

## Libertarian Support for Indigenous Rights

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### Introduction

Political institutions designed to protect the interests of indigenous people are an entrenched feature of modern life. As Jacob Levy observes, "From U.S. Indian reservations to Greenland to the Canadian territory of Nunavut to the northeastern states of India, indigenous peoples are living under a distinctively indigenous level of government that comes between them and the central state."<sup>1</sup> In North America, the most well-known such institutions are the reserve and reservation systems of Canada and the United States, which bestow a distinct set of legal rights on their indigenous occupants, rights that uniquely allow them to live, own property or stand as candidates in band and tribal elections.

As widespread as such arrangements have become, their legitimacy is contested. The most prominent philosophical defenders of indigenous rights have been egalitarian liberals: thinkers in the tradition of Rawls and Dworkin who defend civil and political liberties alongside an ambitious program of wealth redistribution.<sup>2</sup> But unlike their canonical predecessors, these liberals also defend distinct rights for minority groups.<sup>3</sup> Libertarians, on the other hand, are often critical of minority rights in general and indigenous rights in

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<sup>1</sup> Jacob Levy, *Indigenous Self-government. Nomos XLV: Secession and Self-Determination* (New York: New York University Press, 2003), 119.

<sup>2</sup> John Rawls, *A Theory of Justice. Revised Edition* (Cambridge: Harvard University Press, 1999); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2002).

<sup>3</sup> Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Alan Patten, *Equal Recognition: The Moral Foundation of Minority Rights* (Princeton: Princeton University Press, 2014).

particular.<sup>4</sup> Indeed, opposition to “collective rights” is, for many libertarians, a core commitment.<sup>5</sup> Given the prevalence of this view, it is natural to think that no form of libertarianism is compatible with a distinct set of legal rights for native people. Natural as this view may be, however, it is false. The version of libertarianism advanced by one of its most distinguished philosophical defenders is striking in the degree to which it ratifies the liberal case for indigenous rights.

In support of this claim, I offer a reconstruction of arguments drawn from the work of Robert Nozick. For readers familiar with Nozick’s libertarianism, mentioning it in the context of indigenous issues is likely to call to mind Nozick’s principle of rectification, which is often thought to have bearing on land claims.<sup>6</sup> My deployment of Nozickian libertarianism, however, does not rely on Nozick’s principle of rectification.<sup>7</sup> It is an instrument of economic justice, or what Nozick called justice in holdings, whereas my concern is with political entitlements. I therefore draw primarily on aspects of Nozickian libertarianism, which I will call *libertarianism* for short, that are not centrally concerned with economic justice. To my knowledge, these less purely economic elements of libertarianism have been overlooked in the debate over

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<sup>4</sup> Friedrich Hayek, who is often read as defending a conception of law that treats all members of society in a uniform way, has long been a source of inspiration for libertarian and classically liberal critics of indigenous rights. See Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2007), x, 229-54, and Tom Flanagan, *First Nations? Second Thoughts*. Third Edition (Montreal-Kingston: McGill-Queen’s University Press, 2019), 8. For Hayek’s conception of law, see *Law, Legislation and Liberty: Volume One: Rules and Order* (Chicago: University of Chicago Press, 1973), 48-52. Whether Hayek’s account does in fact rule out indigenous rights is a question I cannot take up here.

<sup>5</sup> Jan Narveson, Collective Rights?. *Canadian Journal of Law & Jurisprudence* 4/2 (1991), 329-345.

<sup>6</sup> For critical discussions see Michael McDonald, Aboriginal Rights. *Contemporary Issues in Political Philosophy*. William Shea and J. King-Farlow, eds. (New York: Science History Publications 1976): 27-48; and David Lyons. The New Indian Claims and Original Rights to Land. *Social Theory and Practice* 4/3 (1977): 249-72. McDonald and Lyons both conclude that the principle of rectification **and** Nozick’s theory more broadly are too flawed to justify land claims, which they argue should be defended on different grounds.

<sup>7</sup> While I mention the principle of rectification in passing below, my reason for doing so (that of better understanding the principle itself) is not part of my argument for indigenous rights.

indigenous issues.<sup>8</sup> My goal therefore is to demonstrate the important yet unacknowledged support libertarianism lends to indigenous rights. In that spirit I will draw on Nozick's principle of compensation, but it is not to be confused with his principle of rectification. Among other differences, it is not a component of his theory of justice in holdings.

Some measures designed to protect the interests of native people find support in libertarianism even prior to any reconstruction. After noting some arrangements of this kind, I take up my central goal of extracting normative principles from libertarianism and applying them to issues of indigenous justice. I start with Nozick's framework for utopia and the many ways in which it legitimizes separate and distinct native communities. I then note how any state, even a minimal one, inevitably places indigenous minorities at a disadvantage. Given this, Nozick's libertarian account of utopia lends support to the liberal conception of native rights as a form of compensation for state-imposed disadvantage. I justify this claim by noting how Nozick's libertarian principle of compensation overlaps with and validates the understanding of compensation that features in the liberal rationale for native rights.

Because the liberal case for native rights also appeals to an understanding of culture as normatively significant, which is an idea that Nozick, like other libertarians, does not discuss, libertarianism may stop just short of providing a complete justification for native rights. Alternatively, depending on how much weight we give to Nozick's brief discussion of the foundation of rights, even the liberal conception of culture may find validation in libertarianism.

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<sup>8</sup> The only article I am aware of that cites Nozick in defense of indigenous rights is Torivio Fodder, 'Toward a Libertarian Framework for Indian Rights,' *The Journal Jurisprudence* 19 (2013), 203-18, which discusses Nozick at 206-08. Fodder's discussion of Nozick may be so brief because, on his account, "what Nozick offers in scope, he lacks in detail" (208). Fodder also takes Nozick to show that indigenous and non-indigenous people should enjoy a uniform set of legal rights. I argue below that Nozick's work lends support to distinct rights for native people that can be spelled out in detail.

Either way, it is surprising how much libertarianism lends support to separate legal arrangements for native people.

While my primary motivation is to bolster the legitimacy of indigenous rights, I also hope to show how the aspects of libertarianism that vindicate such rights have bearing on broader debates about libertarian philosophy. In particular, the resources that libertarianism offers to a theory of indigenous rights reveal that the theory does not suffer from more than one alleged shortcoming. These include the charge, prominently made by Charles Mills, that libertarianism displays a colonialist mindset, one that Mills takes to be representative of Anglo-American political philosophy as a whole.<sup>9</sup> If a “decolonized” philosophy is one that can address the needs of indigenous peoples, then libertarianism has on that score been decolonial all along.

### **The Other Nozick: Political, not Economic**

Anyone who has taught Nozick’s philosophy to undergraduates in North America or Australasia knows that a question it gives rise to concerns its application to the situation of native people. This is due to the principle of rectification, which holds that injustices in the acquisition or transfer of economic resources must be corrected.<sup>10</sup> In the case of stolen goods, for example, rectification would entail either returning them to their owner, or reimbursing him or her for their original value. Although Nozick leaves crucial aspects of the principle undefined, he keeps open the possibility that the need to rectify the unjust transfer of resources may endure across generations. Such a possibility is further suggested by his discussion of justice in acquisition, which concerns events of centuries ago, during which

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<sup>9</sup> Charles Mills, *Black Rights/White Wrongs: The Critique of Racial Liberalism* (Oxford: Oxford University Press, 2017), 38-9, 44-47, 88-9.

<sup>10</sup> Robert Nozick, *Anarchy, State and Utopia* (Malden, MA: Blackwell, 1974), 152.

unowned lands first became property. For many readers, these aspects of Nozick's theory prompt the thought that the forced displacement of native people during the era of colonization may need redress today.

The case for indigenous rights however is an argument as to what justice requires today. It does not essentially rest on the idea that historic injustices require reparations. For this reason, although I note in passing a context in which the rectification principle could be said to support a form of indigenous rights, the principle plays no role in my argument. This allows me to avoid problems that are said to come with using it, such as that it is difficult to obtain all the information necessary to rectify historic injustices, or that administering justice in the present may supersede the demand to rectify historic wrongdoing.<sup>11</sup> Even if these and other objections can be met, applying the principle to land claims or other issues of historic injustice would direct our attention away from the question of justice at hand, which is contemporary rather than historical.

Once we have ruled out the principle of rectification, Nozick's work may seem an unlikely source of support for indigenous rights. It barely mentions native people, and when it does it perpetuates the myth that they lived in a state of nature prior to the arrival of Europeans, without political institutions of their own.<sup>12</sup> Nozick admits a partial exception for the Apsáalooke (Crow)

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<sup>11</sup> For these criticisms see, respectively, Adam James Tebble, *The Tables Turned: Wilt Chamberlain Versus Robert Nozick on Rectification*. *Economics & Philosophy* 17 / 1 (2001): 89-108; Jeremy Waldron, *Superseding Historic Injustice*. *Ethics* 103 / 1 (1992), 4-28. For additional criticisms, to the effect that Nozick's principle is extremely impractical, possibly requiring redistribution of the majority of the land on earth, and is susceptible to the non-identity problem, see respectively Jon Elster ed., *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006), 18 and Lawrence Davis, *Comments on Nozick's Entitlement Theory*. *The Journal of Philosophy* 73 / 21 (1976), 842. For defenses of multigenerational compensation see Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*. *Ethics* 112 / 1 (2001), 114-35, and A. John Simmons, *Boundaries of Authority* (Oxford: Oxford University Press, 2016), 153-86. Although neither Thompson nor Simmons defend Nozick's original principle, their accounts raise the possibility it may avoid many common criticisms.

<sup>12</sup> Nozick, *Anarchy*, 54, 116.

people and other inhabitants of the Western plains, whom he describes as administering state-like authority “only as situations arose.”<sup>13</sup> Otherwise, however, the passing mentions of Native Americans reiterate a stereotype with a long history among state-of-nature theorists. As Hobbes put it four centuries before Nozick, “the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all.”<sup>14</sup>

This view is at odds with historical scholarship documenting the widespread existence of indigenous confederacies and other political institutions.<sup>15</sup> It is perhaps unsurprising that Nozick held such a view given that he was writing in the 1970s, when indigenous history was not well known outside native communities. But there are principled grounds for looking past this aspect of Nozick’s account which, rather than arising organically out of his libertarianism, uncritically repeats a view typical of his time. His references to indigenous statelessness are meant to illustrate points that arise in his discussion of the state of nature as such. Precisely because the myth is only a minor illustrative detail, it can be set aside at no cost to Nozick’s libertarian framework, which is my subject.

Some measures designed to advance indigenous rights can be reconciled with libertarianism even without reconstructing the theory. One straightforward case is that of treaty rights. Between 1778 and 1871, the United States alone signed hundreds of treaties with native American tribes, typically pertaining to such matters as land claims or hunting and fishing

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<sup>13</sup> Nozick, *Anarchy*, 116, quoting Lawrence Krader.

<sup>14</sup> Thomas Hobbes, *Leviathan*. C.B. Macpherson, ed. (Hammondsworth: Penguin, 1968 [1651]), 116.

<sup>15</sup> Bruce Trigger, *The Children of Aateantsic: A History of the Huron People to 1660* (Montreal-Kingston: McGill University Press, 1987), 156-63; Pekka Hämäläinen, *The Comanche Empire* (New Haven: Yale University Press, 2008), 102-6, 277-83; Dean Snow, *The Iroquois* (Malden, MA: Blackwell, 1994), 52-66.

rights.<sup>16</sup> In other cases, indigenous people have been the beneficiaries of treaties they did not sign. Jay's Treaty, for example, which the United States and Great Britain entered into in 1794, and which remains authoritative at the Canada-U.S. border, bestows a right of free passage on "the Indians dwelling on either side of the boundary line."<sup>17</sup> Libertarianism gives individuals, corporations and governments wide latitude to negotiate economic and other contracts, with the only limit on what can be negotiated set by the need to avoid force and fraud. Although many treaties were negotiated under conditions unfavourable to native people, the special entitlements they do contain are ones that contemporary native people wish to see upheld. Such entitlements remain in effect on a libertarian account simply because they are a subject of a mutually agreed contract.

Other practices that are readily justified under libertarianism include that of drawing sub-national political boundaries to enable indigenous self-government. One such example, Nunavut, was noted above by Levy. In 1999, Canada created the province-like jurisdiction out of the eastern portion of the Northwest Territories. Nunavut was established to give the Inuit greater autonomy in a region of the Arctic in which they form the majority. This was the case, even though Nunavut does not bestow any special rights on its indigenous residents: non-indigenous people remain free to live and work there and run in territorial elections. Although the territory in this way differs from the reserve and reservation systems (hereinafter, reserves) that I discuss below, it shares with them the goal of ensuring that indigenous people are

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<sup>16</sup> But see my discussion of hunting rights, below.

<sup>17</sup> Avalon Project at Yale Law School, "British-American Diplomacy: The Jay Treaty; November 19, 1794." Lilian Goldman Law Library. [https://avalon.law.yale.edu/18th\\_century/jay.asp](https://avalon.law.yale.edu/18th_century/jay.asp).

able to exercise local authority and control.<sup>18</sup> Such an arrangement is consistent with most theories of federalism, which grant latitude to members of a national community and their representatives to determine internal boundaries. On such matters libertarianism aligns squarely with the federalist mainstream. As Nozick writes, “I have nothing special to add to the standard literature on federations, confederations, decentralizations of power, checks and balances, and so on.”<sup>19</sup> As such, the creation of territories such as Nunavut is consistent with his libertarianism.

### **Libertarian Utopia**

Libertarianism however offers deeper philosophical support for indigenous rights. We can begin to see this by noting the framework for utopia that Nozick outlines in Part III of *Anarchy, State and Utopia*. Where the first two sections of the book seek to establish that the minimal state is justified, and that a more extensive state is not, Part Three seeks to offer a third, independent source of support for the minimal state. It is that such a state “best realizes the utopian aspirations of untold dreamers and visionaries.”<sup>20</sup> Not only is the minimal state morally justified, Nozick argues, but it is morally inspiring as well.

Like most theories of utopia, this one is meant to reflect unfettered political imagination. But in other ways, the libertarian vision is designed to avoid problems associated with prior utopias. Thus, rather than put forward one arrangement for society as a whole, Nozick envisions “a wide and diverse range of communities which people can enter if they are admitted, leave if

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<sup>18</sup> For defenses of drawing the borders of provinces, states and other subunits of countries so that national minorities are the local majority, see Kymlicka, *Multicultural Citizenship*, 26-30, and Patten, *Equal Recognition*, 171-7.

<sup>19</sup> Nozick, *Anarchy*, 330.

<sup>20</sup> Nozick, *Anarchy*, 333.



they wish to, shape according to their wishes.”<sup>21</sup> The particular arrangements that will exist at any given time will be determined in a bottom-up fashion by members of small-scale communities. The world they create will thus be one in which “utopian experimentation can be tried, different styles of life can be lived, and alternative visions of the good can be individually or jointly pursued.”<sup>22</sup>

In legitimizing small communities animated by distinct conceptions of the good, libertarianism offers a response to one of the most longstanding objections to separate arrangements for native people. It is that such arrangements cut them off from full participation in society.

A version of this objection was famously made by the Canadian government in 1969, when it announced its desire to abolish “the separate legal status of Indians.”<sup>23</sup> Canada’s proposal was partly inspired by the American civil rights movement, which seemed to call into question all legal distinctions based on not only race but ethnicity and culture. But Canadian policymakers would not have been satisfied if, after having abolished indigenous legal privileges, native people continued to live in separate communities of their own, one step removed from the wider society. The goal was not merely to change the law, but to place native people on “a road that would lead gradually away from different status to full social, economic and political participation in Canadian life.”<sup>24</sup> Call this the anti-separateness objection. It goes beyond a concern with how the law treats native people and questions the appropriateness of separate and distinct native communities.

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<sup>21</sup> Nozick, *Anarchy*, 307.

<sup>22</sup> Nozick, *Anarchy*, 307.

<sup>23</sup> Government of Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Minister of Indian Affairs and Northern Development, 1969), 5.

<sup>24</sup> Government of Canada, *Statement*, 6.

Libertarianism's framework for utopia repudiates this objection. It takes seriously the differences between human beings and the values they endorse. As Nozick writes, "there is no reason to think that there is *one* community which will serve as ideal for all people and much reason to think that there is not."<sup>25</sup> A separate and distinct native community, therefore, rather than being objectionable, is just as worthy as "full social, economic and political participation" in the wider society.<sup>26</sup>

In libertarian utopia, everyone is free to leave a given social arrangement. Nozick's label for a community in which members lack such freedom is an *east berlin*. But if Nozick sought to distance his utopianism from socialism as it was construed in East Germany, a deeper purpose of his framework is to shrink the distance between libertarianism and socialism. His utopia clears a space for socialist and communist arrangements to exist inside the minimal state. Insofar as these forms of community are voluntary associations that do not impede on others, they are appropriately included in libertarian utopia, their non-libertarian internal features notwithstanding.

The diversity of arrangements that the libertarian-utopian framework is meant to support however is not endless. One constraint, imposed by universal freedom of exit, is that only communities appealing enough to attract a critical mass of members will enjoy a stable existence. Another is that the framework is inhospitable to what Nozick terms *imperialistic* utopianism, which seeks to coerce everyone into one kind of community. The forms of utopianism the libertarian version is meant to shelter are those that are *missionary* or *existentialist*. Missionary utopians seek to bring everyone into their arrangements through persuasion, but stop short of forcing them to do

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<sup>25</sup> Nozick, *Anarchy*, 310.

<sup>26</sup> Fodder makes a similar point. See *Toward a Libertarian Framework for Indian Rights*, 207.

so. Existentialist utopians are concerned only that their particular form of community be allowed to exist, not necessarily universally.

Native communities meet these conditions. That they achieve the stability requirement is suggested by the fact that the oldest reserve in North America, The Pamunkey Native Reservation of Virginia, dates from 1646. Similarly, while indigenous people have historically resisted efforts to dismantle the reserve system, they have not sought to coerce large numbers of non-natives into living there, and so are not imperialistic in the present sense.<sup>27</sup> Insofar as native people simply wish to maintain their own political communities, their project qualifies as a form of existential utopianism, and so is legitimized by libertarianism's framework.

The arrangements a libertarian scheme is meant to accommodate are diverse not only in their economic and political rationales, but also their cultural and religious ones. Native communities again illustrate this aspect of libertarian utopia. Many reserves are located in the traditional territories of the peoples they house. For some members, their desire to be part of the community is due to the "special bond" they have with the land.<sup>28</sup> Insofar as the existence of distinct native communities is partly due to such a bond, it too is a value that finds shelter under a libertarian framework.

This aspect of libertarianism is evident not only in the abstract commitment to freedom its utopian framework is based on, but in the examples Nozick gives of communities it can accommodate. These include early Jewish communal settlements in Palestine, which in some cases were religious and cultural communities in addition to political and economic ones. Some

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<sup>27</sup> For resistance to the Canadian government's attempt to dismantle the Canadian reserve system see Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

<sup>28</sup> Supreme Court of Canada, *Delgamuukw v. The Queen* (1997) 3 S.C.R. 1010, 193.

members of the Kibbutz movement saw themselves as having a special religious tie to the land where their communities were located. While it is a familiar matter of controversy whether Jewish settlers were entitled to the land that became Israel, Nozick's positive reference to the Kibbutz movement illustrates that in a libertarian framework, a spiritual tie to territory is a legitimate basis on which to found a political community. This tie is one that many native people also affirm, in both political and spiritual terms (and in their case, there is no contemporary population equivalent to displaced Palestinians).

Similarly, Nozick illustrates the forms of life his framework can accommodate by listing famous individuals whose values it can protect. Nozick's list includes Gandhi and Thomas Jefferson, who stood for different forms of anti-colonialism. Such a view continues to have a constituency among native people, some of whom view participation in reserve-based political institutions as an escape from colonial institutions of the wider society.<sup>29</sup> Such a motive is yet another basis for a predominantly native political community which libertarianism validates.

Although the libertarian framework imposes constraints on each community's dealings with non-members, such that a commune cannot impose its will on outsiders, the principles that regulate life *inside* a community allow it to depart from libertarian precepts on a wide range of matters, beyond their economic arrangements. In particular, communities can impose strict conditions on membership. A communist community, for example, could expel someone who refused to pool their resources. And while each community must permit its members to leave, it is under no

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<sup>29</sup> Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), 54.

corresponding obligation to allow newcomers to join. As Nozick writes, “someone may be refused entry into a community he wishes to join, on individual grounds or because he falls under a general restriction designed to preserve the particular character of a community.”<sup>30</sup> In this way the framework grants communities the power to define their memberships as they see fit.

These attributes are again found in native tribes and bands, which have historically resisted efforts to encroach on their ability to apply their own membership criteria.<sup>31</sup> Laws in both the United States and Canada allow first nations to exclude non-members from voting or running in reserve elections, and to restrict or impose conditions on their ability to reside or own real estate on reserves (although the restriction on land ownership admits of wide exceptions in the United States).<sup>32</sup> The underlying rationale of these and other laws designed to uphold native self-determination is clearly affirmed by Nozick’s account. Whether the laws themselves are also legitimized is the question to which I now turn.

### **Resources for Indigenous Rights**

In one sense it is unremarkable to say that libertarianism grants members of native communities the legal power to exclude outsiders. Libertarianism allows them to do so as property owners. To see how, consider the Viejas

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<sup>30</sup> Nozick, *Anarchy*, 352.

<sup>31</sup> Simpson, *Mohawk Interruptus*, 7-10, 13-16.

<sup>32</sup> For Canadian restrictions see Kymlicka, *Liberalism, Community and Culture*, 146. Historically non-natives were able to buy property on American reservations following the introduction of the Dawes Act (1887), the goal of which was to break up indigenous territory. See D. S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Norman: University of Oklahoma Press, 2014). Today non-natives generally cannot buy so-called trust land on U.S. reservations, which is held in trust by the federal government for native tribes and individuals; but they can own so-called fee land, i.e. former trust land that has been converted to private ownership. Jessica Shoemaker and other critics also note problems with the current system of land title on reservations. See her *Transforming Property: Reclaiming Indigenous Land Tenures*. *California Law Review* 107 (2019), 1531-1608. My concern is whether Nozick’s theory can in principle justify any set of indigenous land rights that includes a reserve system, not necessarily one that matches reality in every detail.

Band of Kumeyaay Indians, who occupy a 647-hectare (1,600-acre) reservation in the Viejas Valley region of Southern California. According to the band, the reservation came into being in 1934 when a Kumeyaay community was displaced by a reservoir project, after which 28 families combined compensation funds to purchase adjoining land. "Today," the Band's history states, "membership in the Viejas Band of Kumeyaay Indians is determined by direct descent from the families forced from Capitan Grande who pooled their shares of dam-site purchase money to buy Viejas Valley."<sup>33</sup> Like most theories of property, a libertarian one will recognize the Viejas band as having the power to determine who is admitted to the reservation simply in their capacity as landowners.

Given all the difficulties that are often said to undermine Nozick's principle of rectification, it bears noting that the Kumeyaay case shows how it can be applied in a straightforward way. This is because compensation was given to the same people who experienced the injustice rather than their descendants. Of course, one hardly needs to be a Nozickian to think that the Kumeyaay families were owed rectification for being forced from their homes. Still, the Viejas story illustrates how the principle of rectification could lead to the creation of a native community with the legal power to exclude outsiders and set internal rules, in a manner consistent with libertarianism's principles of rectification and justice in transfer, as well as its utopianism.<sup>34</sup>

Of course, most native reserves are not the result of native people pooling their economic resources. The right of native communities to determine who

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<sup>33</sup> Viejas Band of Kumeyaay Indians, "Viejas Band of Kumeyaay Indians," <https://viejasbandofkumeyaay.org/viejas-community/kumeyaay-history/>.

<sup>34</sup> Nozick's account lends similar support to compensation programs administered to survivors of residential schools, such as Canada's Indian Residential Schools Settlement Agreement. In Nozick's framework residential schools, which sought to assimilate native children, were a form of utopianism that was both missionary and imperialistic.

is eligible to vote in band elections is enshrined in law. Similarly, in the United States and even more so in Canada, non-natives' ability to buy real estate on many reserves is limited. And insofar as this latter arrangement could see a band prevent a sale from a willing native seller to a willing non-native buyer, it would seem to be at odds with the principle of justice in transfer, which holds that transfers and exchanges are just insofar as they are voluntary. What I want to now argue, however, is that there is a deeper strand in libertarianism that suggests that the gap between it and contemporary indigenous law is smaller than may appear at first glance.

### **The Culture of Government**

Liberal defenders of indigenous rights typically make their cases as part of a larger defense of differentiated rights for national minorities. Such minorities are those who have their own language, culture and political institutions, and whose presence in states such as the U.S.A. and Canada predates such states' foundations.<sup>35</sup> Indigenous peoples, alongside Puerto Ricans and the Quebecois, are examples of national minorities in this sense. Whereas immigrants consent to live in a foreign culture, the presence of national minorities is due not to their own choice, but to conquest, colonization and other historic factors that have shaped the societies in question.<sup>36</sup> The most prominent defenders of different rights for national minorities are Will Kymlicka and Alan Patten, whom I will collectively refer to as *difference liberals* to distinguish them from other egalitarian liberals who do not endorse minority rights.

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<sup>35</sup> For discussion of this understanding of national minorities, see Kymlicka, *Multicultural Citizenship*, 10-13.

<sup>36</sup> History here explains how native people *came to occupy* a situation of contemporary vulnerability, which does not entail that indigenous rights are meant to *rectify* historic injustice. For this distinction, see Lyons, "The New Indian Claims and Original Rights to Land," 267. For a defense of difference liberalism's distinction between national minorities and immigrants, see Patten, *Equal Recognition*, 269-98.

In an influential early formulation of the difference-liberal view, Kymlicka offered a theory of minority rights that took them to “compensate for unequal circumstances.”<sup>37</sup> Patten’s account, although it differs from Kymlicka on many particulars, also views such rights as form of compensation. One of the primary circumstances that both thinkers draw attention to is the working of government, which cannot be neutral in the matter of language and culture.<sup>38</sup> It is simply not possible to make every language official. Typically, governments use the language of the majority, and often enshrine its holidays and other culturally specific elements into law. (And while holidays, unlike language, could in principle be removed from state calendars it would be politically difficult to do so.)

Once we recognize that states must violate cultural neutrality to function efficiently, it raises a question about the libertarian framework for utopia. That framework is meant to accommodate a radical and deep diversity of ways of life. When residents of local communities organized around indigenous language and culture interact with the government, however, they will find themselves at a disadvantage. Insofar as the language of state is a non-indigenous one, they may still be able to receive important services in their own language. If they are involved in a trial, for example, a minimal state can provide a court-appointed translator. But because governments typically favor the language and culture of the majority, they usually disadvantage smaller languages and cultures. When a language becomes the language of government this practically guarantees that it remains prominent in public life. This adds to the pressure on people to live and work in the language and culture of the majority.

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<sup>37</sup> Kymlicka, *Liberalism, Community and Culture*, 191.

<sup>38</sup> Kymlicka, *Multicultural Citizenship*, 108-15; Patten, *Equal Recognition*, 156-69.



In characterizing this as an injustice, difference liberals present arguments for the normative significance of culture that go beyond ideas explicitly stated in libertarianism. For Kymlicka, our culture provides the context of choice in which we discover, compare and adopt meaningful life plans. The culture in question is what Kymlicka terms a *societal culture*: one that permeates both private and public activity, and is centered around a common language. Indigenous rights are justified on Kymlicka's approach because they protect the societal cultures of native peoples, the preservation of which in turn is justified by the role such cultures play in making different conceptions of the good intelligible.

Patten, for his part, defends the significance of culture on the grounds that when a culture is threatened with disappearance, it renders the options available to its members inadequate. What makes a person's range of options adequate is partly determined by considerations that apply across cultures, such as the interest most people have in finding employment. But Patten argues that a fully adequate range of option will also include a subjective component, insofar as it allows someone to realize the preferences and values they happen to have, which are often culturally conditioned. As a result, the more people with whom we share a culture, the more likely will we be able to realize our values and preferences. Many people also value their culture intrinsically, viewing it as an important part of their identity. An inability to realize our preferences, including subjective culturally-specific ones, can raise issues of justice when we are prevented from doing so by unfair circumstances. Patten argues that such a circumstance obtains when the state fails to compensate national minorities for the pressure it exerts on their culture.

The difference-liberal insight that the state inevitably favors the culture of the majority reveals an important limitation of libertarian utopia. Utopian communities are meant to find shelter in a minimal state. But in the matter of culture, the libertarian state is not so minimal. It places communities organized around minority cultures under stress. As a result, not merely the framework for utopia but the minimal state itself comes apart from its freedom- and diversity-based rationales.

Although Nozick did not address this problem, his libertarianism suggests a solution in line with difference liberalism. Nozick allows that the state that houses utopia can take more than one form. "There will be problems about the role, if any, to be played by some central authority," Nozick writes. "How will it be ensured that the authority does, and does only, what it is supposed to do?" Rather than offer a detailed blueprint of the state that will best protect utopian values, Nozick outlines a principle to guide our understanding of how the state should be structured. "The major role, as I see it, would be to enforce the operation of the framework [for utopia] . . . It seems desirable that one [state form] not be fixed permanently but that room be left for improvement of detail."<sup>39</sup>

This aspect of libertarianism suggests that when the workings of the state impede the flourishing of utopian communities, it is the state that should change rather than vice versa. Although difference liberals introduce some considerations not found in libertarianism to justify differentiated rights for indigenous people, Nozick's account nonetheless lends broad support to their

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<sup>39</sup> Nozick, *Anarchy*, 329-30.

project of revising the traditional structure of the state to make it better accommodate indigenous communities.<sup>40</sup>

### **Compensation for Cultural Disadvantage as Rights Violation**

There is however a further, deeper way, that libertarianism supports difference liberalism's compensation-based conception of indigenous rights. This becomes evident when we note that libertarianism shares with difference liberalism the recommendation that states must compensate those whom they disadvantage to such a degree that it amounts to a rights violation.

Nozick advances this idea in the course of describing how a minimal state could arise from the state of nature. In Nozick's telling, stateless people would form protection agencies to enforce justice. Eventually one agency would become dominant in a particular territory, thereby evolving into what Nozick calls the ultraminimal state. Such a state resembles a conventional state in that it has a de facto monopoly on the use of force; but it differs from a standard state by only wielding force on behalf of people who pay it for protection.

Given these features, clients of the ultraminimal state could have neighbors who do not subscribe to the state's protection services. Such holdouts would prefer to administer their own methods of enforcing justice. Nozick argues that once a protection agency evolved into an ultraminimal state, it would be justified in forbidding holdouts from administering justice independently. This is because the holdouts' means of doing so could pose unacceptable risks to the people whom the state has contracted to protect.

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<sup>40</sup> Like difference liberals, Nozick can deny an equivalent state obligation to sustain communities organized around immigrant languages and cultures, on the grounds that immigrants chose to immigrate to a country where they would be a minority.

Prohibiting holdouts from seeking justice, however, might be thought to generate its own injustice. Nozick's description of the minimal state arising from the state of nature is meant to establish that this could happen without the state committing gross acts of immorality along the way. Individuals in the state of nature, however, have a right to punish wrongdoers, a right that does not recede with the ultraminimal state's arrival. And while the holdouts' methods for extracting justice may be risky, even to the point of sometimes punishing innocent people, there will be other instances, whether due to luck or other factors, in which the holdouts could deliver appropriate punishment to guilty parties. When that happens, the holdouts would not be doing anything wrong. As a blanket prohibition on the holdouts' ability to administer justice prevents them from doing something they are entitled to do, it would seem an unacceptable rights violation. If so, then the minimal state cannot arise in a just manner after all.

To get around this problem, Nozick invokes a principle of compensation. It justifies compensating the individuals whose risky means of enforcing justice are outlawed, thereby exhibiting due respect for their rights. Nozick argues that the most appropriate form of compensation is for the state to extend its protection services to the holdouts, at which point the ultraminimal state finally becomes a minimal one.

The libertarian principle of compensation is "fuzzy."<sup>41</sup> Nozick is happy to leave its full scope unspecified because he only seeks to apply it in the transition from ultraminimal to minimal state. Even so, the principle has obvious affinities with the understanding of compensation that justifies difference-liberalism's conception of indigenous rights.

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<sup>41</sup> Nozick, *Anarchy*, 87.

Both notions of compensation are intended to rectify not just any disadvantage, but the violation of a right. In both cases, it is a rights-violation for which the state itself is responsible. In libertarianism, it is the right of holdouts to independently enforce justice, which the state infringes intentionally. In difference liberalism it is the right of native people to pursue their conception of the good life free of state interference, which the state infringes unintentionally. And in both cases the particular form of compensation the principle generates is in-kind: the libertarian state makes up for the holdouts' inability to protect themselves by offering its own protection services, while the difference-liberal state makes up for the cultural pressure it exerts on indigenous communities by granting them distinct rights designed to protect their culture.<sup>42</sup>

Although Nozick does not fully define the principle of compensation, he does identify a form it should *not* take. This would be any version that encouraged widespread rights violations, which would occur if people knew they could get away with rights violations just so long as they offered their victims compensation after the fact. Among other problems, Nozick argues that such an indiscriminate use of compensation would create a climate of fear, in which people would constantly worry about their rights being violated. Such fear would not itself be entirely compensable, as it would still

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<sup>42</sup> In this way difference-liberal compensation is a form of commensurate compensation. As Eric Mack elaborates this idea, "due compensation for an infringement upon . . . rights must then take the form of an offsetting prevention of a more extensive violation of . . . rights." Nozickian Arguments for the More Than Minimal State. *The Cambridge Companion to Nozick's Anarchy, State and Utopia*. Ralf Bader and John Meadowcroft, eds. (Cambridge: Cambridge University Press, 2011), 110.

occur on days when no one ended up violating our rights, which would leave us with no identifiable person from whom to seek compensation.<sup>43</sup>

The difference-liberal model of compensation avoids the problems Nozick associates with an unrestricted “violate, then compensate” approach to rights.<sup>44</sup> This is because the compensation that difference liberals defend does not license rights violations in advance. It is administered after the fact, to ameliorate wrongdoing that the state cannot avoid while continuing to govern efficiently. States that compensate indigenous communities for the cultural pressure they generate are not thereby incentivized to engage in further wrongdoing. Because the liberal conception of compensation has a retroactive application, it abides by the caveat that libertarian forms of compensation must uphold.

Insofar as there is a difference between a libertarian understanding of compensation and that of difference liberalism, it concerns how people come to deserve compensation. Libertarianism’s principle is meant to justify the state providing protection services to people who have chosen to remain physically vulnerable by declining state protection. The difference-liberal principle is meant to justify the state providing cultural protection to members of a minority who did not choose such a position of vulnerability. If the libertarian principle justifies compensation to people in a *chosen* position of disadvantage, it would also seem to lend support to compensating communities that are disadvantaged through no fault of their own.

When libertarianism’s principle of compensation is noted alongside its framework for utopia, these two features lend converging support to

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<sup>43</sup> Nozick, *Anarchy*, 65.

<sup>44</sup> Seena Eftekhari calls this the *cross-and-compensate* conception of rights. See his Compensation, Consent, and the Minimal State. *The Journal of Value Inquiry* 55 (2021), 57-85.

difference-liberalism's compensation-based rationale for indigenous rights. As a result, the onus will be on the libertarian to explain why the difference-liberal framework should be rejected. This is because libertarianism not only legitimizes the existence of distinct indigenous communities which the minimal state places at a serious disadvantage, but also appeals to a principle of compensation for state injustice similar in its essential features to that employed by difference liberals.

### **The Property-rights Objection**

Is there a libertarian case to resist difference-liberalism's framework of indigenous rights? One strategy might be to argue that such a framework violates the rights of *non*-indigenous people. As noted above, the ability of non-native people to own real estate on many reserves is limited. Libertarianism is especially concerned to defend property rights, so perhaps there are libertarian grounds to object to such restrictions?

Although property rights are central to libertarianism, they are not absolute. Nozick for example notes that the unrestricted exercise of property rights could see one individual trap another by buying up all the land around them, such that they could not legally move without trespassing.<sup>45</sup> In order to avoid this, Nozick endorses a proviso on transfers and exchanges. This proviso is similar to his more well-known Lockean proviso, which applies to the original acquisition of land and other resources. The proviso on transfers and exchanges excludes selling someone a piece of property if doing so would result in their real estate surrounding another person, thereby trapping them in place. Nozick is thus explicit that property rights can be restricted when a sufficiently important interest is at stake.

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<sup>45</sup> Nozick, *Anarchy*, 55. Similarly, Nozick notes that if someone bought up all the waterholes in a desert, their property rights would deserve to be limited (180).

If property rights can be limited to enable freedom of movement, it seems fair to ask whether they might also be limited for other purposes, including to uphold the self-determination and cultural security of native people. I don't mean to suggest that Nozick's willingness to restrict property rights automatically entails restrictions on what non-native people can do on reserves identical to those defended by difference-liberals. As we've seen, difference-liberalism draws on an argument for the normative significance of culture that finds no explicit support in libertarianism. The point at hand however is that Nozick's libertarian account establishes that property rights can be restricted to protect vital interests. Once that much is established, the difference between a libertarian and a difference liberal will be a matter of degree. The dispute between them will not be over first principles, but one that turns on how much weight we should give to the cultural interests of native people and other questions that libertarianism does not address. If the difference-liberal case for the importance of those interests goes through, it will provide the final element of justification that, when added to libertarian principles, completes the case for native rights.

So far I have been careful to characterize the difference-liberal view of culture as one with no support in libertarianism. But there may actually be Nozickian grounds to embrace the liberal view of culture. This possibility is suggested by Nozick's discussion of the basis of rights. Although Nozick is notorious for not offering a complete account of the foundation of rights, he does say that their justification may be related to our status as meaning-seeking animals. As he writes, "I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with some overall plan in his way of giving meaning to his



life; only a being with the capacity to so shape his life can have or strive for meaningful life.”<sup>46</sup> Nozick thus suggests that we need rights in order to fashion lives that we find meaningful.

Here again, Nozick strikes a difference-liberal note. As Kymlicka puts it in defending the importance of culture, “freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful.”<sup>47</sup>

On the difference-liberal account, a framework of indigenous rights is necessary to protect the ability of native people to live within the culture that makes life-options meaningful to them. Given that, for Nozick, rights themselves are justified by our need to find meaning, careful and limited restrictions on the rights of non-indigenous people may be justified insofar as they preserve the ability of native people to exercise the very capacity, that of pursuing a life of meaning, that grounds rights in general. The difference-liberal argument for the importance of culture might thus be read as a more developed and worked-out understanding of the link between meaning and rights that Nozick touches on in his brief discussion of the justification of rights. But even if this proves not to be the case, Nozick’s libertarianism will still lend significant support to the liberal case for indigenous entitlements.

### **Why Libertarian Resources Matter**

This concludes my extraction of libertarian resources for indigenous rights. I want now to explain what is at stake in using libertarian philosophy this way.

One possible response to my argument might be to ask why it matters. If the legal framework I invoke is one already defended by difference liberals,

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<sup>46</sup> Nozick, *Anarchy*, 50.

<sup>47</sup> Kymlicka, *Multicultural Citizenship*, 83.

what hangs on the relationship of libertarianism to that framework? Wouldn't it make more sense to mount the case for indigenous rights within a difference-liberal framework and be done with it? If a libertarian rationale does not generate novel conclusions in terms of what rights native peoples deserve, isn't all of the above redundant?

This criticism would have bite if my goal were to generate new policy conclusions. But my point is to note just how close one can get to difference-liberalism's conclusions via a libertarian path. My claim to distinctiveness is about the path, not the destination. To think that the only thing that can matter about an argument is its conclusion is to overlook how supporting considerations themselves can be significant, in this case, in three ways.

First, my account raises the possibility of native rights finding overlapping support among different political philosophies.<sup>48</sup> As the most stable and enduring political arrangements tend to be those compatible with a range of views, drafting a version of a theory long considered hostile to indigenous rights as an ally raises the possibility of indigenous rights finding wider support among diverse political theories. I don't mean to suggest that libertarians will soon embrace native rights en masse. But some libertarian resistance may soften if native rights can be reconciled with any form of libertarianism. If so, such an outcome can only strengthen the legitimacy of indigenous rights in societies where they are already the status quo, and possibly encourage their spread elsewhere.

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<sup>48</sup> This may recall Rawls' notion of an overlapping consensus. But as liberalism and libertarianism are theories of justice rather than reasonable comprehensive doctrine, I avoid Rawls's concept. See *Political Liberalism*. Expanded Edition. (New York: Columbia University Press, 2005), 133-72.

Second, my reconstruction has bearing on broader debates around libertarianism. In particular, my reconstruction suggests that it does not suffer from more than one alleged shortcoming.

A longstanding criticism of Nozick's framework for utopia has been that it is far less congenial to diversity than Nozick thought. This is because a libertarian system of property rights would allow the wealthy to buy up and control land. Jonathan Wolff gives the example of a rural communist community whose members disperse to try their hand at big-city corporate life, only to opt to return to their communal ways. When they try again to buy land for this purpose, however, they discover that they cannot afford it ("owing, say, to the explosion of the 'Golf Village' style of utopia.") Wolff suggests that over time only the most economically fit communities would survive. As a result, "we would expect to see a development not of diversity but of homogeneity. Those communities with great market power would eventually soak up all but the most resistant of those communities around them."<sup>49</sup>

Wolff and other critics conclude that libertarian utopia is inhospitable to diversity due to Nozick's tolerance of extreme economic inequality.<sup>50</sup> When we switch to the political and cultural diversity represented by legally protected native communities, however, the homogenization charge is not borne out. Although my account acknowledges the pressure that a minimal state would put on minority cultures, it also identifies libertarian resources that can correct for this. If so, then even if libertarian utopia is problematic on an economic level, rather than reject the framework altogether, we may do

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<sup>49</sup> Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Cambridge: Polity, 1991), 135.

<sup>50</sup> Peter Singer, *The Right to be Rich or Poor. Reading Nozick: Essays on Anarchy State and Utopia*, Jeffrey Paul, ed. (Totowa, N.J. Rowman and Littlefield, 1981), 38.

better to recognize what forms of diversity it is hospitable to, and perhaps ask how it might be modified to accommodate others.

Another critic, William Bradford, challenges libertarianism on grounds closer to hand. Bradford engages Nozick in his capacity as an advocate of rectification for historical injustice, or what Bradford calls justice as compensation (JAC). “JAC theory,” Bradford writes, “is largely silent as to remediation of ethnocide and denial of the right to self-determine.”<sup>51</sup> Bradford speculates that this shortcoming of libertarianism is due to “a philosophical commitment to assimilation.”<sup>52</sup> The possibility of a libertarian justification for indigenous self-determination, however, suggests that this criticism is unfair. The libertarian framework for utopia as presented already seeks to shelter human beings from unwanted assimilation. When combined with other aspects of libertarianism, it lends support to legal measures to prevent this from happening to native people. Nozick’s libertarianism therefore is properly viewed as an instrument of anti-assimilation.

Third and finally, my reconstruction of libertarianism has bearing on recent calls to “decolonize” political philosophy. Such a call is prominently made by Charles Mills, who is critical of the ideal theory that predominates in Anglo-American political philosophy. Although most contemporary philosophies are presented as being opposed to any form of racial bias, Mills argues that many still privilege “illicit white racial advantage.”<sup>53</sup> Mills cites libertarianism as an example of a philosophy that is pernicious in this way, pointing to Nozick’s account of the minimal state’s emergence from the state of nature. Mills objects that Nozick’s depiction of “the state of nature as empty of

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<sup>51</sup> William Bradford, *Beyond Reparations: An American Indian Theory of Justice*. *Ohio State Law Journal* 66/1 (2005), 59.

<sup>52</sup> Bradford, *Beyond Reparations*, 59.

<sup>53</sup> Mills, *Black Rights/White Wrongs*, xv.

aboriginal people” reflects a larger shortcoming on libertarianism’s part, which is its failure to address glaring racial injustices during the history of the United States.

As Mills characterizes this failure:

It is a distinctively white (not colorless) abstraction away from Native American expropriation and African slavery and from the role of the state in facilitating both. It is in effect—though at the rarefied and stratospheric level of philosophy—a conceptualization grounded in and apposite for the experience of white settlerdom.<sup>54</sup>

Mills argues that libertarianism in this way represents the shortcomings of political philosophy in general. Nozick’s abstract theorizing is meant to present principles that sound attractive—freedom, rights, justice—but which are biased to reflect a white point of view, a bias evident in Nozick’s failure to bring his principles to bear on the long history of racial injustice. Hence Mills’ grim conclusion: “in Western political philosophy in particular, the decolonizing enterprise has a long way to go, indeed in some respects has barely begun.”<sup>55</sup>

Mills’ criticism of libertarianism is not well made. As noted above, Nozick does in passing associate native people with the state of nature. This however is a *weakness* of his account. In criticizing Nozick for not incorporating such an association into his theory proper, Mills is criticizing Nozick for avoiding a genuinely racist trope of previous depictions of the state of nature. There is no special connection between the native people who existed during North

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<sup>54</sup> Mills, *Black Rights/White Wrongs*, 39.

<sup>55</sup> Charles Mills, Decolonizing Western Political Philosophy. *New Political Science* 37/1 2015, 1. For a cogent critique of Mills’s understanding of decolonization see Olúfemi Táíwò, *Against Decolonisation: Taking African Agency Seriously* (London: Hurst, 2022), 55-8.

American colonization and the state of nature, and suggesting there is risks reinforcing a damaging stereotype.

My reconstruction suggests that libertarianism also avoids a white point of view. Precisely because concepts such as freedom and rights can be applied to a range of cases, there is nothing in the principles themselves that limits our ability to apply them in an unbiased and inclusive way. Mills, to his credit, recognizes this. He concludes that rather than reject freedom and other philosophical ideals, we should reject the “mystified individualist social ontology” that sees them applied in an exclusionary fashion.<sup>56</sup> But if that is the issue, the problem with libertarianism, and by extension political philosophy more broadly, is not its use of ideal theory after all. Mill’s real objection, it turns out, is to philosophies that do not have the resources to adequately acknowledge interests rooted in our membership in racial, ethnic or cultural groups.

I cannot here address how widespread such a failing may or not be in political philosophy as a whole. But Nozick’s work does not suggest a discipline-wide problem. His libertarianism, like other theories of justice, employs principles that reside at a certain level of abstraction. The most appropriate way of adjudicating the charge of colonialism, therefore, is to apply libertarian principles to questions of racial and cultural justice, as I have above. Once we do so, it becomes clear that libertarianism offers justificatory resources to a framework of rights that is tailored to the needs of the same vulnerable group, indigenous people, that Mills claims political philosophers cannot see. If a decolonial philosophy is one that can speak to the situation of

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<sup>56</sup> Mills, *Black Rights/White Wrongs*, 39.

native people, then Nozick's has contained decolonial resources since its inception.

Before concluding, I want to address a different possible objection. I argued above that libertarianism entails adherence to treaties that legalize hunting and other rights. Nozick, however, argued that eating animals was unjustified, on grounds that suggest something like an animal-rights view.<sup>57</sup> This might be thought to pose a problem for my account. After all, if there are Nozickian arguments in favor of native hunting rights, how effective can such arguments be if there are other arguments in Nozick that call into question not only the permissibility of hunting, but fishing and other traditional practices that harm animals, practices which remain important to many native people? This objection might seem especially salient for supporters of animal rights.<sup>58</sup> Can Nozick's philosophy really justify a right to harm animals, they might ask, given the extensive criticisms philosophers have made of hunting, meat-eating and similar practices?<sup>59</sup>

My reconstruction of Nozick is compatible with more than one stance on this issue. At the extremes they include rejecting hunting rights or rejecting Nozick's opposition to eating animals. But there is also a reading of Nozick that takes him to distinguish animals' moral status, as entities whose interests matter morally, from their political status, as entities without legally enforceable rights.<sup>60</sup> At the level of normative theory, this view is unstable. We typically expect the moral standing of human beings to be reflected in

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<sup>57</sup> Nozick, *Anarchy*, 38. On Nozick's animal ethic see Josh Milburn's book, *Animals, State and Utopia: Robert Nozick's Animal Ethics*, forthcoming from Oxford University Press.

<sup>58</sup> A group to which I belong. See Andy Lamey, *Duty and the Beast: Should We Eat Meat in the Name of Animal Rights?* (Cambridge: Cambridge University Press, 2019).

<sup>59</sup> For an overview see Lamey, *Duty and the Beast*.

<sup>60</sup> Josh Milburn, Robert Nozick on Nonhuman Animals: Rights, Value and the Meaning of Life. *Ethical and Political Approaches to Nonhuman Animal Issues*. Andrew Woodhall and Gabriel Garmendia da Trindade, eds. (Cham, Switzerland: Palgrave Macmillan, 2017), 97-120.

their political status, and it is not clear why animals should be any different. But as a here-and-now compromise, distinguishing animals' moral and political status holds some appeal.

Denying the legal right of indigenous people to hunt wild animals, which are normally able to engage in species-typical behaviors, while the non-indigenous majority face no legal consequences for eating factory-farmed animals, which are not, risks seeing the colonialist label applied to Nozick's libertarianism and, by extension, to efforts to help animals more broadly. This may impede attempts to improve the situation of animals over the long term. Separating their moral and legal status avoids this risk while still allowing moral suasion to be brought to bear against hunting. That such suasion can be effective is evident in the growing number of indigenous critics of meat eating.<sup>61</sup> Only after the anti-hunting view attains a certain level of support among indigenous communities will a legal ban on hunting be worth considering.

### **Conclusion**

If my account is correct, then at a minimum, a prominent version of libertarianism brings us to the threshold of native rights as justified by difference liberals. And if it turns out that the liberal view of culture as a generator of meaning is continuous with the libertarian view that rights are grounded in the need for a meaningful life, Nozick's arguments will bring us across that threshold. Although a Nozickian might still resist my conclusion, it would seem difficult to do without rejecting one or more of Nozick's arguments. Certainly the Nozickian cannot say that, as a libertarian, there is

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<sup>61</sup> Craig Womack. There is no Respectful Way to Kill an Animal. *Studies in American Indian Literatures* 25/4 (2013), 11-27. See also the essays by Margaret Robinson and Ruth Koleszar-Green & Atsuko Matsuoka in *Critical Animal Studies: Towards Trans-species Social Justice*, Atsuko Matsuoka and John Sorenson, eds. (Totowa, N.J. Rowman and Littlefield, 2018).



nothing in their philosophy that lends support to indigenous rights. The debate between the liberal proponent of native rights and a Nozickian critic must now take place at the level of details, against a background of many shared commitments. The retreat to libertarian first principles as outlined by one of its most able defenders will not be an avenue of escape, but one of near-total surrender.