is the task we undertake here.

⁴⁶ The most expansive formulations found in the International Covenant on Economic, Social and Cultural Rights (ICESCR)—such as the right to “the highest attainable standard of physical and mental health” found in Article 12—also seem off the mark, because the moral balance between state provision and personal effort is missing.

⁴⁷ If we reject this, what we really seek is a priority right to necessities, not an equality right. Derek Parfit describes the differences between priority and equality rights, and between types of equality rights. Derek Parfit, *Equality and Priority*, X 3 *RATIO (NEW SERIES)* 202 (1997). Parfit explains that egalitarians are concerned with relativities and prioritariness with absolute levels, offering this analogy:

People at higher altitudes find it harder to breathe. Is this because they are higher up than other people? In one sense, yes. But they would find it just as hard to breathe even if there were no other people who were lower down. In the same way, on the Priority View, benefits to the worse off matter more, but that is only because these people are at a lower *absolute* level. It is irrelevant that these people are worse off *than others*. Benefits to them would matter just as much even if there *were* no others who were better off.

Id. at 214.

injustice nor a right to remediation.⁴⁸ And at the least, because meeting all needs may be impossible, the need criterion is incomplete.

Instead, I believe that the injustice that gives rise to an economic right is best captured by Rousseau's remark quoted earlier, that it is unjust "for the few to gorge themselves on superfluities while the starving multitude lacks necessities."⁴⁹ An economic right that protects against severe deprivation in the midst of excess is more morally secure, and partly for that reason, more practically promising, than these other formulations. The right is best expressed as a *priority right*, giving the worst-off a claim to resources necessary for subsistence before they can be used by the better-off.

Most importantly, however its object is defined, an economic right must be structured to take account of one highly significant difference between economic rights to government aid and liberty rights to non-interference: rights to material aid are *necessarily* competitive in a way rights to government forbearance are not. The state may fulfill an obligation of non-interference for each right-holder simultaneously simply by doing nothing, but duties of assistance always involve tradeoffs and often require some form of rationing, either by design or default. For example, consider the rights to health care and free speech: free speech can be guaranteed to you without taking anything away from me or the state, other than our freedom to interfere with it and the costs of insuring that we do not. But if you require dialysis three times a week to stay alive, a right to that dialysis forecloses using those resources for preventive health measures such as vaccinating thousands of children, as South Africa's high court noted in denying a kidney patient's constitutional health rights claim.⁵⁰ Some reject this familiar contrast between "negative" and "positive" rights on grounds that negative rights, if they are to be enforced, require expenditures on police, courts, and other bureaucracies,⁵¹ but no one should doubt the enormous difference of degree between these enforcement expenses and the cost of providing positive rights to social security, health insurance and housing to those in need.

What happens when we ignore this difference, and treat economic rights in the same way as liberty rights—as individual rights that presumptively trump the collective will and welfare? Consider Art. 11 of the International Covenant on Economic, Social and Cultural Rights, which affords a right "to an adequate standard of living . . . including adequate food, clothing and housing."⁵² If I am homeless, and if the provision is read to guarantee an individual right to

⁴⁸ See RAWLS, THEORY OF JUSTICE, *supra* note 8, at 290-91 (explaining that when nothing can be done to change a situation, the question of justice does not arise).

⁴⁹ Rousseau, *supra* note 33.

⁵⁰ *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC) at para. 30-31, (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1997/17.pdf> ("Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which a court can make. . . . The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.").

⁵¹ See, e.g., CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001) (explaining that protecting negative rights requires governmental action); STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 35-47 (1999) (explaining that the enforcement of negative rights needs supervision by government monitors including courts and government agencies); Virginia Montouvalou, *In Support of Legalization*, in DEBATING SOCIAL RIGHTS 85, 110-13 (Conor Gearty & Virginia Montouvalou eds., 2011).

⁵² International Covenant on Economic, Social and Cultural Rights, art. 11, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

housing, it seems I should be able to go to court to enforce it, and that the court should be able to order the government to provide me with shelter. If so, millions of others who lack adequate housing, food or clothing would also have rights to court orders obligating the government to provide them. The court, then, would be saddled with three problems of great moral and practical significance. Its adjudications would be:

(1) *Inevitably one-sided*, because budgetary choices in the face of scarce resources inherently involve tradeoffs that are arbitrarily excluded from consideration if an individual has the right to trump them. Moreover, given their zero sum structure under conditions of scarcity, enforcing one individual's economic rights may well foreclose the same rights for others.

(2) *Undemocratic*, because the court would be dictating budgetary priorities that constitute the crux of popular sovereignty and therefore should be left to the democratic branches to decide;⁵³ and

(3) *Unrealistic*, potentially requiring the impossible, since some governments will not have the resources to deliver to everyone in need all the economic rights envisioned, usually including not only housing, but also health care, nutrition, clothing, and other necessities. (It may be that properly distributed, sufficient resources exist, but a court or U.N. committee with the power to reallocate to the degree required—for example, by ordering massive cuts in defense spending to fund universal health care—would, of course, exacerbate the anti-democracy problem.)

Critics have catalogued a number of other problems with economic rights,⁵⁴ but these three in particular help explain the neither fish-nor-fowl legal instruments that declare ambitious sets of individual economic rights while simultaneously hedging them to a degree unimaginable in the case of liberty rights. India's constitution, for example, includes numerous sweeping economic rights, but labels them as "directive principles" which are to serve as goals for the legislature but not as rights enforceable in court.⁵⁵ The International Covenant on Economic, Social and Cultural Rights includes such extensive economic rights as Article 11's right to "adequate food, clothing and housing," Article 24's right to "periodic holidays with pay," and Article 12's right to "the highest attainable standard of physical and mental health."⁵⁶ In contrast to the International Covenant on Civil and Political Rights (ICCPR), however, states need not

⁵³ See, e.g., Aryeh Neier, *Social and Economic Rights: A Critique*, 13 No. 2 HUM. RTS. BRIEF (2006) (arguing against economic rights, in part on grounds that the purpose of a democratic process is essentially to deal with two questions: public safety and the development and allocation of a society's resources).

⁵⁴ In addition to the libertarian objection and the three criticisms above, some commentators complain that courts attempting to enforce economic rights *stray beyond their competence*, because individual judges are ill-equipped to make economic policy compared to legislatures that can deploy experts and conduct investigations to consider what laws would be effective; and *operate untethered to any standard and the rule of law*, because it will often be quite unclear when a government is violating the right. See, e.g., DAVID KELLEY, *A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* 21-28 (1998); Conor Gearty, *Against Judicial Enforcement*, in *DEBATING SOCIAL RIGHTS*, *supra* note 51, at 1-84; M. J. Dennis & D. P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004); Neier, *supra* note 53.

⁵⁵ However, an activist Indian Supreme Court has found some economic rights implicit within the right to life and other constitutionally-enforceable civil rights. See *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180 (India), available at <http://www.indiankanoon.org/doc/709776/> (explaining that, on this basis, the court has at least prevented the government from backtracking on material benefits that individuals already possess, for example by barring the government from evicting slum dwellers).

⁵⁶ ICESCR, *supra* note 52, at art. 11, 12, 14.

deliver these rights, but must merely “take steps . . . with a view to achieving progressively” these rights. And the steps themselves need not be undertaken to the extent that they exceed “the maximum of its available resources” or are incompatible “with the purpose of promoting the general welfare in a democratic society.”⁵⁷ The problems that attach to economic rights, and the schizophrenic approaches to promulgating them, have prompted a great deal of skeptical commentary about the basic viability of any conception of economic rights.⁵⁸

The complaints that economic rights are unrealistic, anti-democratic, and arbitrarily exclude morally relevant factors seem to present a Hobson’s choice between rights so strong that they would strike at the heart of democratic policy-making and threaten collective welfare, and rights so weak that a person’s material survival is left to the vagaries of the market or the discretion of a legislature. What we should be seeking, instead, is a formulation that defines economic rights as much more than just another policy question, subject to the same tradeoffs as an infrastructure project which might be cancelled to provide income tax breaks; yet something less than the kind of individual right that is structurally oblivious to the same rights of many more.

We can formulate such rights, but only by forsaking the individual rights model and recognizing economic rights as *group* rights—rights that belong to those lacking material necessities as a group. It is the deprived group collectively that possesses a priority claim to essential resources that properly prevails over any alternative, non-essential individual or societal

⁵⁷ *Id.* at art. 2(1), 4. Without this and the other qualifications just described, most countries would surely have rejected the ICESCR, and most of the signatories would be in default. Even many wealthy countries that could afford to do so do not provide any kind of robust and protective safety net.

By contrast, the ICCPR requires its signatories “to respect and to ensure to all individuals within its territory . . . the rights recognized in the present Covenant” (art. 2.1) and to “develop the possibilities of judicial remedy” (art. 2(3)(b)). The weaker ICESCR obligations seem at variance with Article 8 of the Universal Declaration of Human Rights (UDHR), which provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The UN Committee on Economic, Social and Cultural Rights has lamented that “despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.” U. N., Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rights, Official Records, U.N. Doc. E/1993/22, Annex III, ¶ 5 (1993).

⁵⁸ See, e.g., E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETHS. YBK. INT’L L. 69 (1978). Vierdag writes:

What are laid down in provisions such as Articles 6, 11 and 13 of the ICESCR are consequently not rights of individuals, but broadly formulated *programmes* for governmental policies in the economic, social and cultural fields. It is suggested that it is misleading to adopt an instrument that by its very title and by the wording of its relevant provisions purports to grant “rights” to individuals, but in fact appears not to do so, or to do so only marginally.

Id. at 103.

Some commentators friendly to re-distributionary policies see it as exclusively a legislative decision. See, e.g., Neier, *supra* note 53; Cass Sunstein, *Against Positive Rights*, 2/1 E. EUR. CONST. REV. 35 (1993) (arguing against the inclusion of economic rights in Eastern European post-Cold War constitutions). Others favor the enunciation of detailed goals which would identify both the beneficiaries, and the addressees whose have responsibility for accomplishing them “as quickly as possible,” and be monitored by a government body. James Nickel, *Human Rights*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY at § 3.4 (Edward N. Zalta ed., Winter 2008), available at <http://plato.stanford.edu/entries/rights-human/#IntHumRigLawOrg>. While not amounting to enforceable rights, it is claimed that goals of this kind would be more effective than leaving the issue to discretionary policy. See also INDIA CONST. art. 36-51, with its set of “directive principles,” roughly exemplifying this kind of goal-based program.

use (excepting those assets that are self-owned on the analysis in Part 2). The distribution of these resources within the deprived group remains an issue of justice, which cannot be determined by assuming that, whatever the circumstances and tradeoffs, each member has an individual right to them. (Whether the right should be deemed a “human” right, given that it belongs to a group, is largely a semantic question; group rights are sometimes referred to as the “third generation” of human rights.)⁵⁹

Group rights and economic rights are each highly contested concepts, but together they are more plausible, not less.

Regarding economic rights, an individual right that prevails at great cost to impoverished others is implausible. But an economic right *is* plausible if it attaches to an impoverished group collectively because it is then able to distinguish morally sound tradeoffs from those that are not, and in a way that reflects the Rousseau moral principle we have discussed. It would, for example, prohibit tax cuts in favor of the rich while material necessities were lacking for some of the poor, but permit tradeoffs within the worst-off group so that the most important necessities were provided to the greatest number. South Africa’s economic rights jurisprudence seems to be moving to this kind of group-based approach after finding the all-or-nothing individual rights model unsatisfactory.⁶⁰

Regarding group rights, skeptics wonder how groups could have a moral entitlement that is separate from those of the individual members; they say the purported group right to self-determination is no more than an individual human right to representation that must be exercised collectively, for example.⁶¹ That criticism seems overstated when applied to group rights designed to protect the vulnerable cultures or languages of indigenous or ethnic groups, but in any event it can’t apply to the very different kind of group right described here. A group priority right to economic necessities is not simply aggregating individual rights, since its application turns on the economic patterns within and across classes.⁶² Thus an impoverished person may have a right

⁵⁹ Characterizing this group right as a human right seems no more problematic than the common practice of treating a right to prenatal health services that can only be utilized by women as a human right. Each right, after all, is justified by virtue of the humanity of its holders.

⁶⁰ In the *Soobramoney* case noted earlier, in which the plaintiff asserted he had a right to dialysis several times a week under the constitution’s right to health provisions, the South African Constitutional Court presumed the right to be an individual right. But in a concurring opinion, one justice characterized the health care right as a collective right that calls for a different kind of analysis:

The rationing of access to life prolonging resources is . . . integral to . . . a human rights approach to health care. . . . When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights . . . but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

Soobramoney, (12) BCLR 1696 at para. 52, 54 (Sachs, J., concurring). In subsequent cases, the Constitutional Court has analyzed economic rights claims through the kind of group-rights analysis suggested in this article. See, for example, *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033, available at <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>, in which the court views positive economic rights through a group-rights lens. The right to health does not guarantee an individual right to treatment on demand, the court writes, but rather requires the government to develop programs that address “[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.” *Id.* at para. 69 (quoting *Gov. of the Republic of S. Africa v. Grootboom*, 2000 (11) BCLR 1169 at para. 44).

⁶¹ See, e.g., Jan Narveson, *Collective Rights?*, 4 CANADIAN J. L. & JURIS. 329 (1991); James A. Graff, *Human Rights, Peoples, and the Right to Self-determination*, in *GROUP RIGHTS* 186, 194 (Judith Baker ed., 1994).

⁶² In saying that the group right is not simply an aggregation of individual rights, I do not mean to imply that

to extensive end-of-life medical treatments in an unequal society that can afford it, but no right in a society where everyone is destitute for lack of resources, or where the resources could instead be used to meet the equally urgent medical needs of many more.

The burden of this section has been to demonstrate that economic rights must be understood as group priority rights in order to truly reflect the unique moral dynamics that attach to positive rights. There are many further questions that must be resolved to sufficiently specify the right, only a few of which I can note here. One is the question of what constitutes the relevant community: to whom do the rights and obligations attach? On redistributive issues, most people today envision that community as consisting of all citizens (or individuals) within a state, but that assumes away the domain of global distributive justice and thereby takes the most urgent problem and most attainable solutions off the table. Moral obligations sometimes transcend borders—it is just as wrong for an American tourist to attack a Spaniard as a fellow citizen—so the question is why economic rights obligations would not. The ICESCR is notably ambiguous on this point, obligating the state parties to “take appropriate steps to ensure the realization of [the right of everyone to an adequate standard of living], recognizing to this effect the essential importance of international co-operation based on free consent.”⁶³

Another question arises from the group-based structure of the right: that structure is required in part to accommodate the further resolution of the distributive justice issues within the worst-off group, but how large that group is, and what that distribution should be in any particular case, raises difficult issues that will still need to be determined. What counts as deficient health care or housing, and more generally what constitutes a necessity rather than a luxury, are highly contestable issues within a society, let alone across societies in vastly different stages of development. What counts as a redistributive solution is highly contestable as well. Does re-channeling resources towards the most destitute 10% of the poor qualify, even if it entails reducing efforts for the other 90%? Does a policy that reduces poverty today, even if it will promote poverty in the future?⁶⁴ (The current Republican proposal to scrap “job-killing” environmental regulations may be such a policy.) Like any form of rationing, these line-drawing and interpersonal comparison issues are daunting.

Our study has also not fully specified the object of this group right—what it is a right to. I have described it as a priority right to resources necessary for economic security, but left open what this entails. As we have seen, a right grounded on physiological needs will be pegged at a very different level than a right based on the material prerequisites for living a minimally decent life, or for living a life fashioned by choice rather than necessity. As for means, certainly the right need not require the outright provision of food, housing, or other material necessities. It might instead be framed as a right to the means necessary to obtain them (such as a right to employment,

the group itself has a moral status independent of the moral status of its members. The group right I have described is sometimes called a “collective group right”: it serves the interests of the individuals within the group, but as Peter Jones has written, “the individuals who make up the right-holding group possess a right together that none of them possesses separately.” Peter Jones, *Group Rights*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* at § 4 (Edward N. Zalta ed., Winter 2008), available at <http://plato.stanford.edu/archives/win2008/entries/rights-group/>; see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 208 (1986) (explaining that collective rights are “individual interests which arise out of the individuals’ membership in communities”).

⁶³ ICESCR, *supra* note 52.

⁶⁴ For a thoughtful discussion of these and other choices that confront any poverty eradication program, see Eduardo Rivera-Lopez, *Global Poverty: Moral Theory and Empirical Knowledge* (2011) (unpublished manuscript) (on file with the author).

thereby requiring the indigent to work in order to attain the necessary goods), or it might be a priority right to a threshold level of wellbeing and ability (measured in health, literacy, mobility and the like, which recognizes that people may require different levels of resources to attain the same threshold level, as the Americans with Disabilities Act does). For our purposes, it has been unnecessary to resolve this issue because each one defends against the injustice of poverty in the midst of plenty, and thus each respects the economic human right defined here. For public policy purposes, however, it may well be that for 21st century America an economic right centered on access to adequately remunerative employment (with other provisions for the aged or infirm) would be a promising interpretation of the right. It resonates with our cultural predilections for personal responsibility over free-riding, and for “growing the pie” over tax-and-transfer payments; and it draws on the ideologies of libertarians and egalitarians alike. It is worth recalling that while such staunch libertarians as Milton and Rose Friedman vigorously indicted policies designed to achieve “fair shares for all” as reducing liberty, they also celebrated “government measures that promote . . . equality of opportunity [because they] enhance liberty.”⁶⁵ Like public education, access to a job should be recognized as an essential element of equal opportunity.

V. CONCLUSION

Most states do little to reduce poverty and inequality, even when they can afford to do so without seriously reducing the living standards of the better off. That’s the case in the United States, where fifteen million people, about five percent of the population, own almost two thirds of the wealth, while forty three million people live in poverty.⁶⁶ Globally, of the world’s adult population, the richest one percent collectively possess forty times as much wealth as the entire bottom fifty percent.⁶⁷ One third of the world’s population dies prematurely from poverty-related causes⁶⁸—a plight that could be avoided through modest, properly designed resource transfers from the developed world.

Many people argue that such situations, in which dire poverty continues unabated in the midst of plenty, violate a human right to economic security. I share that view, and have tried in this article to support the claim against libertarian objections by demonstrating the essential relationship between leading one’s own life and having the resources to do so, and by noting the

⁶⁵ Milton Friedman & Rose Friedman, *Free to Choose*, in JUSTICE: A READER 49, 53 (Michael J. Sandel ed., 2007).

⁶⁶ See Donna Smith, *Poverty Rate Hits 15-Year High*, REUTERS (Sept. 17, 2010, 8:46 AM), <http://www.reuters.com/article/2010/09/17/us-usa-economy-poverty-idUSTRE68F4K520100917> (reporting that 43.6 million people lived in poverty in 2009); see also Bob Herbert, *Losing Our Way*, N.Y. TIMES, Mar. 26, 2011, at A23 (reporting that in the United States, the top 5 percent owns 63.5 percent of the wealth, while the bottom 80 percent owns under 13 percent).

⁶⁷ SEE JAMES B. DAVIES ET AL., U.N. UNIV., WORLD INSTITUTE FOR DEVELOPMENT ECONOMICS RESEARCH, THE WORLD DISTRIBUTION OF HOUSEHOLD WEALTH 7 (2008), available at http://www.wider.unu.edu/publications/working-papers/discussion-papers/2008/en_GB/dp2008-03/_files/78918010772127840/default/dp2008-03.pdf (explaining that members of the top percentile are almost 2,000 times richer than the bottom fifty percent using proportions based on research conducted in the year 2000).

⁶⁸ See WORLD HEALTH ORGANIZATION, GLOBAL BURDEN OF DISEASE: 2004 UPDATE 54-59 (2008), available at http://www.who.int/healthinfo/global_burden_disease/GBD_report_2004update_full.pdf (reporting one-seventh of the world’s population is hungry and undernourished); U.N. FOOD & AGRICULTURE ORGANIZATION, THE STATE OF FOOD INSECURITY IN THE WORLD 4 (2010), available at <http://www.fao.org/docrep/013/i1683e/i1683e.pdf>.

requirements of distributive justice that are excluded from libertarian thought. But the right must be defined in a way that accurately reflects the moral truths underlying it, and typical formulations of the right do not. They commonly define economic rights as individual rights analogous to liberty rights, a conception that has proved unworkable and morally arbitrary. The result is that impressive words on paper have had little impact on practice. If the analysis in this article is correct, re-conceiving economic rights as a priority right belonging to the impoverished collectively would help narrow the distance that now separates morality from law, and law from practice.