

GAUTHIER ON RIGHTS AND ECONOMIC RENT*

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David Gauthier's *Morals by Agreement*¹ is an impressive—indeed, daunting—exercise in contractarian moral and political philosophy. The primary purpose of his treatise is to explicate practical rationality as constrained maximization and morality as compliance with these constraints. Gauthier offers an account of which constraints on straightforward utility maximization each rational individual will be prepared to accept and comply with on the condition that other individuals also will accept and comply with them as well as an explanation of why compliance with those constraints counts as morality. However, although *Morals by Agreement* is in the great tradition of Hobbesian moral and political theorizing, Gauthier's morality by agreement does not begin with the Hobbesian state of nature. Gauthier does not start by envisioning a Hobbesian war of all against all which has been generated by rational individuals, each pursuing his own maximum utility, and then asking what constraints on this no-holds-barred utility maximization would be mutually advantageous and therefore mutually rational. Morality by agreement does not begin with an account of what interpersonal constraints would, if generally abided by, lift us out of the sorry Hobbesian condition.² Rather, Gauthier takes the primary domain of morality by agreement to be that which is characteristically addressed within theories of distributive justice. His primary question is: what principles of division will it be rational for all utility-maximizing individuals to adopt when mutually advantageous cooperation is possible, yet some principles for the division of the benefits of that cooperation are needed—needed, perhaps, for that cooperation itself to be possible? It is precisely because such principles are not needed in the “perfect market”—in part because they are not needed for

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¹ David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986). All bracketed citations in the text are to *Morals by Agreement*.

² This is the strategy of Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988).

Left absolutely to their own devices . . . people will perform actions that lead to a [Hobbesian] condition that will make their lives immeasurably worse than if they were instead subject to restrictions: namely, restrictions on just the sort of actions that have that effect. [136]

any market interaction wherein the division of the benefits is set by agreement among the interacting parties—that “the perfect market . . . would constitute a morally free zone, a zone within which the constraints of morality would have no place” [84].³

However, Gauthier is not silent about the principles that seem most conspicuously absent in the Hobbesian state of nature and most conspicuously needed for the existence of a market order: namely, rights to one’s person, one’s powers, the products of one’s labors, and the receipts of one’s trades. According to Gauthier, these rights are presupposed by any rational agreement giving rise to morality. Rational bargainers will not agree to, comply with, or expect others’ compliance with bargains that preserve past predations or free rides or prospectively tolerate any such advantage-taking. The victims of predations or free rides will insist, and their beneficiaries will concede (out of fear of losing the potential gains from interaction), that their joint initial bargaining position ought to be adjusted to negate these past forms of advantage-taking. The bargainers lift themselves out of the Hobbesian condition of unlimited blameless liberty; they accept a ban on advantage-taking retrospectively (and prospectively), so that they can capture and secure the gains of subsequent cooperation:

all effects of taking advantage must be removed from the initial bargaining position. . . . This constraint is part of morals by agreement, not in being the object of an agreement among rational individuals, but in being a precondition to such agreement. [192]

This constraint on advantage-taking—that is, on bettering one’s position by worsening the condition of others—is expressed by Gauthier in the form of a Lockean Proviso,⁴ a proviso which shall be referred to as Gauthier’s Proviso throughout this essay. The rights derived from this Proviso are supposed to constitute the basic (Lockean) moral structure upon which the superstructure of market interaction and nonmarket cooperation is to rest. Through the defense of his Proviso and his derivation of rights from it, Gauthier attempts a retrospective Lockeanizing of his (otherwise) Hobbesian state of nature. In this respect, Gauthier’s Proviso is intended to do much more than any normal Lockean Proviso. For rather than being merely a constraint on the permissible exercise of

³ Gauthier persists in this way of speaking, despite recognizing that Smith’s “obvious and simple system of natural liberty” requires that each “not violate the laws of justice” [83, 85].

⁴ The term “Lockean Proviso” is introduced by Nozick to refer, in the tradition of Locke’s requirement that private acquisition from nature leave “enough and as good” for others, to a moral restraint on people’s private acquisitions and subsequent holdings to ensure that, in some specified way, the institution of private property does not worsen any individual’s circumstances relative to his situation in a pre-property state of nature. Compare Robert Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974), pp. 174–82.

certain independently identified rights (for example, rights of acquisition and transfer), it is supposed to serve as a schema for the generation of persons' most basic rights.⁵

This essay does not directly address Gauthier's contention that a ban on advantage-taking would arise as a by-product of an agreement by rational individuals about the division of the benefits of their social cooperation. Instead, it focuses on questions about what Gauthier's Proviso implies, or fails to imply, about persons' rights—and, more specifically, about persons' economic rights to rents and persons' basic (Lockean) rights to their own natural endowments. In Section I of this inquiry, I focus on Gauthier's endorsement in principle of the confiscation of economic rent—with the proceeds of that confiscation to be distributed across all members of society in accordance with his principle of minimax relative concession.⁶ I draw out certain implications of Gauthier's views about economic rent that are odd in themselves or coexist most uncomfortably with other aspects or aspirations of Gauthier's doctrine. In Section II, I deal briefly with Gauthier's positive argument for treating rents as part of the cooperative surplus and hence as subject to redistribution in accord with minimax relative concession. In Section III, I turn to Gauthier's endorsement, as an implication of his Proviso, of persons' rights over their respective natural endowments. Gauthier contends that the right of individuals to their respective natural endowments does not imply a right to the rents noncoercively derived from the sale of their ser-

⁵ The constraints of Gauthier's Proviso only apply among individuals who stand to benefit from cooperation. Gauthier often writes as though *whatever* ban there is on the initiation of force derives from the need for such a ban as a condition for positive cooperation.

It is rational for utility-maximizers to accept the proviso as constraining their natural interaction and their individual endowments, in so far as they anticipate beneficial social interaction with their fellows. . . . Without the prospect of agreement and society, there would be no morality, and the proviso would have no rationale. [193]

This suggests that there would be no rationale for the proviso among two individuals between whom a nonaggression pact would be mutually advantageous, but for whom there are no other potential benefits from interaction or cooperation. Hence, there would be no ban on aggression between these individuals. But elsewhere [115, 132], Gauthier indicates that a nonaggression pact between these two individuals would itself count as a bit of cooperation "in order to avoid mutually destructive conflict." Thus there is a rational basis for a ban on aggression even in this case. But note that here the ban is "the product of rational agreement" and not, as the ban within the proviso is supposed to be, "a condition that must be accepted by each person for such agreement [on positive cooperation] to be possible" [16].

⁶ Strictly speaking, the idea that individuals have no right to noncoercively derived rents is a feature of the state of nature theory that is generated by Gauthier's Proviso, while the positive prescription of the distribution of rents in accordance with minimax relative concession is the object of rational agreement.

The principle of minimax relative concession requires that the cooperative surplus be divided so that the greatest relative concession experienced by any one of the cooperating parties be less than that relative concession would be under any alternative division of the surplus. An agent's relative concession is the degree to which his actual allotment from the surplus represents a concession from his demand for as much of the surplus as it is possible for him to receive (without driving others away). See Gauthier, pp. 136-46.

vinces. Hence, he maintains, his denial of rights to rent does not conflict with his assertion of rights to natural endowments. I question these contentions, suggesting that Gauthier's views on economic rent reflect a failure of philosophical commitment to robust rights to natural endowments. In addition, I challenge Gauthier's claim that his Proviso can generate rights of persons to their own natural endowments and hence to their own powers. I argue that this Proviso cannot generate such rights and that this reflects Gauthier's implicit conception of rights as claims to specified utility levels.

I. GAUTHIER ON ECONOMIC RENT

Gauthier characterizes economic rent as follows:

The recipient of rent benefits from the scarcity of the factors she controls—a scarcity which is of course entirely accidental from her standpoint, since it depends, not on the intrinsic nature of the factors, but on the relation between them and the factors controlled by others. She receives more than is needed to induce her to bring her factors to the market; rent is by definition a return over and above the cost of supply. [98]⁷

Gauthier's discussion focuses on rents derived from the exercise of talents and, in particular, on the rents derived by hockey player Wayne Gretzky and basketball player Wilt Chamberlain.⁸ Let us focus on the latter, since

⁷ There seem to be two distinct, although closely related, conceptions of rent at work in this passage. First, there is the conception of economic rent as "by definition a return over and above the cost of supply." Second, there is the conception of economic rent as a return over cost of supply *in virtue of* the scarcity of the factors controlled by the recipient. Thus, later in *Morals By Agreement*, Gauthier declares that

rent is determined by factor scarcity; it is the premium certain factor services command, over and above the full cost of supply, because there is no alternative to meet the demand. [272]

It seems that the two notions need not be extensionally equivalent. For something other than the scarcity of the item brought to market may account for a seller's returns exceeding the costs of supply. For instance, the seller may receive rent because buyers are ignorant of how little this seller and his competitors would be willing to accept.

Note that we shall subsequently refine the notion of rent so that the smidgen a seller receives over cost to motivate his choosing to sell will not count as economic rent.

⁸ Gauthier, of course, recognizes that among the payments needed to bring certain skills to market (for example, Chamberlain's basketball skills) are the payments needed to induce individuals with various natural talents to identify and cultivate those native capacities. The payments necessary to motivate individuals to develop their respective skills do not count as rent. Yet (as Ellen Paul has suggested to me) doesn't the very recognition that individuals develop their respective skills, that they chose to cultivate this or that natural talent—sometimes precisely because of the anticipated scarcity of the resulting skill—cast doubt on Gauthier's idea that the scarcity of an agent's skill will (always) be "entirely accidental from her standpoint"?

we already have a hypothesized figure from Nozick for the annual income of Chamberlain generated in the nonperfect market for his services—namely, \$250,000 (in 1974 dollars!).⁹

According to Gauthier, whatever segment of this \$250,000 exceeds the minimum that would induce Chamberlain to play basketball, were Chamberlain to be certain that no higher offer would ever be forthcoming, represents factor rent on Chamberlain's scarce natural endowments.¹⁰ Gauthier favors (at least in principle) confiscatory taxation of that entire segment. Such a tax, Gauthier tells us, would have no effect on the supply of factor services. For, by hypothesis, Chamberlain would still be motivated—albeit only minimally motivated—to apply his talents to basketball. Nor, according to Gauthier, would such a confiscation constitute any infringement upon Chamberlain's employment freedom. For Chamberlain remains free to choose among occupations. He is not being required to play (or not to play) basketball.

[Chamberlain's] right to use his [basketball] skills as he pleases is not affected by the distribution of rent; we have just seen that a confiscatory tax on rent would not, and could not, affect his willingness to play [basketball]. Each person's right to his basic endowment is a right to the exclusive use of that endowment in market and cooperative interaction. But market interaction is not affected by the distribution of the surplus represented by rent; each person's exclusive use of his capacities in market interaction is left untouched if rent is confiscated. [273-74]

Furthermore, according to Gauthier, Chamberlain's natural freedom is not infringed upon by forbidding his receipt of the full \$250,000.

Certainly the principle [that of minimax relative concession applied to the distribution of Chamberlain's rent income] does interfere with a particular liberty—specifically, the freedom to collect factor rent. But this is no part of the freedom of a solitary being; the surplus represented by rent arises only through interaction. And so it is not a necessary part of market freedom conceived as an extension of the natural freedom enjoyed by Robinson Crusoe. [276]¹¹

⁹ Nozick, *Anarchy, State, and Utopia*, pp. 160-64.

¹⁰ More precisely, the rent is not the difference between the payment that would *now* induce Chamberlain to play and the \$250,000. Rather, it is the difference between the amount needed both to elicit Chamberlain's development of his skills (in light of his uncertainty about whether he will "make it") and to draw forth his current supply of those developed skills, and the \$250,000. See note 8.

¹¹ Unfortunately, as Jeffrey Paul has pointed out to me, Gauthier's discussion ignores the allocative function of rents. Chamberlain will play basketball for anyone for \$30,003 if no greater payment is possible. But, especially at that price, *lots* of coalitions of fans are eager to purchase his services. How is he to determine whether to play for the fans in Los An-

We may note in passing something rather strange about this last argument. The "surplus"¹² income that can be ascribed to rent is not the only increment to income that "arises only through interaction." In particular, consider the mutual gains from trade that arise from a division of labor in which individuals pursue their comparative advantages. The prospect of interaction between Crusoe (who is a great natural farmer) and Friday (who is a great natural fisherman), the specialization that prospect engenders, and the trade interaction that specialization allows may significantly enhance the real income of both Crusoe and Friday. Presumably, Gauthier does not want to say that neither has any entitlement to his "surplus" income because this increment to their income arises only through market interaction and would not have existed had each remained a "solitary being."¹³ Nor, it seems, does Gauthier want to hold that what each would be entitled to is an equal share of the total gains due to specialization and trade. For it is Gauthier who declares that

pure market inequalities no more reveal unfairness than do inequalities among isolated, non-interacting individuals. Those who are able to supply more factor services to the market may expect to enjoy a preferred share of the private goods. [270]

Gauthier cannot be arguing that because this interaction would not occur in a universe of solitary beings, interference with it does not constitute an infringement upon "market freedom conceived as an extension of natu-

geles, in Philadelphia, or in Shreveport—each coalition of which *easily* comes up with \$30,000? Should Los Angeles be allowed to tempt Chamberlain away from Shreveport with its beachfront communities, or should Shreveport be allowed to add a special hardship component to its salary offer? Is the ultimate choice of employer even Chamberlain's choice to make? If we allow equalization of bids by allowing, for example, Shreveport to add some extra monetary payment to compensate for the charms of Los Angeles and do not permit any competitive bidding among the aspiring employers, we fully eliminate net return to Chamberlain as an allocative device and, in the (intentionally?) ominous words of one economics text, "some other technique would have to serve this function" (*University Economics*, A. Alchian and W. Allen [2nd ed.; Belmont, CA: Wadsworth, 1967], p. 99). Whether or not this shows that a blanket prohibition on rent infringes upon Chamberlain's market freedom, it certainly seems to show that it infringes upon the market freedom of would-be competitors for his services. In light of the rationing function of rents, it is certainly false that "market interaction is not affected by the distribution of the surplus represented by rent" [273].

¹² The term "surplus" is not normatively neutral. When part of someone's holdings is described as a surplus, there is a strong suggestion that there is no significant moral barrier to the redistribution of that holding and, furthermore, that there is some good reason in support of that redistribution. Nevertheless, the term is ubiquitous. It cannot readily be avoided. Occasionally I allow myself to mark the non-neutrality of the term by the use of scare quotes.

¹³ Though one way of reading Gauthier here is that he is employing a third and much more encompassing notion of rent—namely, rent is whatever one receives beyond what one would have received as Crusoe. Tyler Cowen pointed out to me this third possible use of "rent." It may be through such an all-encompassing sense of rent that Gauthier seeks to assimilate rents and cooperative surpluses.

ral freedom." For if this trade does not constitute an exercise of "market freedom conceived as an extension of natural freedom," *nothing* does. It is then difficult, to say the least, to imagine what conception of "market freedom conceived as an extension of natural freedom" Gauthier can be appealing to here such that the freedom to receive and retain rent from (noncoerced, nondisadvantaged) trading partners does not fall under that conception, while the freedom to receive and retain other gains from trade does.

It seems that, as Gauthier sees it, what really marks the difference between gains from market specialization and gains from profit and rent is that only the former would exist in a perfectly competitive market. In the bloodless world of perfect competition, no special scarcities exist; there is an unending supply of (potential) hockey sticks, or perfect substitutes for hockey sticks, ready to come on the market at any price that covers the cost of supply. Furthermore, there is perfect information regarding hockey sticks; all potential sellers know that other sellers will undercut them if they attempt to sell at more than their costs, and all potential buyers know where to find "eager" sellers. Thus, in a perfectly competitive market, there are no gains to be had from the relative scarcity of one's productive factors or from one's special insights.¹⁴

It is, unfortunately, not needless to say that this "idealization" of the market, which permeates *Morals by Agreement*, completely abstracts from a standard feature of actual market exchanges and the dynamic virtues of real competitive markets. The standard feature of actual exchanges is that both parties gain more than minimally from them. Both parties receive more than what would cover their costs in bringing their supply (of, for example, hockey sticks or money) to the exchange; both parties receive more than their costs plus that smidgen of return which would move them to make the exchange, were they assured that no greater payment (in money or hockey sticks) were possible. In standard actual exchanges each payment—for example, money for hockey sticks, hockey sticks of so-and-so quantity or quality for money—is wasteful or inefficient in the sense that some lesser payment would have called forth the same supply, had the supplier known that this lesser payment was the maximum possible payment to him. But, of course, the total "surplus" from each exchange, which is divided among the traders in accordance with the terms they had agreed to, is not "socially" lost. What is lost to the purchaser of

¹⁴I am told that if perfect competition is defined in terms of all sellers being price-takers (that is, they are unable by any bargaining to affect their selling price), then profit (and rent?) is possible under perfectly competitive conditions. It is not clear to me (unversed in these matters as I am) that this is so. For it is not clear to me how, if the conditions for sellers not being price-takers to any extent are satisfied, sellers will be able to elicit more for their goods or services than the cost of their supply (plus the smidgen needed to induce them to bring those goods or services to market). In any case, Gauthier does not characterize perfect competition in terms of all sellers being price-takers.

hockey sticks is found in the seller's greater-than-minimal return and what is lost to the seller of hockey sticks (in the form of having provided more or better sticks than he might have had to for the money received) is found in the purchaser's greater-than-minimal return. Those who invoke the model of perfect competition recognize, of course, that this is an "idealization." But the invocation, nevertheless, characteristically suggests that there is something fishy about gains that exceed those that would exist, if any would, under the conditions of perfect competition.

This suggestion that there is something suspicious about more than perfectly competitive returns is strongly reinforced by the idea that the competition that enhances efficiency and that is appropriately envisioned in the economic justification of the competitive market is one which steadily and incrementally reduces suppliers' more than perfectly competitive returns. The more competitive the world is, the more competitors sensing the gap between the return to the hockey-stick provider and his costs will rush in and bid down the price of these implements. At least the *tendency* of unrestricted competition will be to reduce returns to the cost of supply. In actual competitive economies, however, insightful entrepreneurs will not imitatively ape the production and marketing of others; they will search out new ways of producing for new or as-yet-unexploited markets. The entrepreneur does not replicate the efforts of the existing supplier except to the extent that she hopes to marginally undercut his prices. Instead, she hopes to create or homestead a new market or a new way of producing for an existing market such that the gap between her costs and the value that her potential customers see in her product will be *greater* than the gap between the present supplier and his customers. She seeks not less but more in the way of imperfectly competitive returns. If she succeeds, she does not so much undercut her competitor as render him obsolete.¹⁵ Even the entrepreneur who merely (!) finds a better, more cost-effective, way of providing a good or service identical to her competitor's may achieve a greater net return than the

¹⁵ Such actual, entrepreneurial competition is therefore much more like the competition between diverse cultures with different perceptions of the world and different technologies as this larger-scale competition is described by Gauthier himself. The "old ways" of the North American natives "were highly effective adaptations to an environment that the native inhabitants were unable to transform." The Europeans did not engage in incrementally better versions of those adaptations. Rather,

European technology rendered these adaptations obsolete. The problems with which the natives grappled were dissolved by that technology—to be replaced, to be sure, by new and different problems, but related to a more advanced level of human development. . . . The effect of the European incursion was to turn cultural practices that had been necessary to survival into a form of play. [296]

The parallel to the distinction between biological evolution conceived as incremental improvements in existing forms of adaption versus enterprising (albeit randomly induced) leaps to new modes and directions in biological adaption is evident.

competitor while undercutting his price.¹⁶ This actual competition is the source of the innovative and dynamic quality of market economies—a quality which is needed to keep pace with a world of changing technology, resource availability, information, and consumption preferences and which contributes to market societies being such worlds.¹⁷ This is competition as a “discovery procedure,” through which portions of the knowledge that the model of perfect competitiveness assumes to exist in superabundance first become available to economic agents.¹⁸ The perfectly competitive market idealization draws our attention away from the way in which actual competition enhances value and knowledge in society through a process whose participants aim at, and sometimes achieve, higher (than normally imperfectly competitive) returns.

The point of the last couple of paragraphs is not that since profits and rents are essential to actual innovative competitive processes and since these competitive processes are good, individuals (typically) have a right to their entrepreneurial profits and noncoercively derived rents—although that would not be too bad an argument. Instead, the argument is that it is only the pervasiveness of the perfect competition idealization in *Morals by Agreement* that gives any initial plausibility to a distinction between, on the one hand, pure profits and rents and, on the other hand, the smidgen of gain that minimally motivates trades and the benefits from the division of labor. It is only this faulty idealization that suggests that the former are any less likely candidates for membership in the system of natural liberty. This in itself is not an argument for the right to profits and rents.

Let us proceed to Gauthier’s core claim that in principle all rent should be confiscated, and what such a claim portends for the program of treating individuals as bearers of entitlements to their respective natural endowments. Here I shall depart from the standard manner of speaking in which the same figure (for example, \$100,000) is cited as the minimum motivation for an individual to engage in some activity and as his oppor-

¹⁶ Entrepreneurial profits then turn out to be rents on the entrepreneur’s unique (perhaps only temporarily) knowledge.

¹⁷ The classic reference, of course, is to Joseph Schumpeter’s discussion of the “creative destructiveness” of market economies. See *Capitalism, Socialism and Democracy* (3rd ed.; New York: Harper and Row, 1950), ch. VII. Schumpeter’s own weary sense that the rate of technological, informational, and preference change was diminishing contributes to his conclusion that, in the future, a bureaucratic structure that simulated the actions of a perfectly competitive market would be feasible and adequate to that more static world. See Schumpeter, chs. XVI and XVII.

¹⁸ See F. A. Hayek’s “Competition as a Discovery Procedure” in his *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago: University of Chicago Press, 1978), pp. 179–90 and, more importantly, “The Meaning of Competition” in his *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), pp. 92–106. Israel Kirzner is pre-eminent among those currently developing the Hayekian insights. See, e.g., his *Discovery and the Capitalist Process* (Chicago: University of Chicago Press, 1985), chs. 1–4.

tunity cost for that activity—that is, the payment he would forgo in opting for that activity. This standard manner of speech neatly (and, I think, misleadingly) veils the fact that if the agent *chooses* between the activities, the chosen activity must provide *something* more than the opportunity costs to him of supplying the service. If the payment attached to the chosen activity is identical to that attached to the best-paying forgone activity, the agent will be left indifferent between the two competing activities. It seems better to mark the difference between choice and indifference with some difference in payoff.

Assume, then, that an annual payment of \$100,001 would minimally motivate Chamberlain to play basketball. Were it impossible for him to receive more than this figure, he would opt to play ball for this amount. Under these circumstances he would still choose to play hoops because this deal beats, albeit minimally, his next-best offer—which is, let us suppose, to be the stand-in for television's Incredible Hulk at \$100,000 per year. That \$100,000 is, or at least seems to be, Chamberlain's opportunity cost for opting for basketball. It is, or seems to be, the cost (to him) of supplying the basketball services.

Having distinguished between what will minimally motivate Chamberlain to play ball and his opportunity cost, we have two possible ways of casting Gauthier's claim. One is that in principle, everything over \$100,001 should be confiscated. The other is that in principle, everything over \$100,000 should be taxed away. Let us understand Gauthier's proposal as the first of these variants—simply because this allows us to recognize Chamberlain's *choice* of the basketball option. Our question, however, is whether the \$100,001 really is just minimally over Chamberlain's opportunity costs. It is just minimally over Chamberlain's opportunity costs *if and only if* Chamberlain would be allowed to keep all of the \$100,000 were he to be the stand-in for the Incredible Hulk. But under Gauthier's proposed confiscation of all rents, Wilt would be allowed to keep all of that sum if and only if no portion of that \$100,000 would constitute economic rent. Yet surely Chamberlain is more suited than the average person to be the stand-in for the Incredible Hulk. He may be uniquely suited, or he may be one of a few especially suited, for roles of this sort. And it will, then, be only because of this scarcity that he will be able to solicit an offer of \$100,000 for being the Hulk's stand-in.

We must therefore ask what remuneration would elicit Chamberlain's agreement to be the Incredible One's Number Two, were no more generous payment possible. Maintaining roughly the same proportions, we may imagine that, were all higher offers prohibited, Chamberlain would agree to this entertainment endeavor were he to be offered \$40,001. This would minimally motivate him to choose this option over his next best option—say, a year as a sanitation engineer at \$40,000. But our story does not end here. Not everyone is equally suited for the task of sanitation engineering. Certain nonuniversal strengths and capacities are crucial—for

example, a high tolerance for the odor of rotting food. Those with these strengths and capacities occupy an oligarchic position such that a portion of the negotiated salary for each of them will consist in economic rent. While Chamberlain might elicit an offer of \$40,000 per year in the imperfect market for sanitation engineers, we may suppose that he would sign on for garbage patrol for \$30,001 per year were all more lucrative offers prohibited. In doing so, he would be forgoing the \$30,000 annual salary available to him for engaging in what we may call Universal Labor—a calling which requires only some degree of training of pure, undifferentiated labor power. Thus, that \$30,000 salary would have no rent component.

What salary, then, would minimally motivate Chamberlain to choose basketball over Universal Labor? \$30,003. That is, \$30,001 plus \$1 to minimally motivate being a stand-in for the Incredible Hulk over garbage gathering and \$1 to minimally motivate playing ball over being a stand-in. By hypothesis, \$30,003 is all that is needed to elicit Chamberlain's basketball displays. That \$30,003 is what Chamberlain would receive for his performance on the court were his skills not at all scarce—that is, were there several thousand proto-Chamberlains. It is what he would receive were there *a reserve industrial army of Chamberlains!* Like those who step forward from any reserve industrial army, Chamberlain is to receive on net nothing more than the costs of his own production as a socially useful worker—which, again, equal his opportunity costs plus that smidgen needed to secure his “free” choice of the employment of his talents that others most prefer. In principle, everything above that is, according to Gauthier, to be confiscated for distribution across society so that this basketball-loving community will not be victimized by Chamberlain.

In what sense, if any, is Chamberlain left with a right to an unequal return from the market provision of his distinctive talents and powers? It seems that, with the minor addition of what will minimally motivate Chamberlain into “freely” opting for the socially most highly valued use of his natural assets, Chamberlain can only have a right to the going *rate* in a perfectly competitive market for the amount of Universal Labor he supplies. Only by limiting what he receives for the exercise of his talents to that rate can it be assured that he will not “extract” factor rent from society. Thus, if Chamberlain rightfully receives a greater than equal income, it must be because he supplies a greater than equal *quantity* of Universal Labor.

Although it is certain that, for Gauthier, this is an unwelcome reading of his position, this characterization does seem to fit his claim that “those who are able to supply *more factor services* to the market may expect to enjoy a preferred share of the private goods . . .” [270, emphasis added]. It might be suggested that by “more factor services,” Gauthier simply means *more valuable* factor services. But consider two packages of factor services. There are only two ways in which package A may be more valu-

able than package B. A may be bigger than B. Or the type of services forming A may be more valuable than those forming B. In the latter case, the greater value of A would result from the scarcity of the factor services comprising it, relative to the services comprising B. But,

Rent is determined by factor scarcity; it is the premium certain factor services command, over and above the full cost of supply, because there is no alternative to meet the demand. [272]

If rent must be banished for the remaining inequalities in income from the provision of factor services to be just, differential payment for different packages of services must not be determined by their relative scarcity. Thus, the only way in which package A can be more valuable than package B is for A to be larger than B. Gauthier must mean what he says: namely, that greater than equal shares of private goods can be earned only by providing *more* factor services homogeneously conceived. If this is so, however, neither Chamberlain's nor anyone else's just earnings can ever be based upon that person's qualitatively distinctive (or even relatively rare) talents and powers. If Chamberlain's legitimate earnings exceed that of the average person, it must be because he works longer hours than average or because he somehow produces more minutes of basketball service per playing minute than other players. It is, then, an implication of Gauthier's view that the institution of receiving payment for what is special about oneself, for one's relatively distinct ways of doing things, must always amount to engaging in the unjust extraction of payments from others.¹⁹

I want now to turn to several other questionable features of Gauthier's views on the just distribution of economic rent. It seems odd, at least as a matter of principle, that the economic rent that accrues to Chamberlain should be distributed across all members of Chamberlain's society. It seems, if anything, that a more finely tuned distribution of the seized funds would be more appropriate—namely, one which would distribute those funds precisely to those whose economic demand for Chamberlain's performances add up to an offer of more than would minimally motivate him. Gauthier tells us that "society may be considered a single co-operative enterprise" [274]. But, then again, it may not. It certainly seems odd that someone whose only interest in sports is an inexplicable obsession with ice hockey should have a claim in justice on an equal societal share of the rents Chamberlain "extracts" from his fervent basketball fans. It may not be anything intrinsic to Chamberlain's powers that

¹⁹ In suggesting an ironic similarity between Gauthier's and Marx's commitment to homogeneously conceived labor units, I do not, of course, mean further to imply that Gauthier is like Marx in thinking that the value of the products of this labor is due to the value of that labor.

explains the \$250,000 gross payment. But it is something intrinsic to the desire of Chamberlain's fans for the experience of watching him play. The "cooperative enterprise" that produces Chamberlain's rents—and we shall shortly be concerned with the sense in which these rents are "produced"—is composed of Chamberlain's fans.

Furthermore, any scheme to redistribute the rent across all of society would be self-defeating. For suppose it is known that everything above \$30,003 will be confiscated. Chamberlain will then simply not bother collecting more than that sum for his playing. So no rent will exist to be expropriated and distributed at large, or even to hockey fanatics. The average ticket price to Chamberlain's fans will drop by the amount that they, on average, would have received had the rents continued, been confiscated, and distributed to them. The hockey fans would end up no better off than if they had not been targeted as beneficiaries of the scheme to begin with.

But Chamberlain's fans will be better off—not in the form of a rebate, but in the form of lower initial prices to see Chamberlain play.²⁰ They will be better off in a way that Chamberlain is not. For they have revealed their willingness to pay not \$30,003, but \$250,000, to see him play. His playing is worth (*at least*) \$250,000 to them. However, if it is (*at least*) that valuable to them, then should they not be satisfied with getting that value—granted, not gratis, but for a price that each of them is quite willing to pay? To say that Chamberlain's display is worth \$X because of these fans is simply to say that they are willing, with no coercion at all, to pay (at least) \$X to see it. What complaint can they plausibly have with getting what they value at a price they are willing, without coercion, to pay? We can recognize that they could get what they value at (at least) \$250,000 for less, were someone empowered to prohibit Chamberlain from retaining that \$250,000, without being moved to the conclusion that they ought to get Chamberlain's services for less or that anyone ought to be so empowered.

If the fans who jointly pay \$250,000 to see Chamberlain play when \$30,003 would have minimally motivated him can legitimately complain that he has extracted rents from them, Chamberlain will almost certainly be able to press a similar charge against his fans. Almost certainly there is some greater sum—say, \$300,000—that Chamberlain's fans would have paid to see him play, had it been impossible for them to pay less. However, the fans get his performance for only \$250,000. The difference, the \$50,000 of consumer surplus, is rent extracted by the fans. The fans get \$300,000 worth of pleasure and excitement from Chamberlain's play and slyly pay him only \$250,000.²¹ This complaint against the fans is as rea-

²⁰ We leave aside questions that arise about how many more people would be willing to pay to see Chamberlain play at this new, lower, price.

²¹ The consumer surplus captured by the fans might be due simply to Chamberlain's im-

sonable as their complaint against the basketball player. And who can most coherently make *both* complaints? Neither Chamberlain, nor the fans, but *SOCIETY* declares that each "receives more than is needed to induce [them] to bring [their respective] factors to the market"; each receives "rent [which] is by definition a return over and above the cost of supply" [98]. It is Gauthier's position that, to counteract this act of insidious mutual exploitation, the gains of each party that exceed what would have minimally motivated that party to supply his factors are to be confiscated and distributed across society.

We have been operating with implausible assumptions about Chamberlain's preference ordering for the activities of Universal Laboring, sanitation engineering, Hurling, and basketball playing—namely, that this is their descending order. For, we have been assuming, it takes an extra dollar to get Chamberlain to shift from Universal Labor to sanitation engineering, another extra dollar to shift from sanitation engineering to Hurling, and so on. Suppose we adopt the more plausible assumption that Chamberlain would much prefer to play basketball than engage in Universal Labor. Let us assume that Chamberlain will engage in a season of Universal Labor for \$30,000, but would play ball for the season for \$25,000. If this is so, then the rent component of Chamberlain's gross basketball earnings is \$225,000. A policy of social confiscation of his economic rent will then leave him with less (net dollar income) than he would receive, were he only capable of supplying Universal Labor. This is an odd consequence for Gauthier, who explicates and explicitly rejects Rawls's view that "no one has any entitlement based on being the particular person he is . . ." [250] and who argues that

one's natural capacities are what one brings to society, to market and cooperative interaction. Why should they not determine, or contribute to determining, what one gets in society? [220]

perfect knowledge about the strength of their preferences. Had Chamberlain, on the basis of perfect knowledge about the strength of their preferences, credibly committed himself not to play for less than \$300,000, he would have received that \$300,000. (Or the costs to Chamberlain of creating that credible commitment or of transacting the \$300,000 agreement might be too large for that agreement, on net, to be worthwhile.) But the consumer surplus captured by the fans might also be due to the relative scarcity of the fans. Had there been even more fans comparably eager to see Chamberlain play, the price per ticket would have been bid up. The consumer surplus would have been less and Chamberlain's rents would have been all the greater. On this account of the consumer surplus, the rent extracted by the fans (in the form of \$300,000 of basketball viewing pleasure received in return for bringing a supply of money to market, the cost of which was only \$250,000) would have been due to their oligopsony, their quasi-monopoly as buyers. (Fred Miller reminded me of the language of monopsony and, hence, of oligopsony.)

If, in accordance with Gauthier's definition [98], any return over cost of supply counts as economic rent, then any consumer surplus is rent—even if it is not due to any monopsonistic departures from perfect competition. If, on the other hand, the net over cost must be due to scarcity in order for it to count as economic rent, then rent occurs in the latter situation, but not the former. See note 6.

II. RENT AS COOPERATIVE "SURPLUS"

I have been focusing on problematic assumptions within and resulting puzzles about Gauthier's denial of rights to rents. But something must be said about Gauthier's positive case for treating all rents as subject to redistribution under the principle of minimax relative concession.²² Since rents are a product of—indeed, I have argued, an ineliminable feature of—market interaction, it is surprising that they are supposed to be apportioned in accordance with minimax relative concession. For this principle is not a norm of market interaction, but of nonmarket cooperation. Gauthier does, however, offer a reason for applying minimax relative concession to rents; this reason consists of his construal of rents as *cooperative* surpluses which are, therefore, subject to apportionment under this principle of nonmarket cooperation.

Society may be considered as a single co-operative enterprise. The benefit represented by factor rent is part of the surplus afforded by that enterprise, for it arises only in social interaction.²³ But then that benefit is to be distributed among the members of society on the terms established by minimax relative concession. Each person, as a contributor to social interaction, shares in the production of the benefit represented by factor rent. [274]

In this passage and those in support of it, Gauthier is no longer maintaining the largely negative thesis that, since rent plays no useful function in the operation of the free and perfectly competitive market, denying a right to rent does not clash with the operation of the market or with people's market freedom. Rather, we have here a positive doctrine reminiscent of the theories of many nineteenth-century social critics who argued for the social confiscation of rents—they especially had land rents in mind—on the grounds that the scarcity of the rent-generating good or service and, hence, the value of that good or service, was a product of "society." And, as the product of society, it (the good or service or its value) rightfully belonged to society.²⁴

This sort of argument seems to rely upon a strange mixing of cost of production theories and subjective theories of economic value. It conflates two different senses of "contribution" to some thing's economic value,

²² The need for this further discussion was pressed on me by Kenn Cust.

²³ Here, again, Gauthier may be operating with an enormously broad notion of rent: namely, rent as anything one receives beyond what one would have received as Crusoe (that is, rent as any gain due to social interaction).

²⁴ Compare L.T. Hobhouse's approving report of the following view:

[Site] value the land nationalizer contends is not created by the owners. It is created by society. . . . Directly or indirectly, the community creates the site value. . . . The

detaches the plausible claim to entitlement associated with one sort of contribution, and misleadingly attaches that entitlement claim to contribution of the other sort. Cost of production theories of economic value are "push" theories; economic value gets pushed into objects or activities possessing it by their production out of factors which themselves already possess economic value. There are one or more basic factors which intrinsically possess economic value; labor is the only such basic factor in that simplest of cost of production theories—namely, the labor theory of value. Clearly, *no* explanation can be given for this fundamental and intrinsic possession of economic value. In contrast, the subjectivist theory of economic value is a "pull" theory. People's demands for goods and services, reflecting their various preferences, values, and judgments, confer economic value on those goods and services—though the value resides in people's evaluations of those goods and services, not in those objects and activities as such. Factors for the production of those goods and services, in turn, acquire value through the demand for them on the part of those prepared to use these factors in the production of those goods and services. The value of those factors of production does not reside in those factors as such; rather, it is in the preferences, values, and judgments of those seeking those factors for uses that they *believe* are or will be valued. On the subjectivist view, nothing has intrinsic economic value—least of all, the most basic factors of production (assuming anything can be identified as being among the most basic factors).

If economic value is conceived on the cost of production model, it is quite natural and plausible to think that the person who contributes some rightfully held factor toward the production of a good or service (the value of which is received from the value of its factors of production) has, thereby, some claim on that product and its value. It will be quite natural and plausible to think that the overall entitlement to that product and its value is shared among the contributors of its value-imbuing factors. Indeed, since on this model the value of the product can never be greater than the value of its factors of production, for the contributors to receive

land nationalizer . . . denies the justice of this [private ownership] arrangement, and he sees no solution except this—that the monopoly value should pass back to the community which creates it. Accordingly, he favors the taxation of site value to its full amount.

Although Hobhouse also points to the positive externalities generated by such social arrangements as the reliable enforcement of property rights as further arguments for the "social" nature of property, he seems quite willing to rely entirely on the social creation of the value of that land as his justification for the confiscation of all rent. See *Liberalism* (Oxford: Oxford University Press, 1964), p. 53.

Although Henry George was the figure best known for endorsing such a confiscatory tax (the famous "single-tax")—and he fully accepted the argument cited by Hobhouse—his own endorsement of this taxation was more centrally motivated by his belief in a fundamental natural right of all to the use of the land. See Henry George, *Progress and Poverty* (New York: Robert Schalkenbach Foundation, 1955), p. 344.

less than a full claim to the product or its value is for them to be duped or exploited.

On the other hand, it is not natural or plausible to think that one's contribution to the value of an object or activity *by wanting it* (or by not increasing the supply of that sort of object or activity!) supports any claim to that object or activity or to the value ascribed to it. The contribution that Chamberlain's fans make to the value of his basketball services by being his fans (or of Chamberlain's potential competitors by pursuing nonathletic life plans) is quite unlike the contribution made, as a cost of production theorist sees it, by Chamberlain's parents, his milkman, his coaches, etc. Contributing to or creating economic value in some X by manifesting economic demand for X (or by not supplying additional Xs) does not in the least indicate that some wrong is done to one if one does not receive a share of X or a share of its economic value. The idea that contribution to an object's or activity's economic value by way of demand (or by way of not oneself enhancing the supply) could establish a claim to that value requires, it seems, that we confuse this sort of contribution with the sort of contribution envisioned within cost of production theories.

One hesitates to imagine that Gauthier is making this error. Yet there seems to be a shift in his understanding of "contributing" to the creation of a cooperative surplus that parallels another: the shift from "contributing" to economic value in the sense of supplying productive factors to "contributing" to economic value in the sense of registering a demand. The principle of minimax relative concession is introduced to govern the distribution of the difference between what is produced through agents' joint activity or joint utilization of factors of production otherwise held and used separately as against what would have been produced had the agents pursued separate strategies or uses of their respective resources. This creation of a surplus occurs through the actual contribution and coordinated utilization of factors of production; it is quite different from the type of "cooperative enterprise" that "creates" rents. In the latter case, there is here no "production of [a] benefit" which ought "to be distributed among the members of society" [274]. Of course the seller benefits from the exchange that ensues. The purchasers contribute to that benefit. In doing so, however, they are not merely receiving through purchase something which, by way of creative cooperation, they have already produced. Although they are receiving through purchase something toward the economic value of which they have contributed, their sort of contribution to its economic value gives them no claim on the item or its value such that any payment for the good or service (above its cost of supply) wrongs the purchasers and ought to be remitted to them. Thus, if we are clear about the senses in which the market value of some X may be said to be created by social cooperation, we will not be tempted to believe that those who produce economic value merely by registering economic demand thereby have any claim upon that value.

III. GAUTHIER ON RIGHTS

We have noted that Gauthier is eager to affirm Chamberlain's "right to his basic endowment [which] is a right to the exclusive use of that endowment in market and cooperative interaction." This motivates Gauthier's insistence that denying Chamberlain's rights to rents is fully consistent with maintaining Chamberlain's right "to the exclusive use of [his] endowment." I shall argue, however, that Gauthier is not in a position to ascribe to persons significantly robust rights over their own natural endowments. More specifically, since these rights are supposed to be supported by Gauthier's Proviso, I shall argue that this Proviso cannot yield significantly robust rights over one's own natural endowments.

The core of Gauthier's Proviso is a prohibition on bettering one's situation by worsening the situation of others. About any particular use or possession by some person A, two questions can be asked. (1) Does A's use or possession worsen the situation of any other party? (2) Would interference with A's use or seizure of A's possession worsen A's situation? If the answer to (1) is no, A is morally at liberty to engage in that use or enjoy that holding. If, in addition, the answer to (2) is yes, then others are not at liberty (or not *unconditionally* at liberty) to interfere with that use or to seize that holding; hence, A has a right of *some sort* to that use or to that holding. Through the deployment of the Proviso, Gauthier defends three successive ascriptions of rights: first, each person's "*exclusive right to*" his natural endowments and powers; second, each person's "*right in*" the fruits of his labor; and third, each person's "*exclusive right to*" the fruits of his labor. Throughout his discussion, Gauthier uses these two locutions to distinguish between rights in terms of the form or degree of moral immunity they provide. It is clear that the "*exclusive rights to*," which Gauthier seeks to establish both with regard to natural endowments and extra personal holdings, are to be understood as significantly more robust than mere "*rights in*." My main claim against Gauthier is, then, that the deployment of the Proviso cannot yield rights any more robust than the relatively feeble "*rights in*."

As the prime exhibit for my contention, we should have before us Gauthier's argument for each person's "*right in*" the fruits of his labors along with his explanation of why this argument does not yield an "*exclusive right to*" the fruits of his labors. Inspection of this argument and explanation will allow us to form some sense of what Gauthier takes these two different species of rights to be. This inspection will also reveal why, contrary to Gauthier's expectations, the application of the Proviso—no matter how often repeated—will never allow us to arrive justifiably at "*exclusive rights to*."

After maintaining that the Proviso indicates that each person possesses a right to his own powers (to which contention we shall return), Gauthier redeploys the Proviso to establish rights with respect to the fruits of one's

own labor. First, it is pointed out that, should A cultivate some common land in the state of nature, A's benefit from the useful possession of the products of this cultivation would not be achieved through the worsening of anyone else's condition. A's cultivation and his use of those products does not violate the Proviso. Second, it is asserted that B's seizure of A's product would benefit B through worsening of A's position. Hence, this seizure would violate the Gauthier Proviso. Gauthier takes this nonsymmetrical relation of A and B to the Proviso to "demonstrate [A's] right in the effects of [A's] labor." But he immediately *denies* that it establishes "an exclusive right to their possession." As Gauthier explains,

For we have not shown that the proviso would be violated were someone to seize the fruits of my labour while compensating me for my effort and intended use. . . . The proviso prohibits worsening but does not require bettering another's position, in bettering one's own.²⁵ It does not then require that the person who seizes the fruits of another's labour share her gains; it requires only that she compensate for costs. Thus the proviso affords a right *in* the fruits of one's labour and so to full compensation, not a right *to* those fruits and so to market compensation. [211]

To examine how the contrast between "rights in" and "exclusive rights to" might profitably be articulated, let us draw upon the distinction between "entitlements" that are protected by "liability rules" and those that are protected by "property rules."²⁶ Chamberlain's entitlement against Gretzky to X is (merely) protected by a liability rule if Gretzky may permissibly take X from Chamberlain as long as Gretzky makes appropriate accompanying compensation to Chamberlain—where the appropriateness of the compensation is not established by Chamberlain's actually agreeing to it. Different liability rules will specify different levels of required compensation. The two familiar rules specify (a) full compensation (that is, leaving the subject indifferent to the forced exchange), and (b) market compensation (that is, providing the subject with what he could have received in a free [and perfectly competitive?] market exchange). In contrast, Chamberlain's entitlement against Gretzky to X is protected by a property rule if and only if Gretzky's permissible acquisition of X from Chamberlain requires Chamberlain's (prior) voluntary consent. Gretzky

²⁵ Note the curious suggestion that a prohibition on retaining all the benefits from a forced exchange could only flow from a standing requirement *to better the situation of* the party subject to the seizure.

²⁶ Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review*, vol. 85, no. 6 (April 1972), pp. 1089-1128, especially pp. 1106-10. Calabresi and Melamed cast liability rules in terms of the payment of "an objectively determined value," in contrast to an actually "agreed upon" value.

must make Chamberlain an offer which the latter voluntarily accepts. It is not permissible for Gretzky to seize X along with compensating the previous owner—even if Gretzky compensates Chamberlain as much as would be required were Gretzky to impermissibly seize X. If the right to X is merely protected by a liability rule, the combined seizure and compensation leaves the (former) title-holder morally whole. In contrast, if the right to X is protected by a property rule, the seizure *wrongs* the title-holder in ways that (even) market compensation does not suffice to erase.²⁷

It is quite clear that, for Gauthier, a right in X is an entitlement protected by a liability rule requiring (only) full compensation. The Proviso would not be violated “were someone to seize the fruits of my labour while compensating me for my effort and intended use.” It is considerably less clear whether, according to Gauthier, an exclusive right to X is an entitlement protected by a liability rule requiring market compensation or an entitlement protected by a property rule (which, if violated through the seizure of X, demands the payment of market compensation).

One factor adding weight to the interpretation of exclusive “rights to” as entitlements protected by market compensation liability rules is the introduction of market compensation as a type of enhanced version of full compensation, according to which the title-holder is to receive “a share of the benefit realized by the other individual who seizes the good . . . — the share that could be expected from voluntary exchange” [211]. When Gauthier presents Eve’s motivation in seeking to promote her right in use of land to an exclusive right to a parcel of land, he describes her as seeking “the security that a right to market compensation, rather than merely full compensation, confers” [215]. The suggestion here is that the “exclusive right to” consists simply in the right to that higher level of compensation.²⁸

On the other hand, were Chamberlain’s exclusive right to his own powers merely an entitlement protected by a market compensation liability rule, to coerce Chamberlain to play basketball—as long as this coercion were accompanied by market compensation—would fully respect that exclusive right. Since Gauthier is eager to block any suggestion that his position diminishes Chamberlain’s freedom of choice in the use of his talents, it seems that Chamberlain’s exclusive right to his endowment

²⁷ Thus, if one wants to hold that the violation of A’s right to X as such provides at least some justification for violator B’s *punishment*, one must take that right to be of the sort that is protected by a property rule. Otherwise, the forced transfer of X from A to B could call for no more than B’s making due compensation to A. B’s forced taking, no matter how intentional, would remain only a tort, not a crime. Note how rights viewed as entitlements protected by liability rules provide no basis at all for principled anti-paternalism.

²⁸ But notice that, on the perfect competition model, the difference between full compensation and market compensation is vanishingly small. It is hard to credit that this is the only difference Gauthier means to mark with the contrast between “rights in” and exclusive “rights to.”

must be protected by a property rule. In similar fashion, while Gauthier first says of exclusive right-holder Eve that others must deal with her by "paying market compensation," he goes on to explicate Eve's right as requiring "negotiating with Eve for the right to the land on mutually acceptable terms" [216]. Finally, we must give some significant reading to the continued contrast between "*exclusive* rights to" and (*nonexclusive*) "rights in." Whatever A has a (*nonexclusive*) "right in" as the fruit of his labor is already removed from common use. It already is A's. A must be compensated, albeit only fully, for its seizure. So the *exclusiveness* of A's right to the products of his labor must go beyond identifying A as the party to whom compensation is to be paid. It seems plausible that the dimension along which exclusiveness moves us beyond identifying A as the party to be compensated is the dimension defined by types of entitlement. Exclusiveness moves us from entitlements protected by liability rules to those protected by property rules.

So I take Gauthier to be aiming at entitlements protected by property rules in his discussion of "exclusive rights to." Certainly this is the target worth aiming at. But even if his aim is less ambitious—even if he seeks only to protect entitlement by market compensation liability rules—Gauthier's argument falls short. His account of the reason why the application of the Proviso that yields a right in the fruits of one's labor does not yield an exclusive right to those products is a perfectly general statement of the limits of what the Proviso can provide. Recall Gauthier's remark that

the proviso prohibits worsening but does not require bettering another's position, in bettering one's own. It does not then require that the person who seizes the fruits of another's labour share her gains; it requires only that she compensate for costs.

Thus, whether one's prospective relation to some X is that of temporary user or permanent possessor, one's only claim against others with regard to that X is that their seizure of X may not, on net, worsen one's situation. Such a claim can always be satisfied by the expropriator's provision of full compensation. This reasoning about the severe limits of the Proviso's implications generates two predictions: namely, that the deployment of the Proviso will provide neither exclusive rights to the fruits of one's labor nor exclusive rights to one's natural endowments. These predictions are easily checked through an examination of, first, Gauthier's transition from rights in the fruits of one's labor to exclusive rights to those fruits and to parcels of land and, second, his argument for exclusive rights to one's natural endowment.

Gauthier asks us to consider the case of Eve, who has been (sporadically?) cultivating a segment of common land. Eve

proposes to take a certain area of the island for her exclusive use, so that she (and her family) may benefit by maximizing its productivity. She seeks an exclusive right to a certain portion of the island. [215]

The main line of Gauthier's argument here is clear, although its finer design is not.²⁹ The basic approach is to ask two questions. (1) Does Eve's acquisition of the exclusive use of X better her condition through the worsening of the condition of others? (2) Would the annulment of Eve's exclusive use of X advance some other party's situation through a worsening of Eve's condition? Since, according to Gauthier, Eve's acquisition of the exclusive use does not worsen the condition of others *and* the annulment of that exclusive possession would worsen Eve's (and possibly yet others') circumstances, Eve's exclusive right to X is confirmed. (We should note that this argument is cast in terms of Eve's attaining the greater security of "a right to market compensation, rather than merely full compensation." It is not clear whether the right to market compensation is supposed to exhaust the content of this "exclusive right to" or supposed to be the implied remedy for the impermissible seizure of an entitlement which is protected by a property rule. But, as indicated above, the Proviso will not get us even to the more modestly construed right to market compensation.)

We turn, then, to the reasoning behind Gauthier's answers to questions (1) and (2). No extensive challenge will be launched against the negative answer to (1). Yet some problems deserve mention. Gauthier's claim that Eve's exclusive use of this parcel of land does not worsen the situation of others appeals to the general and immense benefits of the privatization of land. It may well be — I certainly like to believe — that these improve-

²⁹ Complications are introduced by Gauthier's claim that rights *to* one's body and powers and rights *in* the products of one's labor exist in "the pure state of nature" while (apparently) rights *to* the products or *to* land do not exist in "the pure state of nature" [211]. It seems that what Gauthier has in mind with respect to land is something like the following. Certain deployments of land by Evan will impose costs on Ellen that improve the (subsequent) terms of trade for Evan and worsen them for Ellen. Subsequently, when trade ensues, it is through this cost imposed by Evan on Ellen that Evan gains as much as he does. Thus, the combination of Evan's disposition of the land and the subsequent trade violates the Gauthier Proviso. [See 211–14, where the relevant "land" is fish.] Thus, an isolated disposition of land that does not itself violate the Proviso does not a "right *to*" make. But Gauthier's discussion of Eve's right *to* the land she cultivates does not at all show this concern for whether Eve's acquisition of this land unfairly improves the terms of trade she subsequently enjoys with others. Hence, whatever the significance of the claim that rights *to* products or land do not exist in "the pure state of nature," it does not seem to touch upon the argument for Eve's right *to* her cultivated land.

The idea that the warrant for exclusive "rights *to*" is contingent upon their benign effects on the terms of trade should, I think, be much more troubling to Gauthier than it is. For doesn't the possession by a highly skilled, strong, and energetic Crusoe₁ of an exclusive right *to* his powers (which is innocent enough in itself) unfavorably affect the terms of trade with an unskilled, weak, and lazy Crusoe₂ who possesses an exclusive right *to* his puny powers? Doesn't this endanger Crusoe₁'s rights over his own powers?

ments are such that everyone benefits (relative to . . . ?) from a *system* of private ownership of land. But this is different from claiming that everyone benefits (or, at least, is not made worse off) by any given private appropriation. All those who are affected quite indirectly (via greater economic productivity, etc.) may be benefited. But what of Freda, who would have appropriated precisely this parcel of land had Eve not? Gauthier at least has to argue that Freda's complaint against Eve—namely, that she (Freda) is wrongly precluded from appropriating *this* parcel—cannot be legitimate. He might do so by pointing out that if Freda's complaint were to be assuaged by endorsing her acquisition of the parcel, others—including Eve—would be in the position to make a complaint fully comparable to Freda's current one.

More significant challenges can be directed against Gauthier's affirmative answer to question (2)—that is, against his claim that interference with Eve's claimed exclusive right would violate the Proviso. Gauthier points out that there are two forms of annulment to be considered. The land acquired by Eve may nonconsensually be returned to common use, or it may be seized as the exclusive possession of another.

In the first case, the argument for the Proviso's violation focuses on the losses to all those individuals who benefit, however modestly and indirectly, from the privatization of this land parcel. Since privatization is productive, its annulment must on net be costly and those costs must fall somewhere. So Eve, albeit only as one among many indirect losers, has a legitimate claim in terms of her diminished expected utility against the nonconsensual conversion of this parcel from hers to everyone's.³⁰

Unfortunately, the smooth flow of this argument is disrupted by Gauthier's own contention that not every worsening that occurs in the course of someone's bettering herself counts as a violation of the Proviso. A worsening does not count as a violation if it is "incidental" to the benefit received. The benefit received by Gertie, who restores Eve's parcel to common use, is not generated through interaction with Eve (or with any of those who benefit indirectly from Eve's privatization); the benefit received is no greater than what Gertie would have enjoyed were Eve (and all those indirectly helped) not to have existed at all or not to have had anything to do with that parcel. Thus, "the cost [Gertie] impose[s] on

³⁰ Suppose, however, that Eve through Yvonne each consensually return their own land to common use. If Gauthier is correct, as he surely is, about the bountiful effects of private ownership, then these convergent free choices about their respective holdings will significantly worsen the position of the one remaining property holder, Zelda. From being in the position of a private property holder in Switzerland, she has been moved by their choices into the position of a private property holder in Albania. Mustn't we conclude then, if we are guided by Gauthier's Proviso, that these choices of Eve through Yvonne jointly worsen Zelda's situation impermissibly? For Gauthier, since the rights to private property depend on the mutual utility of private property, there can be no systematic legitimate abandonment of private property—unless the content of everyone's utility function changes to give pride of place to intrinsically communal preferences.

[Eve (and any others who benefit from Eve's privatization)] is not necessary to the benefit [Gertie] receive[s] . . ." [210, 212].³¹ Since, therefore, this restoration of the common by Gertie does not violate the Proviso, Eve does not have a right *to* (or even *in*?) the land.³² (Note that the only cases in which Gertie's coercive return of Eve's possession to common use will more than "incidentally" worsen Eve's situation are those cases in which Eve has transformed some raw material, and the common use capitalizes upon that productive transformation.)

In the second case, the seizure by and for some particular individual, the land remains privately held. Thus, there are no indirect costs from collectivization; the argument must focus entirely on the putative direct worsening of Eve's situation. Gauthier's key claim here is that

the person seizing the right is bettering himself by worsening Eve's situation, and may avoid this only by paying market compensation, negotiating with Eve for the right to the land on mutually acceptable terms. [215]

But what justifies the requirement of market compensation rather than (merely) full compensation? In other words, why believe that to avoid worsening Eve's situation, it is necessary for Heidi—who seizes the holding for her own exclusive use—to pay market compensation? One may well endorse Gauthier's claim that "a right *to* land or goods is a right not only to the fruits of use, but also to the fruits of exchange" [215]. And one may well allow that a right to the fruits of exchange is a right to the payment that voluntary (but only perfectly competitive?) exchange would bring. Given all this, *if* Eve's claim to the land represents an exclusive right to it, she certainly has a right to this market level of payment if the land is taken; her situation will properly count as having been worsened if she does not receive market compensation. The taking of the land by Heidi (without the payment of market compensation) will thus violate the Gauthier Proviso. But, as far as I can see, the only way to arrive at the crucial judgment that less than market compensation by Heidi will violate the Proviso is to start with the premise that Eve enjoys an exclusive right to that land. This, unfortunately, is precisely what the argument is

³¹ Gertie's relation to Eve is like that of Columbus, who joins the natives in their common use of the land. Columbus's "arrival worsens their situation; it creates greater population pressure on the land." But this Columbus does not violate the Proviso, because he "does not profit in any way from the presence of the original inhabitants, . . . he does not better his situation in relation to what he would expect were they absent" [292].

³² Perhaps this restorative worsening would violate the Proviso when combined with the nonbenign effects it would have (for Eve) on the subsequent terms of trade between Gertie and Eve. (See note 29.) But Gertie, who gains utility by deprivatizing the world, is not a likely candidate to rush to exploit her (now more favorable) terms of trade vis-à-vis Eve. Similarly, the Columbus of the previous note is assumed to be "entirely self-sufficient."

supposed to demonstrate. If Gauthier's argument succumbs to this problem, the most that he can ascribe to Eve in the way of a right with regard to that parcel is a right in it—that is, an entitlement protected by a full compensation liability rule. Thus, the first prediction about the incapacity of the Proviso to yield exclusive "rights to" is confirmed.

In maintaining that the Proviso gets one no further than "rights in," I have been claiming that Gauthier's argument falls doubly short. It does not even vindicate protection by market compensation liability rules, much less protection by property rules. Against the charge of falling *doubly* short, it may be objected that I have at least chronically exaggerated the difference between a property right to X and a claim to receive market compensation in connection with another's taking of X. After all, it may be argued, the requirement for market compensation will provide the holder of X with as much security in her possession of X as she could rationally desire. She will, it seems, only be subject to those forced exchanges of X for payment that have voluntary counterparts which she would have chosen anyway. Why be bothered by forced exchanges if they are (otherwise) the same exchanges one would have voluntarily made?³³ There is no good answer to this question if the only dimensions about which one can rationally be bothered are value dimensions—for example, the dimension of utility, in terms of which the subject of the forced exchange is, by hypothesis, duly compensated. But entitlements protected by property rules point to a different dimension: the dimension of choice. The seizure of the object of the entitlement does not only move the agent down along some value dimension (for example, utility); it also denies the agent her rightful choice over the disposition of the seized item. This loss of choice survives compensating movements back up the value dimension(s). This element of morally protected choice, authority, or jurisdiction is present in an entitlement protected by a property rule, but absent from an entitlement protected (only) by a liability rule. It is the presence of this element that makes the former entitlements more robust than the latter and which Gauthier is almost certainly seeking in his pursuit of exclusive "rights to."

We can, at last, turn to the question of whether Gauthier is correct in thinking that his Proviso supports the conclusion that persons have exclusive rights *to* their own powers. The tone and idiom of Gauthier's argument strongly suggests a desire to establish robust property-rule rights to natural endowments. For the discussion is framed in the language of people's continued use of their own powers and of constraints on interference with others' use of their powers. Gauthier argues that "each person has an exclusive right to the exercise of his own powers without hindrance from others." This is because

³³ How unfair is it to suggest that this is the argument of the (non-self-deluded) date rapist?

the proviso, in prohibiting each from bettering his situation by worsening that of others, but otherwise leaving each free to do as he pleases, not only confirms each in the use of his own powers, but in denying to others the use of those powers, affords to each the *exclusive* use of his own. The proviso thus converts the unlimited liberties of Hobbesian nature into *exclusive* rights and duties: Each person has an *exclusive* right to the exercise of his own powers without hindrance from others. [209–10, my emphasis]

Yet, for Gauthier, the base point established by the Proviso must be fully captured by a person's claim to the expected utility associated with the anticipated use of his powers. For "the base point for determining how I affect you, in terms of bettering or worsening your situation, is determined by the outcome that you would expect in my absence" [204]; that outcome must itself be specified in terms of utility, since "one situation is better for some person than another, if and only if it affords him a greater expected utility" [203].

Within Gauthier's framework, then, what is up for consideration is not prohibiting interferences as such—that is, prohibiting incursions into agents' respective moral domains. Rather, what is (or should be) up for consideration is forbidding the worsening of agents' respective situations understood in terms of levels of expected utility. And surely the Proviso does favor prohibiting worsening situations—which means that it favors forbidding interference with a person's use of his own powers *unless* that person is fully compensated for whatever loss of (expected) utility the interference engenders. Any combination of interference and compensation should be permitted which, on net, does not lower the subject's (expected) utility.

Notice how Gauthier's crucial passage on behalf of exclusive rights to natural endowments envisions a transition directly from the Hobbesian world of unlimited liberties to the Lockean world of property in one's powers. What has happened to—why is there no consideration of—the intermediate moral universe of entitlements protected by liability rules? Certainly it is plausible for Gauthier to maintain that in bettering one's situation through the use of others' powers that "interfere[s] with their own exercise of their powers, one worsens their situation by that interaction" [209]. But since it is the worsening, not the interference itself, which is the focus of the negative judgment, that judgment can be forestalled without forgoing the interference. One need only fully compensate those with whom one interferes. One need only ensure that the subject's net utility is not diminished. A requirement for full compensation for those whose powers are taken fully embodies the Proviso's demand that none may better herself by worsening the situation of others. The Proviso requires only that each possess a right *in* his powers, not that each possess an *exclusive* right to his own powers.

This is precisely what we should expect. The Proviso that is supposed to generate and define each person's rights with respect to his own powers is the same Proviso that generates and defines each person's rights with respect to the fruits of his own labor. It "prohibits worsening but does not require bettering another's position, in bettering one's own" [211]. And what Gauthier says about the application of the Proviso to the fruits of one's labor applies as well to its application to one's powers themselves.

If the benefit I receive is no less, in terms of my utilities, than what I expected from my labour [or from my possession of my powers] in the absence of intervention, then my situation has not been worsened. [211]

Hence the Proviso, on which Gauthier relies to generate and define the rights presupposed by market and cooperative interaction, yields only an entitlement in one's powers that is protected by a liability rule. And that liability rule is a rule mandating only full compensation upon the seizure of one's powers.

And that is all that poor Chamberlain has: a right *in* his basketball playing powers. Straightforwardly, then, and contrary to Gauthier's assertion, Chamberlain (along with Gretzky) lacks a "right to his basic endowment—his natural capacities" [273]. The two each lack the crucial element of having a right to his own powers—a right against having them seized, against being conscripted into National Basketball (or Hockey) Service. This is the element that Gauthier insists is present in the superstar's moral situation as a mark of his right to his powers. "Wayne Gretzky has the right to his unique hockey skills; *he may use them as he pleases . . .*" [273]. But as long as the fans are (or "society" is) prepared to pay Chamberlain (or Gretzky) enough to compensate him fully for playing, he has an offer that he cannot refuse—an offer which it is permissible to enforce upon him.

Let us suppose, however, that somehow the Proviso does get us to the conclusion that Chamberlain has an entitlement to his basketball powers that is protected by a market compensation liability rule. On this supposition, the offer to Chamberlain that he cannot refuse (that he can be required to accept) is the offer that he would freely agree to play for in a perfectly competitive market.³⁴ Now it might be argued that Chamberlain's possession of this seemingly meager degree of entitlement over his powers would nevertheless suffice to block the seizure of his powers.

³⁴ An entitlement protected by an *actual* (that is, an imperfectly competitive) market compensation liability rule might have considerable protective value. But to move toward such a rule, one would have to reject the regulative status of the perfectly competitive, anti-rent model.

That argument goes as follows: Chamberlain knows that the most he can receive on net for playing is no-rent market compensation. Therefore, if offered that level of payment, Chamberlain by hypothesis will always accept. He will always *choose* to provide his basketball services for that perfectly competitive market compensation. Hence, no occasion for *forcing* Chamberlain to accept the no-rent market compensation offer will ever arise.

Of course, even if no occasion to force Chamberlain to accept the no-rent market offer ever in fact arises, it remains true that, were Chamberlain forced to accept such an offer, Gauthier could not condemn that coercion as a violation of Chamberlain's exclusive rights to his powers. One can, however, do better here than to charge Gauthier's position with such subjunctive sins. Sometimes Chamberlain will have reason to reject the offer made to him by a society that is credibly committed to nothing greater than no-rent market compensation. For, on occasion, such rejections will lead that society to raise its assessment of what would minimally motivate Chamberlain to play, were it known that no higher payment were possible. The society will raise its assessment when it finds it reasonable, as it sometimes must, to interpret Chamberlain's rejection of the offered contract or his refusal to show up in training camp as good evidence that the payment offered is less than what would provide him with no-rent market compensation.

Since "society" sometimes will revise its proposed no-rent compensation in response to Chamberlain's demands for higher payment or his slowdowns or strikes, he has reason to engage in these bargaining maneuvers even if convinced that society will never pay him more than it (finally) determines to be his no-rent market compensation. Thus, if no further factor enters the situation, it will often be the case that a given proposed no-rent market compensation will not be *known* by Chamberlain to be the most that a society committed to no rent will eventually offer him. If he continues to insist ever more vigorously that only some greater payment will induce him to drag his aging bones out on the court or to insist on the profound costs to him of leaving his beachfront home merely for the sake of practice, he may well convince "society" of the inaccuracy of its current assessment. If no further factor is brought into play, this reasonable willingness of society to raise its estimate of no-rent market compensation threatens to unravel the entire no-rent policy. For the rent-seeking Chamberlains of the world will simply recast their unconscionable demands for gains from trade into claims about the enormous, yet intangible, opportunity costs to them of providing their services to society.

A society that is committed to a no-rent policy will, then, have to couple its willingness to raise its estimates of no-rent market compensations with a stern message to would-be rent-seekers.

We will determine what would minimally motivate you to play ball, were you to know that no greater payment was possible. In reaching this determination, we shall give due weight to indications we have from you regarding the strength and ordering of your preferences. But at some point—preferably sooner rather than later—we will complete our deliberations (which ought not to be confused with negotiations with you) and settle upon a no-rent market compensation. Due to our reasonable willingness to raise payments, at that point you may not *know* that the offer is final—that no greater payment is possible. At that point, you may have reason to continue to refuse our offer. But make no mistake about it. At that point, *you will play* for that compensation. You will play “voluntarily,” or you will be required to play—albeit with no-rent market compensation. Take your choice—such as it is.

Only by making such an announcement can the society sufficiently dampen the hopes of would-be rent-seekers so that its proposals for no-rent market compensation will generally motivate acceptance. A credible, demonstrated willingness to seize services, albeit with payment of the socially determined no-rent market compensation, is thus essential in practice to sustaining the no-rent policy.³⁵

Would such a no-nonsense, no-rent policy—one that would embody direct forced labor—violate persons’ rights to their natural talents and powers? It will not in principle violate those rights if they are understood as Gauthier understands them: namely, as entitlements protected by liability rules (even liability rules requiring market compensation). For while such a policy will deprive agents of *choice* about the disposition of their own talents and powers, by hypothesis it will not leave agents with less utility than is due them. If rights over one’s natural endowments do not include this dimension of choice—that is, of moral authority over the disposal of those endowments—then rights over one’s natural endowments are entirely consistent with the confiscation of rents on those endowments, and even the implementation of this confiscation through forced deployment of one’s talents and powers. But this is hardly a consistency that will cheer Gauthier, interested as he is in affirming robust

³⁵ Recall the language of Calabresi and Melamed in characterizing the position of an entitlement holder under a liability rule.

Whenever someone may destroy the initial endowment if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This [socially determined] value may be what it is thought the original holder of the entitlement would have sold it for [or what he would have sold it for in a perfectly competitive market]. But the holder’s complaint that he would have demanded more [or would have gotten more even in perfectly competitive exchange] *will not avail him once the objectively determined value is set.* [p. 1092, my emphasis]

rights to one's natural endowments that stand in sharp contrast with Rawls's designation of natural talents as collective assets.³⁶

The fact that Gauthier's position fails to achieve this contrast can be seen in the similarity between (1) Gauthier's contention that the only legitimate return to an agent for the socially desirable exercise of his talents is a return that exceeds the cost of his supplying that talent by just enough to bring it to market and (2) Rawls's contention that "the premiums earned by scarce natural talents . . . are to cover the costs of training and to encourage the efforts of learning, as well as to direct ability to where it best furthers the common interest."³⁷ The fact that Gauthier and Rawls invoke different principles—namely, minimax relative concession and the difference principle—for governing the division of the "social surplus" which society recaptures from the predatory claws of the talented does not amount to a philosophical difference with regard to the rights of individuals over their own natural endowments.

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³⁶ Compare John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), especially pp. 245–54.

³⁷ *Ibid.*, p. 311. Compare pp. 101–2.